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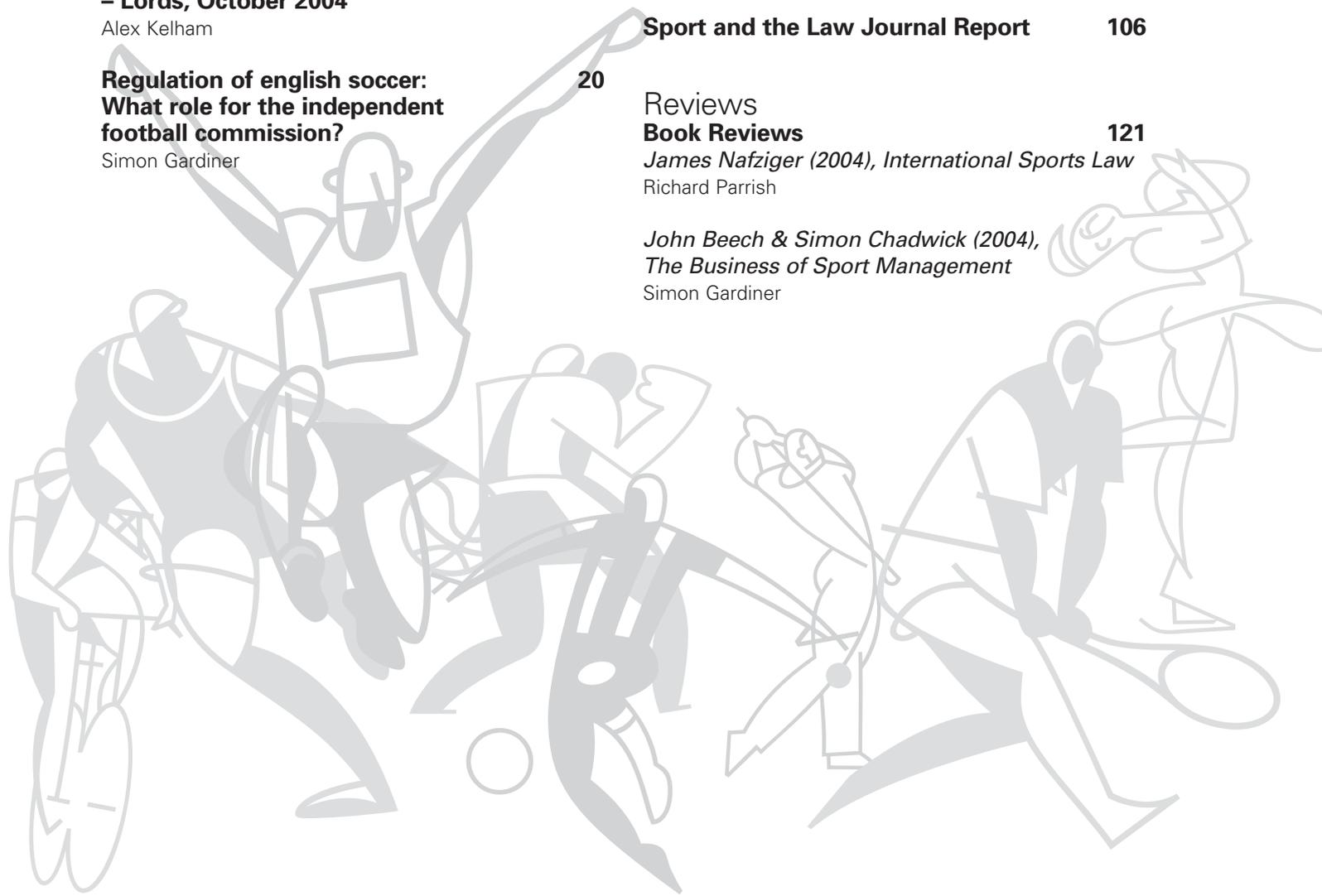
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Editorial

By Simon Gardiner, Editor

In the next few months the British Association for Sport and Law will be re-launching its web site at www.britishsportslaw.org. The Journal will move to primarily be an electronic journal although there will be the opportunity to print off a 'hard copy'. More details will be found in the near future on the web site.

In this latest edition of the Journal a division is made into a number of Sections. The first is entitled 'Opinion & Practice', representing shorter articles ranging from around 1500-3500 words that will focus on explanation and analysis of specific issues and areas of sports-related legal practice. The other section entitled 'Articles' includes longer analytical articles that will normally be between 5000-8000 words. These will be peer-reviewed and the hope is to attract more scholarly work. These two sections will hopefully represent an appropriate and useful balance for all those interested and involved in the practice of sports law.

The Opinion & Practice section provides discussion of a range of topical issues. Karen Bill's discussion of her research on 'the prevalence and nature of age discrimination practices in UK sport and recreation organisations', engages with the reality of the changing demographics of an aging population in the UK. Nick Bitel's timely question, 'Could the Olympic Games be illegal in European Law?' focuses on whether the necessary government financial support for hosting the Olympics could fall foul of the EU rules on State Aid. Mel Goldberg & Simon Pentol discuss the issues surrounding the Ashley Cole affair in 'Football "tapping-up" rules - anachronism or necessity?' Simon Gardiner's 'Regulation of English soccer: what role for the Independent Football Commission?' evaluates the role of the IFC in the context of the on-going debate concerning the governance of English football. Finally, Alex Kelham provides a 'Report of BASL Annual Conference - Lords Cricket Ground, October 2004.'

The longer Articles section includes two more contributions from ex-students on the KCL Postgraduate Certificate in Sports Law run by BASL Board member Jonathan Taylor at King's College London. Rosalind Fox determines the mechanisms that should be used to resolve sports disputes in 'Alternative dispute resolution: should more extensive use be made of ADR, in particular, mediation, to resolve disputes in sport?' Ian Hewitt's 'Commercialisation of major sports events:

does the law help or hinder the event organiser?' reflects a more general debate about how effectively the law regulates contemporary commercial activities. Lastly, Jack Anderson from Queen's University Belfast, based on his completed PhD research, evaluates the future regulation of professional boxing in 'Time for a Mandatory Count: Regulating for the Reform of the Professional Boxing Industry in the UK'.

The regular contributions of Walter Cairn's Sports Law Current Survey and Sport and the Law Journal Reports can also be found together with a new regular feature of Book Reviews with the focus on the eagerly awaited new edition of International Sports Law by the leading international lawyer, James Nafziger and The Business of Sport Management edited by John Beech & Simon Chadwick.

My contribution to this issue focuses specifically on the regulation of English football, which reflects the wider debate on the regulation of professional sport and the call for more effective internal governance of sports bodies. Related to this debate is the discussion concerning how sports agents and specifically football agents should be regulated in the context of on-going concerns about their activities. Football's European governing body, UEFA, has recently held the first meeting of a working group set up to address concerns over the role of agents in the game. The working group comprises experts from all key stakeholder groups such as agents, associations, clubs, leagues, player unions and the sport's world governing body, FIFA.

In the UK, ever since the bungs saga in the mid-1990s, there has been concern over the activities of agents in football with calls for a greater regulatory framework. Players' agents have been active in sport for a significant period of time. They are the 'fixers' for their clients and are invariably the contact for anyone wanting to do business with their client. For the client they are there to provide advice on and negotiate contracts and commercial endorsements etc. Since Bosman, it's been far easier for dubious practice. Players know that they can start speaking legally to other clubs six months before the contract expires. The player is often persuaded by their agent not to re-sign with his existing club in his final year because he can earn huge sums of money by way of sign-on fee if he leaves to go as a free agent to a new club. Players have

also experienced problems because they do not possess the requisite business or negotiations skills necessary to protect their personal and business financial interests from their agents and advisors.

Whether the business dynamics of football or more generally sports agent amount to any legal wrongdoing is questionable but certainly there are highly unethical practices. Recent examples include the fees received by the agent in Harry Kewell's transfer from Leeds to Liverpool and the links that exist between clubs and certain agents and agency firms leading to potential conflicts of interest such as that between Manchester United and the Elite Sports agency run by manager Sir Alex Ferguson's son Jason.

Lured by easy money, the number of football agents in England has proliferated. In football, FIFA first introduced regulations in 1994. They have evolved to the current form where a potential agent has to complete an examination and satisfy insurance provisions before they are granted a license. FIFA's agent regulations give it the power to punish clubs with a ban on all national and or international footballing activity. However there is little evidence of FIFA enforcing these provisions. There is also clearly a problem with unlicensed agents. There are more than 500 FIFA agents in the world, but there are many more that work without licenses and are only after the highest possible commissions.

Sports agency in Europe is an example of a loosely regulated area of private entrepreneurial activity. It has attracted a variety of individuals into the industry, some whose business practices and ethical stance are questionable. A developing issue has been what regulatory framework is appropriate. For example should there be increased licensing, registration or certification as exists in the United States, where three forms of have regulation can be identified.

Firstly, over the last ten years, American states such as California, Florida and Texas that have big-time college football and men's basketball has passed athlete agent registration laws. Typically, these laws require a player agent to complete a state athlete agent registration application, pay a registration fee, file a surety bond, obtain state approval of agent/athlete contract forms, establish a maximum agent fee, and prohibit inducing college athletes with prospective

professional careers which result in making these athletes ineligible for National Collegiate Athletic Association competition.

Secondly, professional athletes who are represented by a union have established an agent certification and regulation program. The player union's authority to regulate agents is found in the National Labor Relations Act ('NLRA'). The NLRA provides the player unions with the authority to ensure that they certify every agent before the agent can negotiate an employment contract with any unionized team.

Thirdly, the rules governing athletic eligibility for most college and university athletes in the United States are implemented and enforced by the National Collegiate Athletic Association ('NCAA'), which also has the responsibility to maintain the ideals of amateurism as well as uphold the integrity of intercollegiate sports. If any athlete has received any financial compensation from a prospective agent, the NCAA will declare that athlete ineligible from any future competition. Once an athlete loses NCAA eligibility, the prospects for a professional career are dim. However, the NCAA does not possess any mechanism to control the recruiting actions of agents.

How should football agents be regulated in the future? Where is the balance to be struck in allowing a highly entrepreneurial activity to flourish, but protecting the vulnerable from exploitation? UEFA has an opportunity to suggest positive reforms to the regulatory framework.

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



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The prevalence and nature of age discrimination practices in UK sport and recreation organisations

By Karen Bill, Principal Lecturer, University College Worcester

Context

If the Department of Trade and Industry's report (2003)ⁱ into age discrimination is to be believed, then UK sport and recreation organisations may find themselves on the wrong side of a forthcoming European Directiveⁱⁱ that includes specific anti-age discrimination legislation, designed to enforce equal treatment in employment and occupation for all employees. There is some debate as to whether the Directive will extend to non-contracted, unpaid employees, upon whom, most sport and recreation organisations are heavily dependent.

According to Shaun Tyson (2003) of the Cranfield School of Management, it is going to be quite a while before we can expect age to be no barrier to recruitment, promotion or retention. Indeed it has been suggested that "age restrictions, were they ever to be challenged, would almost certainly be justifiable given that most sports professionals retire in their late 30's" (Gardiner 1998).

Given this scenario the research sets out to: explore the prevalence and nature of current age discrimination practices affecting employees and volunteers in UK sport and recreation organisations; investigate potential discrepancies in such practices between these two groups; identify and evaluate strategies designed to comply with the forthcoming legislation in order to identify any generic or specific areas of legal concern arising from the introduction of 'the Directive'; and formulate practical policy guidance and training strategies for those affected organisations.

Introduction

The nature of work is changing and with it the demographics of the population as a whole. These two facts are due to have a significant effect on how we view work, on the proportion of time we spend in paid work as opposed to some form of unpaid work and the age at which we decide to start and more importantly finish working. Projections for the UK indicate that by 2020 the number of 20-29 year olds will have decreased by 20%, while the number of 50 to 64 year olds will have increased by 26%ⁱⁱⁱ. Of this latter group, nearly 6 million are in employment, giving an

employment rate of 68%^{iv}. Since 1997 there has been a sharp rise in the employment rate of older people vis-à-vis the working population as a whole^v.

Against this background the prospect of discriminatory practice based on age is likely to be detrimental. Such practice refers to prejudice directed at either older or younger workers. Such practice exists in the workplace when decisions are made on matters related to training or employment that are based on a person's age rather than his or her skills or ability to do the job. It can be both direct and indirect. Direct discrimination occurs when a decision is made on the basis of a person's actual or perceived age and 'indirect' discrimination when a policy or practice applies to everyone but causes disadvantage to one group more than another.

Prior to the European Directive (No. 2000/78), which comes into force on 1st October 2006, there has been no legislation that has covered discrimination on the grounds of age. Consequently there is no mandatory retirement age in the UK, with retirement commonly pegged to the state pension, currently payable to men at 65 and women at 60 (soon to become 65 in 2020). On July 2nd 2003 the DTI published its response to the EU Directive, through a consultation document, '*Equality and diversity: age matters - Age Consultation 2003*'.

In response to the prevalence of age discrimination, the consultation document found that 50% of respondents had suffered or knew of someone else suffering from age discrimination. While 25% of non-working people aged 50+ and 48% of people registered unemployed in the same age category reported suffering age discrimination in the workplace^{vi}. These findings are reinforced by a MORI Survey^{vii} which found that one in five workers had experienced discrimination at work, with 38% citing ageism as the cause. A further UK study found that 30% of advertisements carried discriminatory references against older workers (Heasman 1993). Half of these adverts specified a maximum age limit of 35. Other advertisements used terminology such as 'youthful' and 'dynamic' which carry an implicit message that older workers are not welcome to apply.

The consultation exercise also found that very often age discrimination stems from employers having very strong preconceptions about age and ability (further supported by research at Cranfield^{viii}). Positive stereotypes suggest younger workers are more dynamic and easier to train, while older workers are more mature and reliable. Other studies have presented a more negative stereotype, discounting the productivity and competence of the older workers (Kite and Johnson 1988; Rosen and Jerdee 1977).

There are times when age related practices are necessary and Article 6^{ix} of the EU Directive recognises this fact and sets out a limited defence for direct age discrimination that has to be cited under one of the following headings:-

- Health, welfare and safety
- Facilitation of employment planning – e.g. succession planning
- Particular training requirements for the post in question
- Encouraging or rewarding loyalty
- The need for reasonable period for employment prior to retirement.

As a starting point for discussion the consultation document proposed the introduction of a statutory default retirement age of 70, after which employees can be forced to retire without the need for justification. Davis and Dotson (1987) discuss the notion of physical performance testing as an alternative to arbitrary age limitations for physically demanding tasks.

Some countries like the US and Canada already have existing laws against age discrimination at work^x (see Table 1 below). However the effectiveness of this legislation in the US has been brought into question as it tends to be dependent on case law e.g. *International Brotherhood of Teamsters v United States* (1977)^{xi} and *McDonnell Douglas v Green* (1973) and *Texas Department of Community Affairs v Burdine* (1981).^{xii} While in Canada the legislation is fairly weak as it rarely applies to persons beyond 65 and when it does it is often protected by exemptions such as *Bone Fide Occupational Qualifications* (BFOQs), whereby age can be shown to be a BFOQ (Gunderson 2003).

Table 1: Key Federal Age Discrimination Legislation

Year	Legislation	Provisions
1967	Age Discrimination in Employment Act (ADEA)	Prohibited discrimination based on age, covering those aged 40-65, including discrimination based on age within this protected age range.
1975	Age Discrimination Act	Prohibited age discrimination in all programs or activities receiving federal assistance, including state or local government units that receive federal funds.
1978	ADEA amendments	Extended the age range for the protected group to 40-70, raising the mandatory retirement age to 70 in the process. Eliminated mandatory retirement for most federal employees. Granted some exemptions or delays for raising mandatory retirement age.
1986	ADEA amendments	Eliminated upper age limit, thus banning mandatory retirement, with very limited exemptions.
1990	Older Workers Benefit Protection Act	Regulated financial inducements to retire.

Source: Neumark, D (2003)

The prevalence and nature of age discrimination practices in UK sport and recreation organisations

Age Discrimination and Sport

Sporting bodies are no different from other employers and in one of the great clichés of discrimination law, there must be a level playing field” (Lewis & Taylor 2003) in light of the forthcoming legislation. Headlines have attempted to capture the flavour of the impending changes to UK sport, e.g. ‘Umpires destined for longer service’^{xiii} (The Times) and ‘Older refs on the way’^{xiv} (The Observer) highlighting the issue in cricket and football respectively. Allan Jones^{xv} representing cricket commented, “we shall probably have to be given more stringent medical checks [but I see no reason why] someone who wants to continue until he is 70 couldn’t do so” (2003). While in football the matter is more complex because there appears to be no parity between European and International rules.

In the UK under present rules, referees must retire at 48 whereas in other EU countries the retirement age is 45. A fact recently brought into the spotlight by Pierluigi Collina^{xvi}. According to Heaton-Harris (2004) “Collina is the best football referee in the world and has been voted as such six times. Yet in 2005 he will no longer be able to referee as 45 is the official retirement age for his profession in Italy. It seems absurd that an experienced, talented referee can be forced to give up his job at a relatively young age”. FIFA have yet to respond. Given that the headquarters of FIFA (Zurich) is outside the EU, they may argue a case of non-compliance.

While back in the UK, Johnson sees the EU Directive as benefiting most referees in the top four divisions, who could officiate into their 60’s as long as they passed the same stringent fitness tests. “At present we do not have age criteria, but we are reviewing this in favour of fitness and performance ahead of any proposed legislation” (2003).

The belief that “sport is one of the few industries that gives you opportunities based on your skill rather than how old you are” is prevalent (Sidoli 2004)^{xvii}. Sir Steve Redgrave’s, five olympic golds, bear testimony to this philosophy, as does the number of player managers in lower divisions of the football league who were once premiership players.

This study aims to identify the extent and nature of age discrimination amongst employed and volunteer staff in UK sport and recreation organisations and to investigate what strategies/policies are being developed in order to become compliant with the impending anti-age discrimination legislation.

Methodology

The Central Council of Physical Recreation (CCPR) was used to disseminate e-mail questionnaires to the Chief Executives of 270 National Sport Governing Bodies and associated sport and recreation organisations. The use of e-mail is best compared to postal research, where response rates are known to vary greatly (see Frankfort-Nachmias and Nachmias 1996). The questionnaires, consisting of 6

questions, were based loosely upon the initial DTI (2003) consultation paper^{xviii}. Two questionnaires were used to differentiate between employed and volunteer staff.

As it was felt that little would be known about the legislative requirements, the questionnaire included a section on the specific legal requirements around special defences to age discrimination in terms of how they can be objectively justified. The specific aims of the legislation were provided to raise awareness and assist respondents. This information was gleaned from the IDS Brief 738, August 2003^{xix}. The completed questionnaires (n=46) were then analysed using the SPSS computer software package; cross-tabulations were carried out and qualitative comments recorded.

Findings

28 organisations replied giving an 11% response rate (see Table 2). Despite the fact that some of the responses were limited with various questions omitted, most respondents completed both questionnaires from an employee and volunteer perspective.

Table 2: List of Contributors

English Basketball Association	The British Wheel of Yoga
National Council for School Sport	The Scouting Association
RLSS	The Canoe Camping Club
The Professional Golfers Assoc.	Professional Cricketers
English Schools Football Assoc.	English Amateur Dance Sport
Golf Foundation	English Bowling Association
UK Ultimate Association	Cycling Time
British Balloon and Airship	British Sports Trust
British Cycling	England Hockey
LTA	British Universities Sports Assoc.
British Horse Society	Amateur Rowing Association
Badminton Assoc. of England	Keep Fit Association
F.A.	The Croquet Association
British Hang-gliding and Paragliding Association	English Womens Indoor Bowling Association

The principal findings were as follows:-

- The results indicate that the prevalence of age discrimination practices amongst respondents is limited, with over 61% of organisations having no such practices (see Figure 1).
- Of the 22% of organisations that reported having age discriminatory practices, the main reason given was due to ‘people retiring at a specific age’ usually linked to the mandatory state retirement age.
- There was very little or no recognition of any age discrimination in job adverts (see Figure 2).
- Where age based approaches to retirement were identified it tended to be amongst employees rather than volunteers (see Figure 3).

- 2/3rd's of organisations did not have any kind of comprehensive strategy, either in place or being designed, in order to comply with the forthcoming legislation (see Figure 4).
- The fact that 1/3rd of the respondents wished to receive training in this area and over 2/3rd's wished to receive the results points to the lack of 'legal intelligence' in this area (see Figures 5 and 6).
- The research found no evidence of the 'stereotypical assumptions' identified in the DTI report.
- Sporting experience is valued.
- The level of awareness of legislation is noticeably weaker amongst voluntary organisations. At the same time the cost implications of implementation are prohibitively higher.

Figure 1: Current policies/practices which allow for age discrimination?

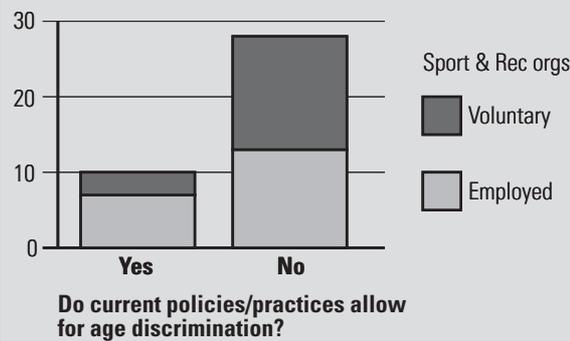


Figure 2: Use of age limits/words in job advertisements

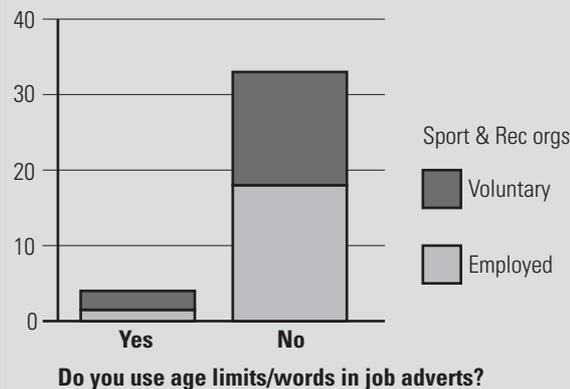


Figure 3 : Age based approach to retirement for employees?

UK Sport and Recreation Organisations	Age based retirement for employees?				Total
	yes	no	n/a	no resp	
Employed	8	12	0	3	23
Volunteers	3	13	1	4	21
no response	0	0	0	2	2
Total	11	25	1	9	46

Figure 4: Policies on tackling age discrimination

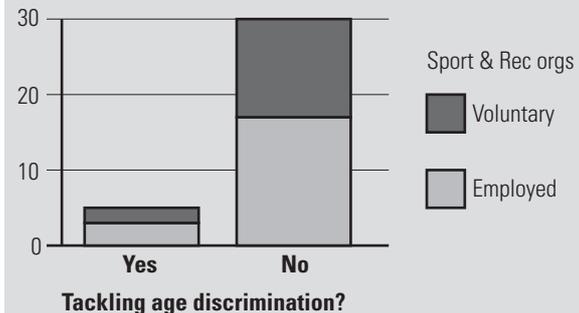


Figure 5: Awareness/training Age Discrimination legislation

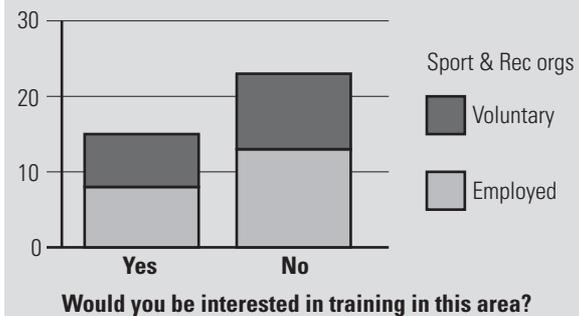
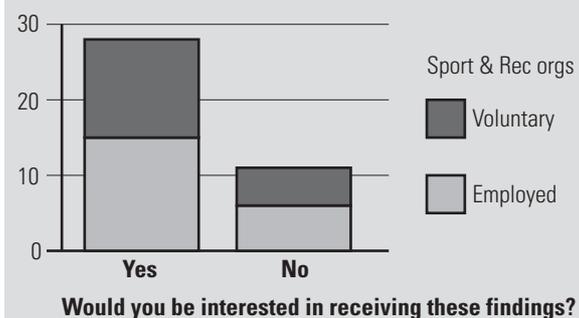


Figure 6: Awareness/research Age Discrimination legislation



The prevalence and nature of age discrimination practices in UK sport and recreation organisations

Discussion

The fact that 61% of organisations claimed to have no age discrimination practices, typically stating that “under their constitution there is no age barrier”; conflicts with the DTI (2003) findings which identified that age discrimination practices were prevalent in many UK organisations. There are a number of factors that might account for this discrepancy. Firstly, although, the DTI’s research was in the same area, their findings were based on a slightly different sample set, i.e. to public and non-specified organisations as well as voluntary and private and to individuals as well as organisations. Secondly, the limited response rate may skew the results with organisations not responding where they felt that by so doing they would create an unfavourable impression. Thirdly, no account is taken of scale i.e. the contrast between participation rates in football and hang-gliding should suffice to make this point. Did the DTI’s research factor in participation rates?

Furthermore a few organisations, despite professing to have no age discrimination practices, did mention that they had a few national initiatives that specifically target youth volunteers or ask for a degree upon recruitment which therefore implies a minimal age. There may have been some discrepancy here between a general emphasis on retirement which caused other forms of age discrimination to be overlooked. One governing body, in particular, noted that, whilst the referees retire at 48, they are not officially employed by them and have no control over employment practices.

Organisations were asked if they discriminated on the basis of age in their job advertisements. Over 95% of respondents indicated they were not aware of any such discrimination. Whilst consistent with the findings of this research, it appears at odds with other research i.e. Heasman (1993). One of the problems with job advertisements is that they do tend to be fairly stereotyped, even hierarchical and therefore HR managers may subconsciously discriminate by drawing on descriptors from previous, similar adverts.

Where organisations were found to have age based approaches to retirement these tended to be aimed at employees as opposed to volunteers. However the voluntary sector itself is not a homogenous group, and there are different practices in different organisations e.g. ‘warrants’ are surrendered at 65 in scouting but 70 for umpires operating from boats. One voluntary organisation required self declaration of physical and medical fitness whereby an annual membership renewal was countersigned by a senior coach or chief officer to verify suitability and ability to continue. In another organisation, those over 70 have to obtain a medical declaration every 2 years, on behalf of the insurance underwriters, saying that they are fit to teach, in order to

continue receiving insurance cover. Such regulations are outside the sports governing body’s jurisdiction.

The fact that 15% of organisations had age based approaches suggests that one might have found some policies or strategies that complied with the pending legislation. However on closer inspection the policy usually amounted to a retraction of any age restriction within the work contracts. While over 65% of respondents indicated that they had no such policies in place. These results confirm Parry’s (2003) research on the lack of preparedness of organisations to comply with the forthcoming legislation. Or indeed whether, given the limited responses that organisations do not fully understand the specific legislation.

Does the absence of any strategies imply that age discrimination is not a priority? Only one organisation alluded to planning. “We shall have to review our provision of personal benefits and consider what is meant by retirement and long service awards”. A couple of other organisations saw the appointment of an ethics, equity and welfare manager as a way forward in terms of overseeing any policy implementation in this area; incorporating non discrimination on the grounds of age into their equity or equal opportunity policy.

Other organisations saw that it might be possible to objectively justify their current practices of discrimination against the first two grounds set out in Article 6, i.e. either, health, safety and welfare or succession planning. Another organisation raised the issue of looking at replacement policies to substitute age criteria for performance criteria, similar to Davis and Dotson’s (1987) proposal.

Voluntary organisations find the demands of changing legislation (however well intentioned) an added pressure. One such organisation commented that they did not need a written policy and would be annoyed if they had to take time and effort to formalise their position. Another stated that they “outsourced their HR and had no idea whether they had any policy”. Yet another felt that they could not comment on any strategies in place stating that they would need to have details of the legislation before answering this. One common concern was the resource issues since the cost to small organisations to assimilate the implications of the regulations will be in the region of £105-£122 according to the DTI survey^{xx}.

The findings suggest that sporting experience appears to have general recognition and is valued, if only because “people who remain as members still have much to offer to others in terms of support and experience.”

Conclusion

The paper concludes that age discrimination practices may not be as prevalent as the DTI indicates. To account for some of the differences one needs to acknowledge that age discrimination is felt and recognised more by those people that are subject to it rather than those people who inflict it; suggesting that who the respondent is matters. While some organisations clearly felt they existed outside the particular legal framework in terms of their employment practices.

Where instances of discrimination were noted, these related mostly to employees reaching mandatory retirement, whilst retirement in voluntary organisations was more arbitrary and the policies and practices more varied. Whilst informative, the small number of responses from voluntary organisations, makes it difficult to provide any meaningful comparisons. From the data it is only realistic to make inferences. Further data would need to be collated in order to validate any observations.

Previous research has indicated that very often age discrimination stems from employers having strong preconceptions about age and ability. However, this was seen positively by employers recognising the valuable experience that older sports people possess. The research predominantly concentrated on discrimination at the upper age limit and might have presented a different picture had the emphasis been on minimum age.

The study complimented previous research in terms of the lack of preparedness of these organisations in evidencing any forward thinking to combat the legislation leading one to conclude that either the time frame is the issue or organisations do not believe the legislation will be so significant. Some organisations felt that specific age practices in sport may be rationalised under Article 6 of the Directive, although in a modern, non-discriminatory society the continuation of age-based criteria has to be questioned. A third possibility is that organisations are assuming and therefore waiting for more guidance on the directive. Certainly there was an interest in increasing their awareness on age discrimination through training and receiving these report findings.

In terms of any practical policy guidance, the findings revealed that of the few that had begun to tackle age discrimination, some had started to do so through sports and equity appointments and strategies and through a focus on the use of fitness tests and assessment as 'fit for purpose' in order to replace age based criteria, although these were in their infancy. ■

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Could the Olympic Games be illegal in European Law?

By Nick Bitel, Solicitor-Partner, Max Bitel Greene

At first sight this seems a very easy question to answer. After all Greece hosted the 2004 Summer Olympics, Italy will host the 2006 Winter Games and London, Paris and Madrid are all bidding for the right to host the 2012 Games. It must be obvious then that the Games are legal.

However, I would postulate that the situation is far from clear and that other events such as the 2006 FIFA World Cup in Germany must also face questions as to their legality.

The problem arises because these large scale events require massive public funding. London 2012 says that £2.375bn has been earmarked to stage the Games, some of which will be raised by a precept on the rate payers of London. New York's budget includes \$250 million of public underwriting, although interestingly their proposed Olympic Stadium will have the whole of its \$800 million raised by private finance. Although Paris say that their bid does not depend on any public subsidy, the infrastructure cost of \$2.34 billion is publicly funded and the Paralympic operating budget does they admit require public subsidy. The cost of the Olympic village in Paris, put at over \$1,000 million is being financed by public authorities.

Even without capital expenditure, the Madrid bid relies on 6.5% of its income coming from National, Local and Regional subsidies.

Although some bids say that they have no state subsidies, the state, whether local or national, is usually in fact providing massive support free of charge in the shape of security, transport and health.

The problem that this then gives is that under Article 87(1) of the EC Treaty:

"Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market."

To understand therefore whether the aid proposed to be given to the Olympic Games would be in breach of

Article 87(1) we have to consider five questions:-

1. Is there an intervention by the State or through State resources?
2. Does it confer a selective advantage on undertakings or the production of certain goods?
3. Is competition thereby distorted, or is there a threat to distort competition?
4. Is there an affect on trade between Member States?
5. If there is State Aid, is it compatible with the common market?

1. State Resources

Quite obviously, the provision of subsidies by the state or by local or regional governments is the use of state resources.

What constitutes State resources has been defined very widely:

"...it should be recalled that it has already been established in the case-law of the Court that Article 87(1) EC covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources (see the judgment in P France v Ladbroke Racing and Commission Case C-83/98 [2000] ECR I-3271, paragraph 50). French Republic v Commission of the European Communities Case C-482/99"

Furthermore, apart from the direct grants, use of National Lottery Funds would be state resources for the purposes of Article 87(1).

2. Undertakings

A far more difficult question arises when we consider whether or not the recipient of the aid is an "undertaking" for the purposes of Article 87(1).

Here the law is less clear. London 2012 has stated that it believes that the Olympic Games in London would make a profit. Their bid book suggests the Games would make £100 million profit. But even if the event had no hope of making a profit, this alone would not preclude it from being an undertaking (see Case C-244/94 Fédération Française des Sociétés d'Assurance [1995] ECR I-4013).

There have been a number of seemingly conflicting decisions on this topic. The starting point is Hofner and Elser v Macroton (case C-41/89 [1991] ECR I-1979) where the Court held:

"...in the context of competition law ... the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed .." (paragraph 21).

However, in Poucet and Pistre (Cases C- 159/91 and C-160/91 [1993] ECR I-637) the Court found that:

"...sickness funds fulfil an exclusively social function...based on the principle of national solidarity and is entirely non profit-making"

and on these grounds found that a social security scheme was not an undertaking for the purposes of the Treaty. Similarly, the Court has found that a body collecting charges levied on the users of air navigation services did not constitute activity of an economic nature, since it was said that this was typically the sort of powers exercised by a public authority (see Eurocontrol Case C- 364/92 [1994] ECR I-43). This was also the case with regards anti-pollution surveillance (see Diego Cali Case C- 343/95 [1997] ECR I-1547) and free health care (see Case T-319/99 FENIN [2003] ECR II-357).

When this matter has come before the English Courts, Bettercare Group Limited v DGFT [2002] CAT 7 (Case No 1006/2/1/01), it has taken a very wide definition of what was an "undertaking" for the purposes of the Competition Act 1988. The Tribunal took the view that the North and West Belfast Health and Social Services Trust were acting as an undertaking when purchasing social care and made the point that

the way in which the Trust carries out or delivers its functions was by business methods and although clearly the Trust had a social aim the "business dimension" could not be overlooked. Since the Trust had contracted out some of its functions, in doing so its activity in this regard was economic in character.

There is obviously a difficulty in reconciling this with FENIN (supra) but the Court will adopt a functional approach and the test as formulated by AG Jacobs in Albany (Case C- 67/96 [1999] ECR I-5751) is: -

"...whether the entity in question is engaged in an activity which could, at least in principle, be carried on by a private undertaking in order to make profits." (Para 311)

Thus although there may be an underlying social objective and solidarity purpose, an entity can still be an undertaking (see Pavel Pavlov Cases C-180/98 to C-184/98 [2000] ECR I-6541 and Ambulanz Glockner Case C-475/99 [2001] ECR I-8089).

The final point under this head is whether or not the LOC is gaining an "advantage". The test is well set out in Altmark (Case C-280/00 [2003] ECR I-7747) which found that subsidies are not caught by that provision, where such subsidies are to be regarded as compensation for the services provided by the recipient undertakings, in order to discharge public service obligations, where the following conditions are satisfied:

"- first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;

- second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;

- third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

- fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the

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costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations” (para 95).

Taking all of these principles, I believe that in the case of the Olympic Games, the LOC will be an entity for the purposes of the Treaty and I say this based on the following:-

1. It clearly is possible to make a profit. Los Angeles did and according to London 2012, so would the Games in London.
2. The LOC is a private limited company as is the BOA.
3. The Games are not part of public service obligations in the same way that, for instance, the provision of leisure facilities might be.
4. The Games would compete for TV and sponsorship income with other economic activities, such as Formula 1 and Football.

3. Distort competition

Again at first sight this would seem to be a test that the Games could easily pass. There is only one set of Olympic Games and so it is not competing against another opposing event.

However, this will depend on what the definition of the market is for the purposes of competition. If the market is merely for the bidding for the Olympic Games, then the fact that all of the bids have had some state finance would seemingly be in breach of the Treaty:

“...when financial aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid (see Case 730/79 Philip Morris v Commission [1980] ECR 2671, paragraph 11, and Joined Cases C-278/92 to C-280/92 Spain v Commission [1994] ECR I-4103, paragraph 40) (see Italy v Commission Case C-372/97 para 52).

Where the state aid has been given in respect of the holding of the Games rather than the bidding, a potential distortion of competition is sufficient for Art. 87(1) to apply (“threatens to distort competition”). Hence only on markets which are not open to any competition will the prohibition not apply, and only for as long as competition is excluded on these markets.

As I have suggested above, the market could be TV sales, Hospitality, Sponsorship, merchandising or any other of the substantial areas of economic activity that make up the Olympic Games. The Office of Fair Trading has previously found in respect of the Wimbledon

Championships that there is a high degree of substitution in the corporate hospitality market and that Wimbledon was therefore competing against the FA Cup, Twickenham and other such events.

I do not think that there is any doubt that the Games would be staged on a non-competitive basis, using funds which have been committed without expectation of commercial return.

For this reason, it could not be said that the payment of the grant satisfies the “market economy investor principle”. For instance see *Inter Air v Commission Case T-16/96*

“In order to determine whether a State measure constitutes aid distorting or threatening to distort competition and affecting trade between Member States within the meaning of that provision, the relevant criterion is that stated in the contested decision, namely, whether the undertaking receiving the aid could have obtained the amounts in question on the capital market (Case C-142/87 Belgium v Commission, paragraph 26). In particular, the relevant question is whether a private investor would have entered into the transaction in question on the same terms and, if not, on which conditions he could have entered into the transaction.” (Para 51).

Also see Cases T-116/00 and T-118/01 P & O European Ferries, 5 August 2003, para 113.

The fact is that no private investor would have advanced the funds needed to stage the Olympic Games, which is precisely why Governments are having to underwrite the events.

4. Effect on Trade

It is not necessary to prove that there has been actual distortion in these markets just that it is capable of doing so as was said in *Alzetta Mauro and others v Commission of the European Communities [2000] ECR II-2319 (joined cases T-298 et al./97, T-1 et al./98): -*

“76 It is necessary to reject the restrictive interpretation of Article 92(1) of the Treaty proposed by the applicants in Case T-312/97, to the effect that only aid having an actual effect on trade between Member States and distorting competition is covered by this provision.

77 This purely literal interpretation is incompatible with the system for monitoring State aid introduced by Article 92 et seq. of the Treaty. As part of its assessment of new aid, which pursuant to Article 93(3) of the Treaty is to be notified to the Commission before implementation, the Commission is in fact called on to review whether that aid might affect trade between Member States and distort competition.

78 A real effect on trade between Member States or distortion of competition do not have to be established in the context of the constant review of existing aid under Article 93(1) and (2) of the Treaty, when the Commission is required to verify, particularly in the event of a change in the competitive situation, whether the existing aid is still compatible with the Treaty and, where appropriate, to require the immediate discontinuance of the aid that has become incompatible (Case C-387/92 Banco Exterior de España [1994] ECR I-877, paragraphs 15 and 20).

79 Lastly, if a new aid has been granted without prior notification having been given, the Commission is not required to establish whether the aid has a real effect on trade and competition. According to well-established case-law, such a requirement would favour Member States which grant aid in breach of the obligation to notify, to the detriment of those which do notify aid at the planning stage (Case C-301/87 France v Commission [1990] ECR I-307, paragraphs 32 and 33, and Case T-214/95 Vlaams Gewest v Commission [1998] ECR II-717, paragraph 67). [...]

81 Moreover, concerning State aid, the conditions under which trade between Member States is effected and competition is distorted are as a general rule inextricably linked. Confirming its earlier case-law (Case 173/73 Italy v Commission [1974] ECR 709, paragraphs 25, 44 and 45), the Court stated in the Philip Morris v Commission judgment, cited above (paragraph 11), that ‘when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid’ (see also the Opinion of Advocate General Capotorti in that case, at p. 2697; similarly, see Spain v Commission, cited above, paragraph 40, and Vlaams Gewest v Commission, cited above, paragraph 50). [...]

95 In this connection, there is no basis for the applicants’ argument that the Commission should have established that Community undertakings had been adversely affected by the granting of the aid in dispute or, at least, that the Community quota had not been exhausted. The Commission merely needs to establish that the aid in question is of such a kind as to affect trade between Member States and threatens to distort competition. It does not have to define the market in question or analyse its structure and the ensuing competitive relationships (Philip Morris v Commission, cited above, paragraphs 9 to 12).”

The effect on trade between Member States, if there is one, need not be “appreciable”: see Bellamy & Child, European Community Law of Competition, 5th ed., paragraphs 19-019 to 19-021. Moreover, aid need only be “liable” to have such an effect: Case C-75/97

Belgium v Commission [1999] ECR I-959 para 51, rather than proven to do so.

The fact that the Olympic Games will attract thousands of visitors from across the European Union must mean that there is a potential effect of trade. In its decision relating to a swimming pool in Dorsten, Germany the Commission said: -

“By its very nature, aid in favour of facilities aimed at attracting international visitors is likely to affect trade between the Member States, whereas in this case the Commission took the view that there was practically no likelihood of intra-Community trade being affected, especially since the catchment area of the swimming pool did not extend to the nearby Netherlands” (IP/00/1509).

Over 500,000 overseas visitors were estimated to have visited Greece in 2004, to see some of the Olympic Games there. It is therefore inevitable in my view that the Commission would find that there is an intra-state effect. In relation to the Terra Mitica theme park in Spain, the Commission found an effect because: -

“...the park clearly adds to the attractions of the Benidorm area, which is visited by a very large number of tourists, including many from other EU countries, by diversifying the activities on offer.” (IP/02/1195).

5. Compatibility

There is one final possible saving grace and that is that it might be said that the aid was not “incompatible with the common market”. It is a matter for the Commission only and not the domestic Courts whether or not aid is incompatible based on the criteria set out in Article 87(2) and (3) EC. The 2 relevant criteria would seem to be Articles 87(3) (c) and (d), which provide for the compatibility of:

“(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest”.

Here at least would be a chance for the Commission to support their assertion that “sport performs an important social, integrating and cultural function” (Competition Report 2002).

The Commission clearly cannot come to a decision which is contrary to the objects of the Treaty: -

“It must be noted in this respect that while the procedure provided for in Articles 92 and 93 leaves a wide discretion to

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the Commission, and under certain conditions to the Council, in coming to a decision on the compatibility of a system of State aid with the requirements of the common market, it is clear from the general scheme of the Treaty that that procedure must never produce a result which is contrary to the specific provisions of the Treaty (judgment in Case 73/79 Commission v Italy [1980] ECR 1533, paragraph 11). The Court has also held that those aspects of aid which contravene specific provisions of the Treaty other than Articles 92 and 93 may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately (judgment in Iannelli v Meroni Case 74/76 [1977] ECR 557).

That obligation on the part of the Commission to ensure that Articles 92 and 93 are applied consistently with other provisions of the Treaty is all the more necessary where those other provisions also pursue, as in the present case, the objective of undistorted competition in the common market." (see *Matra SA v Commission of the European Communities Case C-225/91 [1993] ECR I-3203*)

For years the argument has been whether or not there is a need for a sports specific exemption. As the Commission itself has said: -

"the interdependence between the socio-cultural and economic aspects of sport makes it difficult to apply competition rules to sport as a collection of economic activities" Report on Competition Policy (1999).

Any decision by the Commission which found that state aid for the Olympic Games was incompatible would seem to run contrary to the Nice Declaration. As the Declaration says:

"Sport is based on fundamental social, educational and cultural values. It makes for integration, involvement in the life of society, tolerance, acceptance of differences and compliance with rules"

It seems to me to be obvious that the Olympic Games, World Cup and other major sporting events should not be treated as ordinary economic activities, just as in the same way as cableways used for sports purposes are within the exemption (see Annual Report on Competition Policy, 2002 paras 455 and 456). However, with the Commission one can never be sure. We all know that they have already said that the law does apply to ticket distribution and TV sales, so why not state aid as well.

Until a decision on an event that has been notified has been challenged, we just cannot be sure on the legality of the Olympic Games and that in itself is the point of this article. I do not for one moment suggest that state aid for the staging of major events ought to be unlawful and indeed I go further. I consider that the

staging of Major Sporting events is an essential cultural function of a nation and that per se, it is a function of Government to promote such events. It cannot therefore be that the legality ought to be dependant upon the whim of the Commission or some hair-splitting decision of the Court.

The problem is also not confined to the staging of major events. It seems to me that the same principles would apply to the process of bidding for the right to stage events as well. I have not even considered whether or not the proper public procurement processes have been followed or whether, as seems likely, London 2012 is a "contracting authority" for the purposes of The Public Contracts (Work, Services and Supply) (Amendment) Regulations 2000.

For once the Commission should state clearly that Sport is at least exempt from the provisions of Article 87(1) and that major events should not be treated in the same way as an airline or steel manufacturer. Without this, one day, an unsuccessful bidder for a major event will want to test the legality of state aid for their winning opponents and that is not a prospect that I for one look forward to. ■

Football “Tapping up” rules – Anachronism or necessity?

**By Mel Goldberg (solicitor), partner at Max Bitel Greene
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The media circus surrounding the Premier League inquiry into the alleged illegal approach made by Chelsea FC towards Arsenal’s Ashley Cole has reignited the debate into “tapping-up” within football. Leading sports lawyers, solicitor Mel Goldberg and barrister Simon Pentol examine the rules, procedures, repercussions and the conflicting issues involved.

The football media is currently obsessed with allegations of an illegal approach made by the country’s wealthiest club towards the country’s finest left-back. Behind the headlines exist unfamiliar rules and procedures that raise important matters of principle and law with far reaching repercussions for both the individuals concerned and the future governance of professional football.

The Rules

The Premier League (“PL”) Rules (K) make it clear that a club is at liberty to approach a contracted player of another club with a view to negotiating a contract, only with the prior written consent of the club to which he is contracted.

Any club which by itself, its officials, players, agent or any person on its behalf or by any other means whatsoever makes an approach [with a view to negotiating a contract] either directly or indirectly to a contracted player (who is not in the final year of his existing contract) without the prior written consent of his club, is in breach of Rule K.3.

Equally, a contracted player (who is not in the final year of his existing contract) either by himself or by any person on his behalf shall not either directly or indirectly make an approach to a club [with a view to negotiating a contract] without having obtained the prior written consent of his (current) club (K.4).

Intriguingly, the Press report that Chelsea deny making an approach to Ashley Cole/his agent who they claim were responsible for instigating the now, infamous meeting at a London hotel. Should this be the case, it is moot whether or not they are availed a defence to a breach of K.3 by virtue of a strict application of the words of the rule. Surely, responding positively to an approach made by a contracted player (if that be the case) contravenes the spirit of the rule?

Although many column inches have been devoted to speculation and opinion, very little has been written about the procedures invoked by the PL in a case such as this.

Disciplinary Procedures

The Board of the PL has power to inquire into a suspected or alleged breach of its rules and may require any manager, (club) official or player to appear before it (R.1).

Upon finding a breach, the Board can either (among other things) exercise its summary jurisdiction by imposing a fine upon the culprit limited to £10,000 or refer the matter to a Commission (R.3) which has greater sentencing powers. The respondent can submit to the Board’s jurisdiction and pay the fine imposed or elect to be dealt with by a Commission.

The Commission

The Board will establish a Panel of persons it thinks fit, from which it will appoint three members to sit as a Commission. The Panel shall not include members of the Board or club officials. The chairman of the Commission must be legally qualified (R.15).

The parties to proceedings before a Commission shall be the Board and the respondent club, manager, club official or player allegedly in breach of the rules.

Commission Procedures

Proceedings are commenced by complaint, identifying the alleged breach and summarising the facts alleged (R.17). The respondent will then have 14 days to reply in writing, either admitting or denying the complaint (R.20).

If the complaint is denied, the respondent can ask that the matter be determined by way of written representations or a hearing.

At a hearing, the respondent is afforded legal representation (R.65) and in advance of it, the chairman will conduct a directions hearing at which he will give appropriate directions concerning (among other things) the exchange of witness statements, witnesses to be summoned to attend and authorities/submissions to be relied upon by the parties (R.28).

The chairman has an overriding discretion as to the

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manner in which the hearing is conducted – however, the parties are permitted to question the witnesses, evidence may be given under oath and the parties are entitled to make a closing address. The proceedings are conducted on an inquisitorial basis (R.33) and the onus of proof is on a balance of probabilities (R.36).

The Commission is not bound by any enactment or rule of law relating to the admissibility of evidence in proceedings before a court of law (R.64).

If the members of the Commission are not unanimous, a majority verdict will prevail (R.37).

Commission’s Powers

Upon finding a complaint proved, the Commission may impose the following sanctions (R.42):-

- A reprimand;
- An unlimited fine;
- In the case of a manager, club official or player – a suspension for a period as it thinks fit;
- In the case of a club – a suspension from playing League matches for a period it thinks fit or, a deduction of points scored or to be scored in League matches;
- An order of compensation unlimited in amount to any person or club;
- Any combination of the above;
- Any other order as it thinks fit.

Appeals

An appeal lies to an Appeal Board in respect of either or both the decision of the Commission and the sanction imposed.

An Appeal Board comprises three Panel members – the chairman must have held judicial office and the other two must be members of the Council of the FA who are not club officials.

An appeal must be lodged within 14 days of the Commission’s decision (R.53) and the hearing takes the form of a hearing *de novo*.

The Appeal Board may (R.62):-

- Allow the appeal;
- Dismiss the appeal;
- Vary any penalty made at first instance;
- Make costs’ orders;
- Make such order as it thinks fit.

The position of the Agent

Noticeably, these rules do not govern the behaviour of the football agents allegedly involved in this saga.

Any finding by the PL that either or both (Jonathan Barnett for Cole, Pini Zahavi for Chelsea) aided and abetted their clients to breach the rules, should *prima facie* constitute a breach of Art.14 of the FA Players’ Agents Regulations which could render them liable to censure, fine, suspension or withdrawal of their

licences. History suggests however that little if any action will be taken. More problematic for Mr. Barnett is the potential for legal proceedings being taken against him by Arsenal for destabilizing their player.

The Outcome

It is not for us to predict the outcome of these proceedings as much will turn on the will of the PL to enforce their rules strictly and impose substantial sanctions upon the guilty parties as a means of deterrent. The findings and sanctions will demonstrate the attitude of the PL towards tapping-up.

And herein lies the problem.

These rules are honoured far more in the breach than the observance – so why all the fuss? Because the present allegation involves “giants” of the game, took place publicly and only two previous instances of tapping-up have been prosecuted in PL history.

Liverpool FC were fined £20,000 five years ago for “tapping-up” Christian Ziege (then) of Middlesborough FC (in a case factually different from the present) and last year, the Aston Villa manager David O’Leary was reprimanded for publicly declaring an interest in acquiring the registration of James Beattie whilst contracted to Southampton FC (contrary to K.7).

The PL must be acutely aware of the custom and practices that exist in modern football – tapping-up is rife – what is a club meant to do when it needs a new player, put an advert in the paper and await a response?

The argument for dispensing with these rules is a powerful one – why should football clubs and players be held to standards that would be unacceptable in any other industry?

However football is an industry like no other, it has successfully argued before the EU Commission that players’ contracts differ from other employment contracts because of the need for clubs to be compensated for the transfer of it’s players in order to protect it’s original investment in them.

These rules exist to protect clubs, especially the smaller ones. Without them, there is an argument that football would become even less competitive.

Moreover, players rely on the sanctity of long contracts to protect them from being discarded as a result of injury or loss of form, so why should they be able dispense with their obligations under their contract when it suits them?

Whatever the philosophy, all PL clubs signed up to the rules and the present instance provides a test case as to how football will implement them as it struggles to come to terms with the demands of the modern game.

Lawyers and football officials await the result with interest. ■

Report of BASL Annual Conference – Lords Cricket Ground, October 2004

By Alex Kelham, Farrer & Co

Last year's conference opened with an inspirational presentation by Mike Power. As Chief Executive Officer of London 2012 Limited – the company driving forward London's bid to host the Olympic Games – Mike provided an interesting and encouraging insight into the progress of the Bid. A video giving a glimpse of what a London 2012 Games will offer was shown to the delegates and proved a convincing demonstration that London is in with a real chance when the IOC takes its decision on 6 July.

A session about issues arising from venues and stadia for major events followed. Darren Berman, Head of Legal & Corporate Affairs for Wembley National Stadium Limited was able to provide a particularly interesting insiders-view of such matters. He highlighted the need to obtain guarantees that events will be held in a new stadium at an early stage. This was particularly the case with Wembley as it has no "home" club and therefore no guaranteed events. Only when staging agreements with rights' holders were in place would corporate partners come on board.

Robert Elston of the Sports Business Group at Deloitte spoke about the funding available from naming rights and explained the practical benefits and pitfalls for sponsors. However, as Darren explained, selling naming rights to Wembley Stadium was not an option and therefore other sources of funding took on greater importance. For example, by setting up the Wembley "Club Member" scheme (allowing a 10-year seat licence to be purchased by individuals and companies), significant advanced funding had been secured. Similarly, Wembley had benefited from signing a lucrative 25-year catering contract for all hospitality within the stadium.

The second session looked at the role of volunteers in sport and asked whether it was worth assisting sportsmen. Margaret Talbot of CCPR spoke about administrative difficulties which act as disincentives to volunteers. For example, the unwillingness of the Inland Revenue to accommodate volunteers who are paid for some of their time but give other time for free. The Revenue currently insists they should be treated as

being paid for all time given, not just that for which they are being paid, but this raises national minimum wage issues. Further, Margaret queried whether the benefit of Criminal Records Bureau checks justified the administrative burden which has to be taken on by voluntary organisations. She reported that in the six most recent incidents, none of the perpetrators would have been revealed by CRB checks as potential threats. It therefore has to be asked whether the CRB regime is really working.

Ges Steinberg, the Club Doctor for West Ham United FC, gave an entertaining look into the role and potential liability of medics working for sports organisations. By providing numerous examples, it was clear that his diverse role, coming to the aid from everyone from players to spectators, throws up a lot of interesting challenges. However, he also has to deal with the pressures from the Club (and players themselves) to get a player back on the field, even when this may be against the best interests of the player. Lord Brennan QC of Matrix Chambers expanded on the legal side of these issues by discussing some specific cases involving volunteer medics and more generally giving an overview of recent developments in personal injury law. He explained that a professional acting as a volunteer was judged on the standard of care expected of a professional: clearly a factor that would dissuade medics from volunteering their time. Similarly, governing bodies must increasingly take precautions against participants suffering injury – even when an organisation is entirely voluntary, if a risk is so obvious that precautions should have been taken, a court is likely to find it liable.

Lord Brennan QC also referred to the potential for clubs to sue their players for breach of contract where they have taken banned substances. These comments were reported in *The Daily Telegraph* on 31 October 2004 in an article discussing action being considered by Chelsea F.C. against Adrian Mutu following his positive test for cocaine.

After lunch broadcasting and new media issues were discussed. Phil Lines, Head of Media at the FA Premier

Report of BASL Annual Conference – Lords Cricket Ground, October 2004

League, explained how FAPL were dealing with new media rights. He said the rapidly expanding technology has required a need to be flexible, and to continually reconsider how different rights can be distinguished and best packaged. The challenge is to look at how the cake can be sliced best to maximise revenue from each medium.

Finally, the conference addressed issues arising from sports merchandise, including ambush marketing and competition law. Paul Harris of Munkton Chambers, who acted for Manchester United FC in relation to allegations by the OFT of price fixing for replica football kit, gave a lively presentation about the case which served as a useful reminder that sports organisations are not immune to the competition law regime and that any indication that such bodies are colluding to fix prices or abusing their dominant position could lead to an OFT investigation. The worst case scenarios could result in substantial fines imposed on undertakings or imprisonment for the key individuals within the organisation.

With such a vast range of topics covered, the conference demonstrated clearly how versatile sports lawyers must now be and an understanding of a whole range of legal fields is needed to practice in this area. The next BASL conference is proposed to take place in October, 2005. BASL would welcome any suggestions of subjects to be covered. ■

Regulation of English soccer: What role for the independent football commission?

By Simon Gardiner

Background

At a time when commercial interests such as media corporations exert an increasing influence in the ownership and future direction of elite professional sport, the essential question is whether sport is a business first or foremost, or a social activity with too much cultural and social importance for it to be left to market forces. On a European Level with the intervention of the EU Competition Commission in sports such as motor racing, specifically concerning the relationship between the FIA and Formula 1 racing, a form of supervised autonomy has developed. Two dynamics have emerged. Firstly, Governing bodies need to carefully monitor their roles in 'managing the rules of the game' on the one hand and the increasingly valuable commercial interests on the other hand. Secondly there is clear relationship between effective internal governance by sports bodies and the ability to exercise a supervised self-regulation.

The focus of this article is on English football. English football has suffered many ills in recent times. Managing the hooligan problem and engaging with safety concerns has been an ongoing concern. The Hillsborough Disaster in 1989 that involved the death of 96 supporters led to the Taylor Report in 1990 and the subsequent legislative framework concerning safety at football matches and football hooliganism.

In more recent years the financial well-being of football has been under the microscope. Allegations of match fixing and the Bungs Inquiry during the mid-1990s suggested a lack of financial probity was endemic within the game. The vast majority of professional clubs are in a parlous financial state. The collapse of ITV Digital in 2002 has severely damaged the financial dynamics in the Football League clubs. The conduct of professional players, a significant number highly paid, continues to be under scrutiny. Despite these problems football has an enduring appeal. It is the national sporting pastime in England – as such it is the focus of significant emotional and financial investment by millions of fans.

The governance of football is fragmented. Clear tensions exist between the three regulatory bodies, the Football Association, The Football Association Premier

League and the Football League. The main concern is the inability of the English FA to engage effectively with the realities of the modern football industry has continually been exposed. What is clear is that the FA exhibits the classical tension highlighted above between governing the rules of the game on the one hand and managing and exploiting the commercial value of the game on the other. As the custodians in England of both the professional and amateur games these tensions are multiplied. The FA faces a 'Structural Review' in the wake of the "Fariagate", where allegations of a sexual affair between an FA employee, Faria Alam, both the English National Team manager, Sven Goran Ericsson, and the Chief Executive, Mark Palios, led to the resignation of the latter. This Review may be a welcome development. But it should not be forgotten that the debate concerning how English Football should be regulated has been on-going for a number of years. However it has fallen on deaf ears within the football industry that have clung to the traditional dynamic of self-regulation. It will probably be a surprise to most football fans that there is an external body empowered to monitor English football, namely the Independent Football Commission. Although very much on the sidelines, it has become the forgotten player which had potentially a lot to offer. Within the FA's current Structural Review, there is a strong argument for it to have a stronger and more interventionist role.

Football Task Force

The origins of the Independent Football Commission (IFC) can be found in July 1997, where soon after coming into power in Britain, the 'New' Labour Government appointed a Taskforce comprising different interest groups in football. The perception was that football needed to be regulated as a business to reflect the reality of the modern game. This was predicated on an emerging awareness that interests of the numerous stakeholders in the modern game need to be heard and fans in particular, were being increasingly marginalised from active participation.

The Football Task Force's remit was divided into

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seven areas of work, including issues of racism and participation by ethnic minorities, improving access to disabled spectators and the responsibility that players have as role models in the community. Other areas had a financial context:

- encourage the greater supporter involvement in the running of clubs;
- encourage ticketing and pricing policies that are geared up to reflect the needs of all on an equitable basis, including, for cup and international matches;
- encourage merchandising policies that reflects the needs of supporters as well as commercial considerations;
- reconcile the potential conflict between the legitimate needs of shareholders, players and supporters where clubs are floated on the Stock Exchange.

The consideration of these issues lead to the fourth and main report entitled Commercial Issues – how football should best be governed in the future and how the interests of the governing bodies, clubs and supporters reconciled (Report can be found at www.football-research.org). In fact there were two conflicting reports:

The Majority Report – that represented the fan groups' perspective supported a radical interventionist approach with support for the creation of a permanent standing body, the Football Audit Commission (FAC), and the establishment of a new consumers' voice for football, the Ombudsfan. Supporters' groups would have formal involvement in the FAC. In addition, where a club intended to float on the Stock Exchange, the long term interests of the club ought to be considered.

The highly interventionist FAC favoured by the Majority Report is a very different form of regulation than that of the ISP, favoured by the Minority Report. The FAC would essentially see the existence of two bodies overseeing English football – The FA controlling the playing side of the game, including supervising rule changes and enforcing disciplinary matters. The FAC would control financial and commercial issues concerning the individual professional clubs.

The Minority Report – from the football authorities' perspective (the FA and the Premier and Football League) was significantly more conservative. It argued that increased regulation was not needed for what is 'not an under-governed sport'. They recommended the emphasis should be on self-regulation, but found merit in supporting an advisory body, the Independent Scrutiny Panel (ISP), to provide assessment of the quality of regulation, best practice and governance

found within individual clubs. This body would merely provide advice and no powers to intervene.

The ISP was supported in the Minority Report with the position that:

"... in our view English football is not an under-governed sport... English football does not need an additional set of imposed rules which prohibit and restrict the ability of clubs to make their own footballing and commercial decisions, particularly given the globalisation of the market place within which they are operating."

The Independent Football Commission

The two reports, although sharing some areas of commonality, were far apart particularly on the issues of governance and accountability. There have been two significant developments in response to these Reports. In 2003 the FA created the Financial Advisory Committee, with terms of reference to implement and oversee a review of the overall financial regulatory and best practice framework within football. It is charged to consider the following:

- the adequacy of corporate governance at each level of the game;
- the overall financial health of clubs;
- the manner in which any applicable policy for dealing insolvent clubs has been observed;
- consideration and regulation of material transactions;
- applications from a club to significantly change their interest in their stadia (see www.thefa.com).

Secondly, in October 2000, plans were announced for the creation of an Independent Football Commission – a regulatory body very much in the form of the ISP supported by the Minority Report. The football authorities seemed to have heavily influenced the development of what will be an essentially 'soft-touch' independent monitoring body. After much prevarication, the IFC came into being in March 2002.

Independent Football Commission, 'Terms of Reference' (see www.theifc.co.uk).

1. To review and report on the promotion by the FA, The F A Premier League and The Football League ("the governing bodies") of best practice in commercial and financial matters within professional football, particularly with regard to customer service. In particular to review and report on:-
 - The establishment of a code of best practice, customer charters and customer relations units by each of the governing bodies, and by individual clubs.
 - The governing bodies establishment of a complaints resolution hierarchy based on the Code of Best Practice, with the Independent Football Commission as the final step in that hierarchy: and

- The establishment of a Financial Advisory Unit by the Football Association which will review and monitor aspects of clubs financial performances and promotes best practice

The IFC is to have particular regard to:-

- Ticket Prices
 - Accessibility to matches
 - Merchandise: and
 - Supporter and other stakeholder involvement.
2. To review the rules and regulations of the governing bodies relating to financial and business matters within their competitions, and the Code of Best Practice, and to recommend changes where appropriate.
 3. To review and report on the adoption and/or promotion (as appropriate) by the governing bodies of the customer service related in the recommendation in the Football Task Force Reports 1-3.
 4. To publish their findings by way of an annual public report.

The IFC was met with a largely cynical view as to its likely effectiveness. From the fans perspective a major perceived problem has been that it is fully funded by the football authorities and therefore open to charges that it is not truly independent. It has produced two Annual Reports focusing on such issues as the financial crisis at club level and governance in the game and racism. The IFC has indicated that as a body it is pretty impotent in its ability to engage with the pressing financial and socio-cultural problems in English football.

Evaluation of the IFC

In May 2004, the IFC published 'Self Regulation' a document partly reviewing its role and partly suggesting proposals on alternative structures that could be employed beyond its two-year terms of reference (see Self Regulation: an examination of how football is regulated, May 2004). These alternatives are:

- Discontinue the IFC – have no external scrutiny
- Do Nothing – keep the status quo with the IFC having the same powers
- Extend the IFC terms of reference and increase its funding- increase its ambit
- A radically revised role and structure for the IOC- significantly greater powers of monitoring and intervention
- Immediate revolution- dramatic new powers

- Statutory regulation- creation of a formal regulatory body.

The IFC believes that it has 'lack of power, inadequate resources, restrictive terms of reference and limited access to information'. In evaluating the options presented, the first 5 options will perpetuate self-regulation; options 2-5 will continue to see the IFC having a role; option 6 would lead to direct government intervention through legal provisions and an end to self-regulation. Option 4 is the one favoured by the IFC. The IFC believe keeping the status quo is not a realistic option. The FA is a particular target whose dual role of a regulatory function of the English game and a representative and commercial function within the international game is seen as problematic. It sees the FA as not being wholly independent, with many inadequacies including tensions around the national team and club interests, the handling of commercial interests, lack of accountability and a lack of a code of practice. The IFC sees Option 4 will give:

"... The IFC a new funding base and a stronger focus on its having independence and authority. It stands between football and statutory regulation. It proposes a shift in emphasis and suggests that football structure its self-regulatory model around a formal code of practice, devised by the football business, drawing on an empowered regulatory body to adjudicate breaches of the Code. Public concerns would thus be addressed through a powerful and effective complaints mechanism" (Self Regulation, 2004).

The IFC sees the current self-regulatory system does not work for three basic reasons:

- It is beset with conflicts of interest and growing tensions between the three football authorities while tied to an anachronistic model of governance that impedes decision-making and a flexible response to the changing circumstances that football needs;
- The present system does not attract the confidence and belief of either the game's own hugely important stakeholders, or that of the general public
- Public and media opinion does not budge from the perception that football is a mess, as it witnesses governance failures at club level and also in the authorities' handling of crises that, in recent years have ranged from the relocation of Wimbledon, through the collapse of ITV Digital, to well-publicized off-field matters.

But the IFC is only too aware of its limited power:

"The IFC is consistently criticized for having no teeth, for failing to attack the "real" issues, for exerting no strategic authority, for having so limited a penetration, especially amongst supporters, as to be almost invisible. The IFC

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acknowledges these criticisms. They are valid. The IFC is unhappy that the work it should be doing will, in present circumstances, remain on the bench. The situation is not good for football" (IFC Annual Report, 2004).

The IFC is not alone in asking for greater powers. Birkbeck College's Football Governance Research centre argues:

"The IFC should have a broader range of powers, including the capacity to ensure that their recommendations are acted upon. Whatever forms such moves might take, the IFC needs to be given sufficient authority to help restore the integrity of the decision making ...critically, the level of independence and the authority the IFC has will define whether the IFC can provide a long-term sustainable structural solution to some of the problems that characterize the peculiar governance issues facing the football industry." (Birkbeck Football Governance Research Centre, *The State of the Game: the Corporate Governance of Football Clubs*, November 2004)

Additionally, a Parliamentary Report in February 2004 from the All Party Football Group proposed that the powers of the IFC are increased (see www.allpartyfootballgroup.org.uk/inquiry.htm). The Report also focuses on reforms in the context of the financial realities of English football. Some selected recommendations are:

All Party Football Group, Inquiry into Football and its Finances

- Premier League to double to 10% the broadcasting revenue it re-distributes to the rest of football
- More re-distribution of TV rights money within the Premier League
- detailed research into the financial impact of the transfer window
- Consultation between football authorities and all clubs on the re-introduction of gate-sharing
- Strong support for severe points deduction for clubs going into administration.
- Wage-capping to be considered by Premier League if experiment in Football League/Conference proves successful
- Immediate introduction of the 'Fit & Proper Person' test for club directors
- Supporters' views represented at board level and FA to be more representative of modern Britain
- All professional clubs to have budgets approved two seasons in advance
- Introduction of an agents' levy to be re-distributed to grass-roots game
- Future Premier League contracts to include limited number of games to be broadcast by free-to-air

channels

- Decisive England qualifying matches to become Listed Events
- The norm for a majority of a club's home league fixtures to kick off at 3pm on a Saturday

It was always likely that the football authorities were going to resist any radical changes to the power of the IFC. The FA, the FA Premier League and the Football League have agreed to the renewal of the IFC for an indefinite term (subject to 12 months notice) with unchanged terms of reference. The terms and conditions of the IFC, its terms of reference and its budget are to remain unchanged. The Chairman, Derek Fraser, was reappointed by the three football authorities at the beginning of 2005. Within the annual grant of around £230,000 funded from the football authorities, resources are tight and the staff of the IFC has been cut from four to three. Hardly a positive sign of its future likely effectiveness.

They also want the IFC to be considered with in the Structural Review process under Lord Burns. The IFC also want to 'be consulted early and extensively in the review ... and have a role ... in evaluating any proposed changes and monitoring their efficacy'.

Structural review of FA

The FA is to undergo the most rigorous examination in its 142-year history under Lord Burns, the independent chairman of the Structural Review of the governing body. Burns's private soundings and the questionnaire he has prepared for interested parties suggest that the FA is going to have to justify every aspect of itself and could face the prospect of some form of independent supervision.

Burns's previous reviews, of the national lottery, hunting and the BBC Charter, have established a reputation for sensitivity towards the unique nature of institutions but, equally, for being unafraid of suggesting radical change. His preliminary report on the BBC charter suggested that the licence fee should be phased out, advertising introduced and some form of external regulator introduced.

A consultation document has been circulated to virtually every organisation within the game. Ten of the 31 questions in the consultation document concern the relationship between the FA council, the game's largely amateur governing body, and the FA board, which is split 50-50 between representatives of the amateur and professional game.

The terms of reference of the Review accepts the following agreed objectives of the FA:

- To govern the game with the consistency and

integrity at all levels of football

- To promote and support high standards of financial management and corporate governance amongst all stakeholders
- To promote, lead and coordinate strategic approach for the widest quality participation, and interests, at all levels of football
- To achieve success on the field through leading quality coaching, education and player development at all levels of football
- To achieve success at all levels for the national representative teams
- To maximise income from the events and brands, and ensure the equitable distribution of such income at all levels of football

The Consultation period ran until 6 May 2005 and the Review is set to be published in July 2005.

Conclusion

English football must demonstrate more clearly that it has the ability and will to regulate itself, and that it must be prepared to shoulder the responsibilities that go with self-regulation. The IFC has put the ball the court of the football authorities to see if they are prepared to cede more power to a body such as the IFC to be more than that based on essentially passive scrutiny. The on-going Structural Review of the FA provides a real opportunity to empower the FA to put in place streamlined and effective forms of internal governance. Additionally Lords Burns should propose that the IFC has increased powers along the lines it itself has proposed, to become an adequately funded and 'fully independent' body that can effectively 'police' football. Many within the extended football family, believe that a more powerful IFC is essential for the 'the good of the game'. ■

Simon Gardiner

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Alternative dispute resolution: Should more extensive use be made of ADR, in particular, mediation, to resolve disputes in sport?

By Rosalind Fox

Introduction

Big bucks and large egos – a combination guaranteed to result in disputes, and nowhere is this more true than in sport. The recent unseemly row between Sir Alex Ferguson, United's manager, and John Magnier,¹ a major United shareholder, over the ownership of the racehorse, Rock of Gibraltar, is typical. The argument originated in an oral agreement under which Ferguson believed he had been promised a 50 per cent share in the stud fees generated by The Rock, whereas Magnier's understanding was that Ferguson would receive stud fees of £90,000 per year.² The argument became very acrimonious, ultimately encompassing not only the parties, but also the club's board, shareholders and fans. It was also conducted publicly, with a considerable amount of mud-slinging by all sides. While Ferguson alleged that someone had hired private detectives to investigate his affairs, Magnier increased his shareholding³ in the club to 28.89%, a whisker away from the point at which he would be obliged to bid for outright control under the Takeover Code,⁴ and demanded an inquiry into the conduct of certain transactions undertaken by the club, including payments of commission on transfers to a company owned by Ferguson's son.⁵ Magnier also threatened to prevent United signing a new contract with Ferguson, ostensibly pending the conclusion of the transfer dealing investigation. Meanwhile, United's fans were incensed at the perceived slurs on their manager, and disrupted race meetings at which Magnier's horses were running.⁶ Although steps were taken to commence legal proceedings, the dispute was settled (for a fraction of the amount originally claimed by Ferguson)⁷ but not before considerable damage had been done to the reputations of the parties and the club. United's performances on the pitch also seemed to suffer, at least temporarily, although whether the (relative) lack of form could be blamed entirely on their manager's attention being diverted was not clear. Ultimately settlement was achieved by negotiation, but mediation at an early stage in the dispute may well have helped to defuse the aggression and unpleasantness that was generated and would have limited the damage to the relationships (and reputations) that resulted.⁸

It may be regrettable, but sport is no longer merely an amateur past-time, undertaken for enjoyment without significant remuneration.⁹ It is a multi-million pound global industry¹⁰ and success or failure is not merely a matter of personal prestige but has enormous financial consequences. The significant sums involved make litigation worth pursuing (consider Eddie Jordan's futile action against Vodafone last year¹¹) but litigation may not always be the best option. Alternative dispute resolution ("ADR") is now a professional and practical alternative to litigation and disputants in the sports sector would be well-advised to consider using ADR, rather than embarking on what may well be a very painful litigation process.

What is ADR?

In this article, the term ADR will be used to refer to dispute resolution procedures that do not result in a ruling by a judge or arbitrator¹². Arbitration is already widely used in sport¹³ and has generated sufficient jurisprudence to merit a discussion of its own – it will therefore not be considered further here.¹⁴

The various procedures which may be included under the umbrella of ADR are as follows:

Mediation: the use of an impartial third party to facilitate negotiations between the parties, with a view to concluding a settlement. The process is entirely voluntary and, until a settlement agreement is signed, is not binding: the mediator has no powers of decision. This is similar to conciliation, although in mediation the third party is likely to take a more active role in assisting the parties to reach an understanding.¹⁵

Med-Arb: a combined process, involving the use of a third party to conduct a mediation process, but with the power to make a legally binding award if the parties fail to agree a settlement.¹⁶

Mini-Trial: a non-binding process where each side presents its case to senior executives of the parties, in the presence of a neutral adviser, with the aim of

focusing minds on the issues in dispute and demonstrating the strengths and weaknesses of the respective cases.¹⁷

Neutral evaluation: the issue in dispute is referred to an independent third party, who will provide a non-binding assessment of the merits of the case, with a view to facilitating the negotiating process by making the parties more realistic in their expectations.

Expert determination: an independent expert is appointed by the parties to determine a particular issue, often a price or value. The process is adjudicative, with the expert's decision generally binding the parties. It differs from arbitration in that in most cases the expert is confined to considering factual issues, rather than issues of law or contractual interpretation.

This process can be extremely useful in commercial disputes, particularly where the dispute involves the valuation of the subject-matter of a contract or agreement. It was used in a sporting context recently when the English Rugby Football Union unilaterally sold its home games in the Five Nations Championship to BSKyB. This led to a dispute with the other participants which was settled by agreeing to pay an amount into a central pool relating to the value of the Five Nations Championship matches. However, the fee paid by BSKyB was not broken down and it was therefore necessary to attribute a value to the Five Nations games. The valuation was referred to an expert for determination, and although this took over a year it was almost certainly quicker and cheaper than litigation and ensured the result remained confidential.¹⁸

Med-Arb, mini-trials and neutral evaluation are not widely used in the UK and will not be discussed further. Mediation, however, has acquired a high profile over the last few years, especially in the areas of commercial and family law. It offers a practical and effective method of dealing with disputes and the following sections will consider why it should be a serious option for resolving sport-related disputes.

Mediation

Why choose mediation?

Imagine a dispute between two cooks who both want the same orange.¹⁹ The apocryphal judge listens to the claims of each cook, applies the law and awards the orange to one or other of them. The arbitrator goes through the same process, but decides to split the orange equally and give half to each. The mediator, though, asks why each cook wants the orange and discovers that one needs the peel of the orange to make marmalade and the other requires only the juice for a sauce. The result is that both parties may get what they want – a win/win situation. Simplistic perhaps, but this highlights one of the main advantages of ADR – there is a significantly increased likelihood that each party will achieve what they want, and even if they do not, they are more likely to 'own' the resulting settlement, which

may result in less ensuing bad feeling between them.

Mediation is voluntary and works best when both parties are committed to the process and are ready to reach some form of accommodation. It is becoming increasingly popular as a means of resolving commercial disputes generally, with an estimated 1,800 to 2,000 commercial cases being referred to mediation annually in the UK, and three-quarters of the members of the Institute of Directors claiming that they would rather use ADR than embark on litigation or arbitration.²⁰

It is not hard to see why: there are significant advantages to mediation over the adjudicative processes (litigation and arbitration) which give mediation a real commercial edge when the choice of dispute resolution process is being considered. These are summarised below:

Speed

Mediation is quick. Once a decision to mediate has been taken, the mediation can be arranged within a matter of weeks or, where necessary, days and the mediation session will normally only last for a day or two. This contrasts sharply with litigation which can take months or years to come to court, with the hearing itself lasting days or weeks. Arbitration can also be protracted, depending on the forum and the complexity of the issues²¹. In sport a speedy decision may be essential: the outcome may affect participation in an imminent event or the commercial arrangements relating to such an event. The argument between Richie Woodhall, the boxer, and Frank Warren, his manager, in July 1999 is a good example. Woodhall claimed that Warren was in breach of his management and promotion agreements and that the agreements were unenforceable. He consequently entered into discussions with other promoters. Warren contested all claims and Woodhall commenced litigation proceedings. However, Warren was under an obligation shortly to defend his world title (or lose it) and needed a fast resolution. The parties therefore agreed to stay the court proceedings and submit the dispute to mediation, with the mediation process being set up within 24 hours of referral. A settlement was then reached in a day.²² The result was that Woodhall was not only able to fight in defence of his title, he entered into new agreements with Warren and continued to box for him – the relationship was preserved.

Confidentiality

Unlike the court process, the mediation process is entirely confidential and the parties themselves control what, if any, information is released. This can prevent damaging publicity, such as that engendered by the Ferguson/Magnier row, avoiding the danger of dirty linen being washed in public and the resulting damage to the reputation of sport in general and individuals in particular.²³ This may also be significant where a challenge is made to a decision of a governing body, as it may allow the body to acknowledge that it has made errors and seek to put them right without losing face publicly.²⁴

Alternative dispute resolution: Should more extensive use be made of ADR, in particular, mediation, to resolve disputes in sport?

Parties retain control

The parties have total control over the process, including choice of mediator, venue, timing of hearings, procedure to be followed and whether or not to settle. This allows a mediator to be selected who is familiar with the sport in question or has relevant commercial expertise, or who is a sports lawyer with an understanding of the legal issues at stake. This ensures that the process is efficient and meets the needs of the parties concerned, unlike proceedings in court where the parties must abide by the rules governing civil litigation.

It is also entirely up to the parties to decide whether or not to settle on the terms proposed: neither the process nor the decision is imposed upon them by an external party.

Informality

The process can be adapted to meet the needs of the parties, with the result that a much more practical approach can be adopted than with litigation or even arbitration. The mediation can be held anywhere, from a hotel near an airport if parties are coming from abroad, to private offices away from the glare of publicity. This informality may also assist in defusing tension, allowing the parties to explore possibilities for settlement.

Flexibility

The parties can reach whatever settlement is appropriate – they are not restricted to a range of available remedies, as would be the case in court proceedings.²⁵ Unlike litigation, the settlement may cover areas that are not directly relevant to the issue in dispute. An experienced mediator will assist the parties in identifying the real root of the problem, enabling creative and encompassing solutions to be found.

This flexibility may help where there is a charged emotional aspect to the dispute, or if one party is really seeking a non-monetary solution such as an apology or a change to the rules of the organisation concerned. In a recent case involving a radio broadcast which upset a particular group of individuals, mediation resulted in a settlement which included an apology and a change to the broadcaster's procedures to ensure there would be no repetition.²⁶ This was a highly emotional case and significant work was required to overcome the entrenched positions of the parties to enable them to reach agreement.

One of the unique features of sport is the degree of emotion involved and for that reason the flexibility offered by mediation may be particularly useful, as evidenced by the settlement reached between the rugby club, St Helens, and their coach, Ellery Hanley, in 1999 following disparaging comments made by Hanley about the club. Despite the fact that it initially appeared that reconciliation

was unlikely,²⁷ the parties ultimately agreed to mediation and a settlement was reached which included a 10-day suspension and a public apology from Hanley. Thus the relationship was maintained and the club continued to have a successful season under Hanley's coaching.

Jurisdictional issues

Mediation (and indeed arbitration) may have advantages where there are complex jurisdictional issues arising, as the parties may select an appropriate forum to handle the case and may themselves choose the governing law for the settlement agreement.

Without prejudice

The mediation process does not affect the parties' rights to seek redress in the courts if the mediation fails or even while it is ongoing. Disclosure of information during the process is made 'without prejudice', so if the mediation fails and the parties end up litigating, nothing disclosed by either party can be used in evidence by the other (without agreement) and the mediator cannot be called to give evidence for either party.

Cost effective

Mediation is cost effective: because of the speed and informality of the process, legal and other professional costs can be kept to a minimum and the burden on the parties' time is considerably reduced. Even if the mediation fails, the work done may well be useful in pre-trial preparation and in clarifying the issues in dispute, so any costs incurred would not be wasted.

Preserves relationships

The use of a mediator allows the parties to settle on the basis of a common understanding, rather than through an aggressive, adversarial approach, as in litigation. The process fosters a problem-solving approach and provides an outlet for feelings to be expressed 'within a controlled and constructive forum',²⁸ avoiding escalation of the issues and subsequent ill-feeling between the parties.²⁹ This is important where the parties may have an ongoing relationship and the success of mediation from this point of view has already been discussed in the Woodhall/Warren and St Helens/Hanley cases above.

Forward looking

Litigation and arbitration are backward looking, focusing on past events³⁰, who was wrong and what sanction should be applied.³¹ In contrast, mediation is forward looking: the aim is to find a solution which enables the parties to move on and continue working together. It is not solely about imposing a penalty of some sort on one party or the other, although that may, of course, form part of the settlement.

Successful

Ultimately, the best measure of mediation is its high success rate. CEDR claims that over 70% of the cases submitted to them for mediation settle,³² while the ADR Group³³ claims a 94% settlement rate. A 1998 report on a pilot county court mediation scheme found that 62% of cases settled at the mediation appointment, increasing to 72% when neither side had legal representation!³⁴

Limitations of mediation – real or theoretical?

Despite its practical advantages, mediation 'is not a panacea'³⁵ and is not suitable for all cases. However, some of the supposed limitations of mediation are, in practice, more theoretical than real, as will be shown. Commonly cited limitations are as follows:

Remedies

Although there is a great deal of flexibility in the remedies available to a mediator, which are far more extensive than those available to the court, it is not open to a mediator to award any form of interim relief, such as an injunction. However, agreeing to mediate does not preclude a party, in an appropriate case, from seeking interim relief in the courts pending resolution of the mediation.

Public or private interests?

Proponents of ADR see the civil justice system as providing a responsible method of conflict resolution between individuals. However, this ignores the public interest role of the system over and above the protection of private interests.³⁶ On that view, settlement (such as that achieved in a mediation) has disadvantages for society as a whole and may well have disadvantages for the individual: '[p]arties might settle while leaving justice undone.'³⁷

In one respect, this criticism is fair. Mediation is not appropriate where a legal precedent is required or where the interests of a wider group need to be considered (the 'public interest' element), for example, where a governing body seeks to uphold the application of its rules in order to prevent unfair or dangerous practices in a sport or to preserve the reputation of the sport by eliminating cheating or bad behaviour on the field. The governing body would not then be willing to compromise its position by reaching a mediated settlement, and may actively seek publicity for its decision. A good example is the recent case of Rio Ferdinand and the imposition of an 8-month ban for his missed drugs test. While the Football Association ("FA") may be open to some criticism in the way the

case was handled³⁸, Mark Palios, its new Chief Executive, wished to demonstrate that, whatever the position in the past, the FA was no longer prepared to tolerate breaches of its disciplinary rules. Indeed, at the hearing of the appeal the FA argued unsuccessfully that the ban should be increased. Mediation in this case would have been totally inappropriate.³⁹

Similarly, as mediation is essentially consensual, third parties are not bound by any settlement reached during the mediation. It is not therefore appropriate where, say, the consent of third parties (such as member associations) is required to change the rules of a governing body: in such cases relevant third parties must be brought on-side prior to any agreement being finalised.

Disciplinary offences

The traditional view has always been that mediation is not appropriate for disciplinary cases and it is notable that the Court of Arbitration for Sport ("CAS") mediation procedure excludes cases which relate to disciplinary matters or to appeals against decisions of governing bodies, which must be dealt with by arbitration.⁴⁰ However, there is now a move towards using mediation to deal with disciplinary offences in other sectors, at least where the offence is relatively minor.⁴¹ The Financial Services Authority has instituted a mediation scheme to deal with complaints against its members⁴² and the Health Professions Council⁴³ has recently set up a scheme to deal with minor offences by members which may not warrant the full disciplinary process. The perceived value of such a scheme is that it allows the individual to be given an opportunity to explain his position and to remedy the situation, without irretrievably damaging the employment relationship.⁴⁴ Whilst there is little evidence of such schemes being implemented on a formal basis in the sports sector⁴⁵, this approach should be considered for handling minor sporting infringements, enabling cases to be despatched in a more cost-effective and speedy manner with less damage to relationships and reputations. The Amateur Swimming Association has followed this approach with some success in dealing with child protection issues (see section 4(b) below) and it is hard to see why it has not been adopted routinely in other sports. The ADR Group did in fact deal with one sporting disciplinary case last year, involving a minor breach of the rules by a rugby player and although the relevant governing body was initially not keen on submitting the matter to mediation, it ultimately proved successful.⁴⁶

Although mediation is inappropriate in some disciplinary cases it is well suited to resolving any ensuing claims for commercial loss. Following Diane Modahl's successful appeal against a four year ban for a doping offence, she launched an unsuccessful action for damages against the British Athletics Federation ("BAF"),

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alleging bias in the original tribunal. Ms Modahl had claimed that a contract should be inferred between herself and BAF, which contained an obligation on BAF to act fairly in applying the disciplinary procedures, and that the bias in the first instance tribunal constituted a breach of this obligation. She therefore claimed damages for the losses she had suffered by being unable to compete throughout the period while the ban remained in place. BAF's application to have the case struck out went up to the House of Lords, before one cause of action was remitted for trial.⁴⁷ The financial consequences of the litigation were disastrous, with Modahl selling two properties to fund her action and BAF being forced into administration.⁴⁸ To found a claim in damages, Modahl had to show that a contract existed between herself and BAF which, in the circumstances, the judge at first instance found to be totally artificial.⁴⁹ On appeal, the Court of Appeal held that there was a contract⁵⁰ and there was therefore an implied obligation on BAF to act fairly in operating their disciplinary procedures. However, the Court of Appeal decided that the obligation on BAF only extended to ensuring a fair procedure overall and that the possible bias complained of at one point in the process did not constitute breach of that obligation. BAF were therefore not liable to compensate Modahl. Rather than straining to find a cause of action which would allow her to litigate, Modahl (and BAF) may well have fared better had they considered using mediation (or another form of ADR), which might have allowed a solution to be found which was more beneficial for both parties.

Second class justice

Another concern is that ADR may provide only 'second class justice' if adjudicators/mediators lack the impartiality and specialist training of judges in the court system, in addition to which the procedures themselves may not adhere to the standards of procedural fairness that are guaranteed in the litigation process.⁵¹ However, provided the mediation forum is selected with care, and a professional ADR provider chosen to handle the mediation, the quality of the mediator should be assured. The mediator will be governed by the code of conduct of the organisation concerned, guaranteeing strict impartiality and procedural fairness. As an example, the CAS mediation rules provide that the mediator must be and remain independent of the parties, and must disclose anything which might compromise his independence.⁵²

Additionally, registration as an ADR panel member depends on the applicant having appropriate experience, and most mediators now undergo formal training. There is therefore no longer any real justification for concerns over the standard of ADR processes.

Inequality of the parties

While ADR is generally seen as empowering the individual, by allowing greater responsibility for and input into the resolution of a dispute, it has been suggested that mediation is inappropriate where there is a significant power imbalance between the parties.⁵³ The argument is that the informality and consensual nature of the mediation process, coupled with the absence of formal procedural and substantive rules, may increase the effect of the power imbalance by allowing the stronger party to coerce and manipulate the weaker party, resulting in a settlement which unjustly favours the stronger party.⁵⁴

An alternative view is that mediation can achieve a transition from a position of 'power over' to 'power with'.⁵⁵ In other words, a dispute where one party was originally at a definite disadvantage may be put onto a more equal footing by the intervention of a skilled mediator, coupled with the desire of both parties to reach a settlement. In practice there is no reason why mediation should not work well even if there is a power imbalance: mediators should be trained to deal with this situation and will inevitably spend more time with the weaker party to ensure the mediator understands what is driving the dispute and that the party concerned understands what is being offered.⁵⁶ It is naïve to think that the court system is supportive of the underdog: usually the stronger party has the most financial clout and can afford the best lawyers and professional advice, which the weaker party will not be able to match. The weaker party may also be intimidated by the formality of the court process and so not perform well in the witness box.

Lack of finality

The mediator is not empowered to take a decision which will bind the parties and if they are unable to reach agreement the mediation will not be conclusive. However, if the mediation fails, the process will at least have assisted in clarifying the issues and negotiating positions of the parties and any preparatory work will be of use in any ensuing arbitration or litigation. On the other hand, if the parties do reach a settlement, the mediator will assist in drawing up a settlement agreement between the parties which, once signed, will be contractually binding.

Attitude

In practice, the biggest stumbling-block to mediation is likely to be the attitude of the parties or their legal advisers, many of whom are ignorant about or distrustful of mediation.⁵⁷ In a dispute between the two top divisions in English Rugby Union, the governing body, the Rugby Football Union, suggested that the dispute should be submitted to mediation. The head of the First Division, however, reportedly said: 'It wouldn't make any

difference if they brought the Queen in to arbitrate.⁵⁸ Not surprisingly, the subsequent mediation failed.

Such entrenched attitudes make it very unlikely that mediation would succeed, even if the parties could be brought to the table in the first place. However, the recent trend of the courts is to penalise litigants who refuse to consider mediation (see below), with the result that parties may now have to reconsider adopting such a trenchant approach without good reason, unless they wish to suffer the financial consequences in any subsequent litigation.

Use of mediation in sport

Surprisingly, perhaps, given the advantages of the process, mediation has not to date been as well utilised in the sports industry as might be expected, although this is subject to the caveat that, as the process is genuinely confidential, mediation may occur with no publicity whatsoever. The CAS mediation service was introduced in May 1999 to deal with commercial disputes⁵⁹, but since 2000 only 5 matters have been referred to it,⁶⁰ while the ADR Group is aware of only three sport specific mediations during 2003.⁶¹

The Sports Dispute Resolution Panel ("SDRP") also offers a mediation service. In the four years to December 2003 it had received only 13 references to mediation (compared to 19 arbitrations). However, it received a further 106 enquiries about its ADR services generally and, according to SDRP, their involvement "often assisted in resolving the dispute or identifying an appropriate mechanism to do so."⁶² Nonetheless, the slow take-up of mediation in sport is perplexing, given the large number of commercial cases submitted to mediation generally.⁶³

A factor in this apparent dearth of sports-related cases may well be that disputes are not categorised by the ADR providers along industry lines, but rather by the legal practice area involved. For example, CEDR categorises the cases it handles under the relevant legal discipline (e.g. intellectual property or personal injury) and it is therefore impossible to gauge how many sport-related cases it has handled.

Nevertheless, mediation has been used in a sporting context with some success and examples of sport-related cases where mediation has been successful are given below:

(a) a governing body refused to provide match officials for games involving a team whose manager was alleged to have been abusive to representatives of the body. The governing body's allegations were repeated to the media and the manager claimed this was defamatory. Emotions were running high and pre-mediation meetings were arranged between the parties in an attempt to defuse the tension and to

allow them to vent their emotions. In the event, a settlement was reached which involved the sports body adopting new protocols of behaviour and a new complaints procedure, and setting up a working party (of which the manager in question was to be a party) to improve standards and communications.⁶⁴

(b) In appropriate cases, the Amateur Swimming Association uses an informal mediation process to deal with certain breaches of its regulatory code or complaints against the actions of officials or clubs. Apparently this has worked well as it allows parties to be brought round the table in a relatively short time-frame to air their grievances/concerns in an informal environment.⁶⁵ A large number of children participate in swimming and inherent in that is the need for a robust child protection policy, including a swift means of dealing with bullying. In such cases parents are also likely to be involved, and a mediation process is particularly well-suited to dealing with this type of multi-party situation, allowing all parties to be heard.

(c) Mediation is ideal for personal injury cases where liability is not disputed. In a case handled by the ADR Group in 2000, a spectator was injured when a chair collapsed.⁶⁶ The case was resolved at mediation, in a one day hearing, within 3 weeks of being referred to ADR: contrast this with the litigation process which could have dragged on for months, or even years.

Internationally, mediation in sport is increasing in importance.⁶⁷ In France, there is now a legal obligation to settle sports disputes by arbitration or mediation, and in Germany most governing bodies provide for disputes to be resolved by mediation. The National Sports Dispute Centre was set up in Australia in 1996, specifically to deal with sports disputes in 'an inexpensive, fast and effective' manner.⁶⁸ Unsurprisingly, in the US, where the modern mediation process originated, more sports disputes are submitted to mediation than in any other jurisdiction.⁶⁹

The future of mediation

Mediation is here to stay and its use is likely to increase significantly over the next few years. Lord Woolf's recent report on the civil justice system⁷⁰ recommended the use of mediation early in the litigation process in an attempt to free up court time, save public money and to make the dispute resolution process more effective for all parties. This is reflected in recent amendments to the Civil Procedure Rules ("CPR"), which now oblige all parties to ensure that cases are dealt with cost-effectively and expeditiously and to consider using ADR to avoid litigation.⁷¹ The courts are also required to

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encourage the parties to use ADR if appropriate⁷², subject to sanctions for failure to comply.⁷³

The recent decision of the Court of Appeal in *Dunnett v Railtrack plc*⁷⁴ should have rung alarm bells for commercial and sports lawyers alike. Ms Dunnett had been incorrectly advised by a Railtrack employee that it was illegal to padlock a gate leading onto a railway line. The gate was left open and three of her horses were killed by a train. Although her claim in negligence against Railtrack failed, the Court of Appeal refused to grant Railtrack an order for costs as they had refused to consider mediation, despite being recommended to do so by the court.⁷⁵ The judge reminded the parties of their duties under the CPR and stressed that this includes giving serious consideration to the possibility of using ADR procedures to resolve the claim, or aspects of it.⁷⁶ In considering whether or not to make an order for costs the court must take into account all the circumstances and Railtrack's refusal, without good reason, to contemplate mediation resulted in the court considering it inappropriate to order costs against Ms Dunnett.⁷⁷

Subsequent cases have adopted a similar approach⁷⁸, although the courts have stopped short of making mediation mandatory, recognising that in some cases it is inappropriate. In *Hurst v Leeming*⁷⁹, Lightman J accepted that the defendant's refusal to enter into mediation had not been unreasonable (taking into account the particular circumstances of the case⁸⁰) and there was therefore no reason why the unsuccessful plaintiff should not be liable for the defendant's costs. Nevertheless, a party is not entitled to refuse to mediate solely on the grounds that he has a watertight case: the question is whether, assessed objectively, the mediation has any real chance of success. If not, a party may decline to proceed to mediation. However, this is a high-risk strategy, as if the court disagrees with that assessment the party concerned may be severely penalised.

The English courts have also shown themselves to be prepared to enforce contractual ADR provisions. In *Cable & Wireless v IBM*⁸¹ a commercial contract between the parties contained an escalating dispute resolution procedure: firstly, the parties had to attempt to negotiate a settlement, failing which the matter was to be referred to ADR, under the auspices of the CEDR. Only then did the contract permit the parties to litigate⁸². *Cable & Wireless* refused to go to ADR and commenced legal proceedings, claiming the ADR clause was unenforceable as it was merely an agreement to negotiate⁸³ and there was no intention to be legally bound by the clause. IBM successfully argued for a stay of proceedings to allow ADR to proceed. The judge dismissed IBM's arguments on several grounds, noting that the clause was not simply an agreement to agree, but contained a specific process to be followed and was stated to be mandatory. More

importantly perhaps, he justified his decision on grounds of public policy, citing both the CPR (discussed above) and the decision in *Dunnett*. Although the decision received less publicity, a judge at first instance also upheld a mandatory mediation clause contained in the rules of a sports governing body. *Lewis v World Boxing Council and Bruno*⁸⁴ involved a dispute between the parties as to who should fight Mike Tyson for the WBC title. The WBC rules contain a detailed appeal procedure and provide for compulsory mediation if recourse to the initial appeal procedure fails to resolve the dispute.⁸⁵ The court refused to consider the case, on the grounds that the parties should follow the compulsory mediation procedure set out in the rules. Arguments that the mediation would not be impartial, as it would be conducted under the auspices of the WBC, were rejected as the procedure allowed for final resort to the US courts.⁸⁶

A new County Court pilot scheme goes further, making mediation mandatory unless the parties can convince the court that, on the facts, their case is unsuitable for mediation.⁸⁷ This is an interesting development, as the traditional wisdom is that mediation is not appropriate unless the parties are willing⁸⁸ (presumably on the basis that you can take a horse to water but you cannot make it drink). This is yet another warning that parties who refuse to consider mediation do so at their peril.

Conclusion

Sport is unique. There is a huge amount of emotion involved, not only in the relationships between player and coach/manager, but also between the players and spectators and even between rivals. It differs from most other industries in that, in sport, all participants have an interest in maintaining the competitive balance of the industry, essential if sport is to remain exciting and attractive for spectators (and therefore of interest to television, sponsors etc.). While the aim of individual participants will always be to succeed, that aim is accompanied by concern for the welfare of other competitors and their continuing participation and for the well-being of their sport as a whole. Perhaps the most important factor, though, is that a large part of the entertainment value of sport derives from uncertainty of outcome – this is what makes sport exciting and distinguishes it from other forms of entertainment.

Add to this a potent mix of money, renown and power, and disagreements become inevitable. However, it is not inevitable that such disagreements need to be litigated. Sports lawyers have a responsibility to make sure they understand the ADR process and to think hard before advising clients to refuse mediation prior to or during litigation. Intransigent clients must be warned

of the dangers of insisting on court proceedings if mediation might provide an appropriate alternative.

The consequences of litigation for the parties can be devastating. If such litigation involves a sporting association or governing body it cannot be in anybody's interests for such a party to be put in a position where it could be forced into administration or liquidation. For this reason alone, it is incumbent on parties to consider using ADR to resolve their disputes – it must be remembered that sport is not just a personal commodity, it is something that is of value to the community as a whole.

In the end, it is all about 'keeping sport on court, not in Court'. ■

Acknowledgement:

Thanks to Mike Lind of the ADR Group in Bristol who provided a helpful insight into the practice of mediation.

- 1 Together with his partner, J P McManus
- 2 Given the large amounts potentially involved, in any other commercial sphere one would expect such an agreement to be put into writing, but in sport major agreements have (at least in the past) often been 'back of the fag packet' jobs, such as the alleged agreement between Jordan and Vodafone for a sponsorship agreement worth some £100 million which according to Eddie Jordan had been concluded in a phone conversation! See Duthie, M, 'Doing deals that will stand up in court' *Worldsportslawreport* Vol 01 Issue 01 September 2003
- 3 The shares are actually held through a company, Cubic Expression Limited.
- 4 The rules of the UK Takeover Panel governing takeovers and mergers provide that a shareholder who acquires 30% of the shares of a public company must make a bid for the remaining shares unless the Panel grants an exception.
- 5 These transfers include the signing of the American goalkeeper, Tim Howard, and David Bellion and another goalkeeper, Ricardo (sport.telegraph 25/01/2004 www.telegraph.co.uk/sport). Jason Ferguson's company, Elite Sports Group was involved in all three transfers.
- 6 Fans even threatened to disrupt the 2004 Cheltenham Festival meeting, but the demonstration was called off after Ferguson issued a plea to fans (as part of the settlement) not to go ahead.
- 7 Ferguson originally claimed £110 million, but it is understood that the settlement involved a lump sum payment of £2.5 million. He will, of course, be liable for legal costs which are estimated at around £400,000 (see sport.telegraph 06/03/2004 op cit).
- 8 The turbulence at the club continues, with the current prospect of an all-out bid for the club being made by the American property tycoon, Malcolm Glazer, and the sometimes violent opposition of fans to any such takeover (see for example 'The dark side of the Red Devils' *The Guardian* sport section p1, 11 October 2004).
- 9 Gardiner, however, casts doubt on the accuracy of this rosy-tinted view of sport historically, pointing out that the cricketer, W G Grace, earned £8,835 in 1895, which was a massive amount by the standards of the time, with his total lifetime earnings estimated to be around £120,000. Gardiner, *Sports Law* 2nd edition (2001) London: Cavendish Publishing page 36.
- 10 According to the European Commission's report, *The European Model of Sport* (1999), sport accounted for more than 3% of world trade and over 1% of the GNP of the European Union. Gardiner estimates that in 1999 the world-wide market for sports sponsorship was worth some US\$22 billion – op cit page 41.
- 11 [2003]EWHC 1856 [Comm]. See note 2 above.
- 12 ADR is also used to refer to settlement procedures which do not involve the court process.
- 13 Several arbitral tribunals have been created to deal with sports related disputes, including the UK Sports Dispute Resolution Panel ('SDRP'), set up in 1997 and largely funded by UK Sport, and the Court of Arbitration for Sport ('CAS'), set up by the IOC in 1984 and based in Lausanne, Switzerland. CAS is undoubtedly the most important arbitral tribunal on the global sporting stage and has earned an enviable reputation. Currently the rules of all the Olympic International Federations except FIFA provide for disputes to be heard by the CAS, as do the UEFA rules.
- 14 See for example Tackabery, J and Marriott, A (eds) *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* 4th edition (2003) London Sweet & Maxwell (in particular, Chapter 15 which deals with arbitration in sport), or Gill, *The Law of Arbitration* 3rd edn (2001) London Sweet & Maxwell.
- 15 See Blackshaw, I, 'Resolving Sports Disputes the Modern Way – by mediation' [2000] 18(1) *Sport and the Law* *Journal* 97 at p100 – Blackshaw queries whether there is any practical difference between the two processes.
- 16 See CEDR 'Mediation variations' at www.cedrsolve.com/index
- 17 For further information on mini-trials, see Palmer, M & Roberts, S, *Dispute Processes: ADR and the Primary Forms of Decision Making*, (1998) London: Butterworths at 226 et seq
- 18 See Lewis, A and Taylor, J, *Sport: Law and Practice* (2003) London: Butterworths, at para A5.14.
- 19 This apocryphal story is cited by Bevan, A, *Alternative Dispute Resolution* (1992) London: Sweet & Maxwell at 2
- 20 Karl Mackie, Chief Executive of CEDR Mediation – Into the mainstream February 2004 at www.cedr.co.uk/index.php?location=/library/articles/CMS_review_04.
- 21 Hearings of the Ad Hoc Division of the CAS excepted, which operate in an amazingly short timeframe. The division sits at the Olympic Games and aims to deal with all cases within 24 hours of referral.
- 22 The mediation was arranged by the Centre for Effective Dispute Resolution.
- 23 Arbitration is also confidential, with the exception of decisions taken by the Appeals Arbitration Division of the CAS, which are published unless both parties agree that they should remain confidential (Art R59 of the CAS Code of Sports-related Arbitration)
- 24 An example of this is the result of the mediation discussed in section 4, example (a).
- 25 This point was made expressly by Brooke LJ in the Court of Appeal in the judgment in *Dunnett v Railtrack plc* [2002] – see section 5.
- 26 This case was handled by the Centre for Effective Dispute Resolution, and was settled after a one-day hearing (after a lead time of 5 months). This is discussed in more detail in the CEDR Defamation case study at www.cedrsolve.com/index.php?location=/services/mediation/defamation.htm
- 27 See for example the comments of Radio 5 Live sports commentator, Dave Woods, in *Sport: Rugby League Hanley* suspended by Saints <http://news.bbc.co.uk/2/hi/sport/rugbyleague/292276.stm>
- 28 Brown, H and Marriott, A, *ADR Principles and Practice* 2nd edn (1999) London Sweet & Maxwell at 109-111, cited in Stychin, C and Mulcahy, L, *Legal Method: Text and Materials* 2nd edition (2003) London: Sweet & Maxwell at page 440-1.
- 29 This might have been helpful in the Ferguson/Magner dispute discussed earlier.
- 30 In *Cowl v Plymouth City Council* [2002] EWCA Civ 303, Lord Woolf criticised the parties for concentrating on the past instead of focusing on the future to see how they could settle their dispute, and suggested that if they were unable to do so without help, then a mediator should have been appointed to assist.
- 31 If the issue at stake relates to a breach of contract, the legal position is that damages are intended only to compensate the injured party for any loss he has actually suffered, not to penalise the wrongdoer.
- 32 www.cedrsolve.com/index.php?location=/services/mediation/default.htm
- 33 The ADR Group is a private commercial dispute resolution service, based in Bristol. See www.adrgroup.co.uk for more information
- 34 See Professor Hazel Genn's report on the Central London County Court Pilot Mediation Scheme at www.lcd.gov.uk/research/1998/598estrcf.htm, cited in Stychin, C and Mulcahy, L, op cit at page 443
- 35 Blackshaw, I, 'Resolving Sports Disputes the Modern Way – By Mediation' [2000] 18(1) *Sport and the Law* *Journal* 97 at 99
- 36 See Armstrong, N, *Making Tracks* cited in Stychin and Mulcahy 'Legal Method' op cit at 451
- 37 Fiss, O M, 'Against Settlement' [1984] 93 *Yale Law Journal* 1073 at 1085, cited in Stychin and Mulcahy *Legal Method*, op cit at 451
- 38 The FA was criticised for allowing Ferdinand's name to be published at the outset, for deselecting him from the England squad before his hearing and for the incredibly slow progress of the whole disciplinary process. An issue which seems more worthy of criticism from a legal perspective, but which has attracted only minimal comment (eg. 'Ferdinand ban stays as appeal is rejected' www.telegraph.co.uk/sport 19 March 2003) is that the so-called independent three-man panel who heard Ferdinand's appeal contained as one of its members no less a person than Geoff Thompson, the FA Chairman. This undermines the natural justice notion of impartiality and needs to be addressed if sports bodies are to be taken seriously in their efforts to provide an appeal system which is to inspire confidence and respect.
- 39 A further example is the case of Arsene Wenger, the Arsenal manager, who in October 2000 was banned from the touchline for 12 matches and fined for 'threatening behaviour' towards an official. In this case, the FA was keen to set an example and mediation would have been completely inappropriate. See Newmark, C, 'Is Mediation Effective for Resolving Sports Disputes' [2000] *International Sports Law Journal* Vol 37 pt 5/6.
- 40 Disciplinary cases must be dealt with under the CAS appeals arbitration procedure. See Art 1, paragraph 2, of the CAS mediation rules.
- 41 Information provided to the author by Mike Lind of the ADR Group during a conversation on 26 March 2004
- 42 This is a fairly complex procedure which works in tandem with the FSA's internal disciplinary process.
- 43 The Health Professions Council is a new statutory body set up to regulate the 'non-medical' health professions, such as occupational therapists, art therapists etc. The scheme was set up for the Council by the ADR Group.
- 44 Per Mike Lind of ADR Group op cit
- 45 *Ibid.*
- 46 *Ibid.*
- 47 (14 December 2000 unreported, Douglas Brown J) *See Sports Law*, op cit at A3.122 et seq for further details of this case.
- 48 See Bernstein's *Handbook of Arbitration and Dispute Resolution Practice*, op cit at para 15-111 p954.
- 49 Ms Modahl had been participating in an event in Portugal, and the drugs test had been organised by the Portuguese Athletic Federation. BAF became involved as the disciplinary tribunal. *See Sports Law*, op cit at A3.122 et seq for a further discussion of this case.
- 50 [2002] 1 *WLR* 1192
- 51 See Cappelletti, M, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993) 56 *MLR* 282 at 283 (cited in Stychin and Mulcahy *Legal Method*, op cit at 449)
- 52 Article 6
- 53 Brown, H and Marriott, A, *ADR Principles and Practice*, 2nd edn (1999) London: Sweet & Maxwell pp9-12, cited in Stychin and Mulcahy *Legal Method*, op cit at 432.
- 54 See Bush, R and Folger, J *The Promise of Mediation* Jossey-Bass, San Francisco 1994 pp15-24, cited in Stychin and Mulcahy *Legal Method*, op cit at 437.
- 55 Chornenki, G 'Mediating Commercial Disputes: Exchanging "Power Over" for "Power With"' in J Macfarlane (ed) 'Rethinking Disputes: The Mediation Alternative' (1997) cited in Palmer, M and Roberts, S, *Dispute Processes: ADR and the Primary Forms of Decision Making* (1998) London: Butterworths at 134
- 56 Mike Lind of the ADR Group states that in his experience mediation can work well in this situation. It gives the weaker party the opportunity to be heard and to have a say in the outcome of the dispute, although he would always recommend that such a party has some form of representation, preferably a lawyer, but if not, a union representative, another player etc.
- 57 See Stychin and Mulcahy, *Legal Method*, op cit at 445, citing Professor Hazel Genn.
- 58 The Guardian 20 October 2000, cited in Gardiner *Sports Law*, op cit at 275
- 59 As already discussed, disputes which involve an appeal against a decision of a sports governing body, disciplinary matters and anti-doping issues are expressly excluded from the remit of the CAS mediation service (see Article 1 of the CAS mediation rules (7/99) on www.tas-cas.org).
- 60 E-mail to the author from CAS secretariat dated 22 March 2004
- 61 Information provided to the author by Mike Lind of the ADR Group during a conversation on 26 March 2004.
- 62 SDRP service update January 2004
- 63 Karl Mackie, Chief Executive of CEDR Mediation – Into the mainstream published February 2004 at www.cedr.co.uk/index.php?location=/library/articles/CMS_review_04.
- 64 The mediation was organised by CEDR, and shows the value of a flexible solution. See CEDR Solve website: www.cedrsolve.com/index.php?location=/cases/studies/mediation/defamation2
- 65 Andy Gray, ASA in-house lawyer, lecture at King's College on 16 October 2003. Also see *Sport: Law and Practice* op cit paragraph A5.68 at 274.
- 66 See Gardiner *Sports Law* op cit at 275. The claim was for damages of more than £200,000.
- 67 See Gardiner *Sports Law* op cit at 290 and Newmark, C 'Is Mediation Effective for Resolving Sports Disputes' op cit paragraph A.
- 68 NSDC brochure, cited in Gardiner *Sports Law* at 284.
- 69 Newmark, C 'Is Mediation Effective for Resolving Sports Disputes?' [2000] 5(6) *International Sports Law Journal* 37
- 70 'Access to Justice: Interim Report' (www.lcd.gov.uk June 1995)
- 71 CPR Part 1 'Overriding Objective' Rules 1.1 and 1.3, taken in combination
- 72 *Ibid* Rule 1.4(e)
- 73 30th update to the CPR extending the Pre-action Protocol Practice Direction. See explanatory note on www.cedr.co.uk
- 74 [2002] EWCA Civ 303, [2002] 2 *All ER* 850
- 75 On granting the claimant permission to appeal to the Court of Appeal, Schiemann LJ recommended that the parties should consider ADR to dispose of the case as quickly as possible. Ms Dunnett was in favour, but Railtrack refused to consider ADR.
- 76 White Book (Civil Procedure) Autumn 2001 at para 1.4.11
- 77 *Dunnett v Railtrack plc* [2002] at paragraphs [14] – [16] of the judgment. Railtrack argued that they saw no reason to attempt ADR as this would necessarily involve the payment of sums over and above the offer they had already made and they were not willing to contemplate that. However, Brooke LJ made it clear that in his view Railtrack had misunderstood the purpose of mediation and that in cases such as this, where emotions are running high, a skilled mediator may be able to find a solution which is beyond the powers of the court, for example, in claims against the police, where all the claimant really wants is an apology from a very senior police officer.
- 78 E.g. *Leicester Circuits Ltd v Coates Brothers Plc* [2003] EWCA Civ 333, where a party who withdrew from mediation the day before it was due to take place was refused an award for costs, despite being successful on the main claim. Judge LJ, in the appeal hearing on costs, observed that the point of mediation was that the most difficult problems are often resolved during the process, and that it was not open to a party who had agreed to mediation to claim later that there was no realistic prospect of success; also see *Cowl v Plymouth City Council* [2001] EWCA Civ 1935; Neal v *Jones Motors* [2002] EWCA Civ 1731; and *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (comm) (discussed below)
- 79 [2001] EWHC 1051 (Ch)
- 80 The plaintiff, a solicitor, had already litigated unsuccessfully against his former partners, taking the case to the House of Lords, resulting in his bankruptcy. He was now attempting to sue his barrister for negligence. Factors which influenced the judge in deciding there was no realistic chance of mediation succeeding included the obsessive nature of the claimant, the fact he had nothing to lose and that there was no substance to his claims.
- 81 [2002] EWHC 2059 (comm). See Mackie, K 'The Future for ADR Clauses After Cable & Wireless v IBM' *Arbitration International* Vol 19 No. 3 at 345
- 82 Subject to certain exceptions if one or other of the parties' commercial interests were at risk.
- 83 In English law the traditional position is that an agreement to agree (or to negotiate) is unenforceable for lack of certainty (see eg. *Walford v Miles* (1992) HL)
- 84 Unreported transcript, 3 November 1995, discussed in Newmark, C 'Is Mediation Effective for Resolving Sports Disputes' op cit paragraph B
- 85 See Rule 5.3 of the WBC rules available at www.wbcboxing.com
- 86 See Rule 5.4 (*ibid*)
- 87 35th amendment to the CPR. See CEDR briefing note 35th CPR amendment requires Central London County Court pilot parties to mediate (www.cedr.co.uk/index.php?location=/news/archive/20040224.htm).
- 88 See for example Lazić V, 'Conference on ADR in sports disputes' cited in Gardiner *Sports Law* op cit at 280; Blackshaw, I, 'Resolving Sports Disputes the Modern Way – by Mediation' [2000] SALJ 18(1) 97 at 99; Lord Woolf in his report 'Access to Justice' op cit, and Newmark, C 'Is Mediation Effective for Resolving Sports Disputes' op cit conclusion
- 89 The stated aim of the Sports Dispute Resolution Service – see 'Towards Successful Dispute Resolution Planning' issued by the SDRP

Commercialisation of major sports events: Does the law help or hinder the event organiser?

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Major sports events are important to a large section of the public. Many have “a special national resonance”ⁱ and contribute to national prestige. Raising substantial revenue is vital to the event organiser in order to fund the costs of holding the event (including, frequently, sufficient prize money to attract leading performers). In many cases, revenue from the event is also a major source of funding for the sports governing body responsible for national facilities and the future development of the particular sport at youth or grass roots level. The ability of an event organiser to exploit “commercial rights” relating to the event is crucial to that revenue-raising exercise. Do basic legal principles assist – or hinder – the event organiser?

The law’s support may be judged against the following criteria for an effective commercial programme:

1. Attractive portfolio of available rights. Does the law make available a sufficiently wide portfolio of attractive “rights” for an organiser to sell or exploit for value?
2. Certainty and ease of acquisition of rights. Can the organiser acquire, without undue cost or difficulty, clear “title” to or control over these rights?
3. No undue restraints on freedom to deal with those rights. Does the organiser have legal freedom to exploit those rights and raise maximum revenue in such manner as it thinks commercially fit?
4. Ability to deliver exclusivity and to enforce the rights against third parties. Can the organiser realise the premium value of “exclusivity” and prevent unauthorised third parties infringing or diluting the value of those “exclusive” rights?

Scope of available rights for an event organiser

What “rights” are available for a sports event owner to sell?

No general “property” right

The basic policy question facing the law is: should it acknowledge the investment, organisation and effort of

an event organiser in staging an event by recognising a general concept of “property” in a sports event? English common law has not chosen this route.

The leading case is the House of Lords decision in the Australian case of *Victoria Park Racing v Taylor*.ⁱⁱ A third party erected a stand on land adjacent to, but overlooking, the boundaries of the event and the defendant conducted, for income, a live unauthorised broadcast commentary on the races. Although the defendant was clearly using the event to promote his own business, and to the disadvantage of the event organiser, it was held by a majority that he was not infringing any established intellectual property right. There was no “proprietary” right in a spectacle such as a sports event. There was no remedy.

Whilst a right in “an event” is too vague a concept to be a right *in rem*, the failure to develop a remedy in this case arguably hindered the ability of the common law to adapt adequately to later changing economic circumstances affecting sports events.

Victoria Park pre-dated the growth of commercialisation in sport. A fuller public policy debate on broadcasting rights was, however, the subject of the 1952 Gregory Report.ⁱⁱⁱ A group of sport promoters who founded the Association for the Protection of Copyright in Sports (APCS) argued that a sporting event should benefit from copyright protection comparable to that afforded to the creation of an artistic, musical, literary or dramatic work in order to control both simultaneous recordings of that event and subsequent reproductions from those recordings. This approach would, however, have required a significant conceptual change to copyright law (which looks at the form of the “work” created). The arguments of APCS failed against the BBC’s stronger pressure for new legislative recognition of copyright in live television broadcasts. Ironically, in the *Victoria Park* situation, it is now the broadcaster which would have established proprietary rights under English law!

Taking this basic approach as a starting point, therefore, English law does not help the event organiser – and indeed compares unfavourably with the principled

approach of a number of other jurisdictions (particularly civil law jurisdictions such as Italy, Spain, France and the Netherlands which, with varying degrees of clarity, vest television broadcasting rights in the organiser of the competition or event).^{iv}

Use of contract to create “rights” for an event organiser to exploit

Denied any proprietary rights *per se*, the sports event organiser must be pro-active – primarily through careful construction of an appropriate contractual matrix surrounding the event – in order to create a portfolio of exploitable “rights”. The key to these “rights” is physical control of the venue in which the event is being held – not legal principle.

With that control, the event organiser can by contract create the legal basis for an effective commercial programme:

- a “host” broadcaster may be granted a licence to enter the venue and film the proceedings; copyright will exist in the resulting film and sound recordings and by taking an assignment of that future copyright (contemporaneously with a licence back to that broadcaster of specified rights) the event holder will be able to control valuable “broadcasting rights”.

Contract is also the basis by which other valuable “rights” can be created which assist different third parties to benefit from association with the event, including:

- sponsorship: the right of a third party to have its name designated as a “sponsor” of the event (or possibly the venue) or of a particular part or race within the event;
- “official supplier”: the right to supply particular goods or services to or at the event;
- merchandising: usually in conjunction with the grant of rights to use event trade marks, the right for a third party to sell goods or services to the public in association with the sports event;
- hospitality: the right to receive tickets (and use event trade marks) to include in corporate hospitality services to the public.

Contracts with stadium owners, participants and spectators are also the means for creating a “clean” environment and protecting the delivery of these commercial rights.

Any analysis of the law’s contribution to the commercialisation of sport must therefore stress the flexibility of the English law of contract in enabling different “rights” to be created.

Event marks and other IPR

Marketing of event “rights” requires a strong “brand”. Sponsorship and merchandising rights, in particular, can be made more valuable by use of a distinctive mark or logo associated with the event (e.g. the purple/green “Flying W” of the Wimbledon Championships). The law does offer support through the ability of the event organiser to acquire ownership of registered trade marks^v comprising names or logos (if sufficiently distinctive) or copyright in designs of emblems. These are “property” rights which can be licensed for use by authorised counterparties and represent an important part of the “branding” of the event.

Has the law kept pace with new technological developments?

The law has also reacted favourably (for sports event organisers) in recognising new technology or potential methods and sources of commercial exploitation:

- Insofar as new developments in broadcasting technology are concerned, contract law has enabled event organisers to fit new media platforms into the “slicing” of broadcasting rights by distinguishing (if it wishes) between internet, 3G mobile telephony and/or other new technology outlets – thus potentially maximising its revenue.
- The growth of the internet itself offers further possibilities to attract sponsors and advertisers on an event website; the law has been supportive in preventing or rectifying ‘cyber-squatting’.
- In terms of new “rights” which the event organiser may exploit, sports data has in particular become an increasingly valuable source of potential commercial

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income. The Copyright and Rights in Database Regulations 1997 (incorporating into English law an EC Directive) has created a new sui generis right – a “database right” in favour of a person who makes a substantial investment in the obtaining, verifying or presentation of the contents of the database. Ironically, compared with the lack of rights in the event itself, this database right is expressly based on the investment and organisation of the “creator”.

British Horseracing Board v William Hill^{vii} demonstrated the potential of this database right. The court supported the investment by the BHB in its data relating to horseracing (including details of horses, owners, trainers, jockeys, fixtures, venues and runners). The court held that BHB’s rights in this database could be used to prevent unauthorised reproduction of part of that information by William Hill on its internet site. Subject to the outcome of a reference to the European Court of Justice on certain questions of interpretation, the court’s approach could provide the owners of sports data (including data held by or for event organisers) with a basis for a wide variety of commercial deals.

Has the law’s approach resulted in any significant gaps in available rights?

Therefore, although not derived from any principle of protection per se, an event organiser can in practice build a wide and attractive portfolio of “rights” which – although strictly not “property” rights as such – are “rights” which an event organiser can vest or create for value in commercial counterparties.

The judgement, though, is that the law’s approach is essentially passive. It does not “hinder” the self-help measures of an event organiser based on contract negotiations but provides little positive “help” by way of creating proprietary rights in recognition of the organiser’s effort and investment.

The lack of principle is no more apparent than where the event organiser has no control over access to the venue – in particular where the event is conducted in a public place (for instance, the London Marathon or the Boat Race). In these circumstances, the organiser cannot by contract acquire exclusive broadcasting rights and therefore manage them as efficiently as in the case of a sports event in a “controlled” stadium. The promoter of a public venue sport is left with few legal mechanisms to protect its position (although, in practice, a broadcaster will usually need the support of the promoter in order to build the necessary broadcasting infrastructure). Yet, why – as a matter of principle – should the broadcasting rights which potentially vest in the organiser of a sporting event be different if the competition is held outside rather than inside a stadium?

It is notable that one of the IOC bidding conditions for the hosting of future Olympic Games is an undertaking on the part of the relevant City governing authorities to ensure broadcasting exclusivity for public venue sports.

Certainty and ease of acquiring rights

Without clear proprietary rights as a matter of principle, an event organiser faces the problem of creating or acquiring control over exploitable rights without undue cost, complexity or dispute. The organiser encounters many hurdles. This is illustrated most clearly in relation to the acquisition of “broadcasting rights”.

Need for assignments

The first hurdle is that, as a matter of legal principle, the copyright in the recording of a sports event vests in the party that produces it^{viii}. The event organiser’s “rights” must be based on contractual negotiation with the broadcaster – usually by taking an assignment of future copyright from the broadcaster, in exchange for grant of rights to that broadcaster, as a condition of access to the venue. In most situations, where the event organiser has control of the venue, such an assignment can be achieved.

Similarly, copyright in photographs vests with the photographer and that in designs of emblems or logos with the designer. Unless they are directly employed by the event organiser, copyright will only vest in the event organiser if there is an assignment – which may be an assignment of future copyright – in the photograph or emblem.

Need for restrictive conditions on other spectators or visitors

As a corollary, this “broadcasting right” is only protected if the event organiser imposes appropriate restrictive conditions in the contracts or ticketing arrangements which enable others to gain access to the venue. If it fails to do so, the law has no sympathy. In *Sports and General Press Agency v Our Dogs Publishing Co.*^{ix}, an independent photographer gained access, took his own photographs and sold them to a publisher. The plaintiff agency thought they had “exclusive” publishing rights. No contractual restrictions had been imposed on the independent photographer. Contract was the only means to restrain this activity and support the exclusivity offered to the plaintiff agency.

Even then, the law imposes another hurdle: ticket conditions are only enforceable if they are brought to the attention of the purchaser prior to the sale taking place^x – and thereby incorporated into the contract of sale or admission.

Need to ensure consistency in other contracts and avoid potential conflict

The ability of an event organiser to create an effective commercial programme therefore derives substantially from control of access to the venue and the imposition of contractual terms and restrictions which regulate the legal “environment” in which the event is held. These are essentially self-help measures. A fully effective programme requires diligence and care to impose contractual restrictions through:

- terms of admission for the public, media and others (including players) to ensure that broadcasting activity is only permitted through the “authorised” channels;
- contracts with participants (both clubs and players) to ensure that event sponsorship is not diluted by their own personal sponsorship or endorsement deals; and
- contracts with commercial “partners” to ensure that they cannot overstep the boundaries of their intended rights nor inadvertently assist others to “ambush” the event in a manner unauthorised by the event organiser.

This contractual matrix requires considerable care, time and expense in preparation and negotiation. Potential conflicts abound. Success is largely dependent on the bargaining strength of the event organiser. This can be a tough battle where participating teams and players have negotiating strength; for instance, the conflict in the 2003 Cricket World Cup where the ICC had sold event broadcasting and sponsorship rights centrally but came into conflict with the Indian team which had negotiated its own sponsorship deal with a competing party and, in particular, with players with their own commercial arrangements. The law plays no part in assisting the event organiser to resolve these commercial conflicts. It is left to contractual negotiation and relative bargaining strength.

Limitations on trade mark registration

Hurdles also exist in obtaining “event” marks. Under general trade mark principles, an event organiser will only be able to acquire “proprietary” trade marks if they fulfil certain criteria of distinctiveness. Registration will be refused if the mark is devoid of distinctive character or solely a sign or indication of intended purpose, geographical origin or inherent characteristics of the relevant goods or services.

RFU and Nike v Cotton Traders^{xi} is illustrative of the narrow approach. The court decided that the “England rugby rose” was not sufficiently distinctive of goods produced by or associated with the RFU. Similarly, word marks such as “World Cup” and “Euro 2004” or

geographical marks such as “Wimbledon” are unlikely to be registrable.

These limitations therefore place an extra hurdle for the event organiser to overcome in creating “proprietary” trade marks to support its commercial programme. The lack of registrable rights of this kind results in exposure to forms of “ambush marketing” which could otherwise have been prevented.

Restraints on freedom of contract

Assuming that it is equipped with “title” or at least control over its portfolio of rights, is an event organiser free to make such commercial arrangements with third parties as it wishes – or is it subject to legal constraints which may prevent it maximising its commercial income?

The very popularity of major sports events has resulted in certain constraints on its freedom of action – all principally arising out of “public interest” concerns.

Listed events

First, governmental measures have been imposed to ensure “free” public access (i.e. through coverage or free-to-air, widely available television) to sporting or other events of national importance. Following the “Television Without Frontiers” EU Directive, the UK Broadcasting Act 1996 empowers the Secretary of State to “list” events for this purpose. As a result:

- Group A events (including the FA Cup Final, the Grand National, the Derby and the Wimbledon Tennis Finals) cannot be offered for exclusive broadcast by other broadcasters without the consent of the Independent Television Commission (ITC) unless such rights have first been offered on fair and reasonable terms to “category 1 broadcasters” (i.e. currently the BBC, ITV and Channel 4);
- Group B events (including cricket test matches, non-finals play at Wimbledon, Six Nations rugby matches, the Ryder Cup and the Open Golf Championships) can only be made available for exclusive live broadcast if category 1 broadcasters have been offered an opportunity to carry secondary coverage (i.e. delayed coverage of at least 10% of the scheduled duration of the event).

The motive behind protecting public TV access to such events is understandable and supportable. For the event organiser, though, any restraints of these kinds interfere with free and open competition. It is certainly arguable that, without full competitive tension, bids may be lower than they would otherwise have been – or that a non “category 1 broadcaster” may have been willing to pay more for fully exclusive rights.^{xii}

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Prohibition of certain prohibited sponsors

Next, and simply, the *Tobacco Advertising and Promotion Act 2002* now specifically prohibits using a sponsorship arrangement to promote a tobacco product. Sponsorship by tobacco brands has been a significant source of income for many sports and will no longer be available.

Competition law restraints

The other major potential constraint is competition law. Competition authorities have, in particular, an interest in encouraging competition in the development of broadcasting markets. Premium sports content is a powerful driver for the market of new technologies and TV operators. Commercial terms which may provide maximum revenue for the event organiser could inhibit competition between TV operators. At a certain level – so far applied in relation to major football events – competition authorities^{xiii} take the view that the anti-competitive effect is excessive and will intervene. Particular areas of concern are:

- *Exclusivity.* Of principal concern is the grant of exclusive TV rights for a period which may be regarded as likely to lead to market foreclosure – particularly if the broadcaster is in a dominant position. The EC Commission – from its settlements of TV broadcasting arrangements for the *UEFA Champions League*, *Bundesliga* and *FA Premier League* – appears willing to accept exclusivity periods of up to 3 years (and possibly 5 years or more in other cases if justifiably needed to ensure the entry of a new operator into the TV market).
- *Scope of rights.* Competition authorities are also increasingly concerned if all media rights are subject to the same “bundled” package and exclusivity period. In the *UEFA Champions League* and *Bundesliga* cases, the EC Commission insisted that wider competition could be maintained if separate packages of rights were made available and if certain new media rights were held-back and offered separately to different licensees. The Commission has recently^{xiv} launched a sector enquiry into the sale of sports rights to internet and 3G mobile operators.
- *Central selling.* Where the event is a league or similar event comprising several teams, the EC Commission is concerned that “central selling” of all broadcasting rights may limit competition between broadcasters and thereby consumer choice (since individual clubs or teams cannot compete in the sale of any rights). Despite practical decisions by the EC Commission in approving the *UEFA Champions League* and *FA Premier League* broadcasting contracts, uncertainty remains.

The EC Commission has also been watchful to constrain the terms of other commercial arrangements by event organisers where these are deemed anti-competitive (e.g. sole appointment of a tour operator for overseas travel packages in *Italia '90* or the terminology of official equipment supplier arrangements in *Danish Tennis Federation*).

Effect of these restraints

These restraints may well be justifiable in a “public interest” which is greater than the interest of sports event organisers in maximising commercial revenue in a completely “free” market. They may only apply where the particular sports event has significant market importance. However, for the event organiser, any restraint which restricts its commercial freedom to contract with whom (and on what terms) it wishes inevitably creates a potential “hindrance” to its ability to maximise its revenue from the event.

Ability to deliver exclusivity

Even if “exclusive” rights are not prohibited by governmental or regulatory intervention, the value which counterparties receive – and for which they are willing to pay – will be affected by the effectiveness of those rights vis-a-vis third parties.

The problem is the risk of “ambush marketing” – unauthorised activity undertaken by a third party which takes advantage of the reputation, goodwill or efforts expended by those responsible for the sports event in question. The “official” counterparty’s rights are devalued. The event organiser also suffers. The “official” sponsor may in future pay less to the event organiser or not renew. The event organiser may not in future be able to sell sponsorship rights for full value if the risk of ambush marketing remains or if the marketing integrity or image of the event has suffered.

Ambush marketing ranges from the clearly illegal (e.g. selling counterfeit goods) to the opportunistic (e.g. if a competitor becomes the “broadcast sponsor” or takes significant “insertion” advertising in intervals between broadcasts of the event thus diluting the benefits of being the official “event sponsor” – or if a competitor runs promotions or advertisements, either physically close to the stadium or in “air time” around the event, in a way which implies some kind of official connection with the event). The range of “ambush” marketing activities appears only to be limited by the ingenuity of marketing and advertising executives.

English law offers limited, somewhat fragmented and inadequate, protection. The lack of any general “property” right in a sports event – or, more realistically, any general tortious concept of wrongful appropriation of

goodwill – has made it no easy task to challenge ambush marketing (except where that activity is itself illegal).

Use of contract to prevent “ambush” conflicts

Insofar as ambush marketing results from leakage or inappropriate activities of commercial counterparties, the event organiser does have powers to prevent that activity by the terms of negotiated contracts^{xv} and/or to take enforcement action to enforce such contractual restrictions. Again, self-help is the message.

Reliance on contracts for protection does, though, have a number of significant limitations – not least that its success (particularly where participating teams and players also have negotiating strength) is dependent on contractual negotiation and relative bargaining strength. The law simply plays no part in assisting the event organiser in such situations.

The event organiser does not, of course, have a contractual relationship with “unauthorised” *third parties*. It must look to other, somewhat narrow and inadequate, legal principles for protection or remedy against their “ambush” activities.

Infringement of a “property” right held by the event organiser

A claim based on infringement of a “property” right will exist only if there is infringement of a trade mark or copyright held by the sports event promoter. These could include emblems, logos, photographs and audio-visual footage in which the event organiser has obtained registered trade marks or copyright protection.

Copyright is a valuable tool to attack infringement if a “substantial part”^{xvi} (a qualitative test) of a literary work has been copied without the authorisation of the copyright owner – as in the copyright in the logos and Premier League badge reproduced by the defendant in *FA Premier League v Panini*^{xvii}. However, ownership of copyright is frequently difficult to prove.

Enforcement of a trademark is only possible if the “offender” is using the trademark in a trade mark sense (a test not passed, and probably rightly so, by the incidental use of the FA’s marks in *Trebor Bassett*).^{xviii} The recent battleground to decide the scope of this limitation has been *Arsenal v Reed*.^{xix} Souvenir sellers, clearly linking into the popularity of the event, were taking advantage of trade marks and logos of the event and arguably devaluing the rights of “official” merchandise licensees. The High Court suggested that use of such marks in this case was simply as a “badge of loyalty” and not an indication of origin in a trade mark sense. Following reference to the European Court of Justice, the Court of Appeal has decided in favour of the event organiser by judging that the test should be whether the use is likely to prejudice the function of the trade marks,

namely the ability to guarantee origin – a test more easily satisfied. This remedy does not help, though, if the “offending” use is not of a registered trade mark (or substantially similar mark) – or if the event has not been able to register a distinctive mark; in such a case, the “offending” use will remain unscathed.

Passing-off and misrepresentation

The next possible line of attack is based on the behaviour of the offender in misrepresenting an association with the event. Traditionally, a claim would only arise if the behaviour constituted “passing off” goods or services as those of another. But the boundaries have moved in favour of an event organiser in the last few years. Two cases are illustrative of this trend:

- In *PGA v Evans*^{xx}, the court decided that an interlocutory injunction should be granted to prevent the defendant’s services being offered under the description “Ryder Cup Hospitality” since this misrepresented that the hospitality services were associated with the event organiser (PGA Ltd) or the authorised hospitality agent (Keith Prowse). The court interestingly awarded the injunction not only to PGA Ltd but also to Keith Prowse “as a body authorised to exploit the goodwill of PGA Ltd in the provision of hospitality for the Ryder Cup”.
- In *Irvine v Talksport*^{xxi}, the court broadened the scope of “passing off” to cases of false endorsement. Although concerned with a case of wrongful personal endorsement, the general dicta of Laddie J. could apply to any deliberate misrepresentation suggesting a connection with the “wronged” party:

“In our view, once it is proved that A is falsely representing his ... business to be ... connected with the business of B, the wrong of passing off has been established and B is entitled to relief... If someone acquires a valuable reputation or goodwill, the law of passing off will protect it from unlicensed use by others... the commercial environment in which [the law of passing off] operates is in a constant state of flux.”

If this principle applies to a misrepresentation of connection with a *person* (whose goodwill in his name or character is damaged), the same principle should apply to a misrepresentation of connection with a *sports event* (taking advantage of the goodwill created by the organiser in that event). The courts may now be prepared to use this doctrine to allow remedy to prevent kinds of “ambush marketing” which have previously otherwise escaped the protective scope of the law. However, more subtle forms of “implied” connection with an event and use of its goodwill are still unlikely to be caught.

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Tortious interference with contract

Parasitic marketing frequently involves a party deliberately taking advantage of the goodwill or reputation of an event in circumstances where it knows that a competitor already has a contract with the event organiser (which that competitor has paid for) under which that competitor expects to occupy an “exclusive” position as sponsor or supplier. When does such activity amount to wrongful interference with contract? English case law has been unduly cautious in developing this doctrine. Unless the behaviour knowingly induces a breach of contract, case law indicates that interference with contract will only amount to tortious behaviour if the means used are “unlawful” in themselves^{xxii} – and not simply wrongful or unfair in a moral or judgemental sense. A misrepresentation alone (not itself “unlawful”) will not suffice.

No “misappropriation” doctrine and comparison with other countries

Other ambush activities fall outside the parameters of these narrow remedies. The courts have not been prepared to develop a general concept of “misappropriation” of goodwill as itself being tortious conduct. Indeed, this brings us back to the basic decision in *Victoria Park Racing*.

The cautious approach of the English courts may be contrasted with the approach in the US, where the US Supreme Court’s landmark decision in *International News Service v Associated Press*^{xxiii} brought “misrepresentation of another’s skill, expectations and labours” within the broader doctrine of unfair competition. Although its boundaries may be unclear, the US courts have continued to support the concept of unfair “misappropriation” for the benefit of sports event organisers.

The US approach has, in addition, enabled a licensee or commercial counterparty to have an independent right to bring action^{xxiv} in circumstances which would not be actionable under English law.

English law is illustrated by *BBC v Talksport*^{xxv}. The BBC, as the “official” rights holder, sought to prevent Talksport’s unofficial broadcasts derived from watching live television coverage supported by simulated crowd noise and presented as “live” coverage. The court held that the BBC was not entitled to an injunction. The BBC could not prove any goodwill in a particular sign or symbol that was being used by Talksport. The absence of any principle of property rights in a sports event, or of unfair commercial misappropriation, severely limited the BBC’s legal remedies.

Event-specific legislation in other countries

Common law remedies therefore remain relatively narrow – and slow – to tackle the insidious impact of ambush marketing which can damage the exclusivity which official sponsors expect. This has led government promoters of major events in other common law countries to introduce event-specific legislation and criminal remedies to combat ambush marketing. Two notable examples are:

- For the *Sydney Olympics, the Sydney 2000 Games (Indicia and Images) Protection Act 1996* introduced legislation which prohibited a person (other than a licensed user) from using certain indicia or images for commercial purposes. These cover “any visual or aural representations that, to a reasonable person, in the circumstances of the presentation, would suggest a connection with the Sydney 2000 Olympic Games”.
- For the South Africa Cricket World Cup, two wide-ranging measures to create new offences were introduced:
 - the *Trade Practices Amendment Act 26 of 2001* created an offence for a person to make or display “false or misleading statements, communications or advertisements which suggest or imply a contractual or other connection with a sponsored event or the person sponsoring that event”;
 - the *Merchandise Marks Amendment Act 61 of 2002* advanced to even broader ground by prohibiting, in relation to a “protected event” for a specified period, use of a mark or trade mark (i.e. of a third party) which “is calculated to achieve publicity for that mark or trade mark and to derive benefit from the event, unless prior authority of the event organiser has been obtained”. A party may claim relief in civil proceedings.

Such event-specific criminal legislation provides the organisers and sponsors of sports events with a powerful weapon in their fight against ambush marketing – with much greater clarity, strength and scope – and speed of remedy – than offered under present English law. It will be interesting to see if the London 2012 Olympic bid leads to comparable legislation^{xxvi} in the UK – and, if so, whether it could be used for “protected events” other than the Olympics. It would certainly be welcome.

Conclusion

On balance, and in a pragmatic manner, the law does “help” rather than “hinder” the organiser of a major sports event. However, the law’s support is not positive; it is largely passive. It is the responsibility of the event organiser to develop a sophisticated and careful contractual matrix in order to acquire its “rights”. The event organiser must rely on diligence and bargaining strength. The law does not help the weak or careless. There is little evident policy – apart from support of freedom of contract and limited remedies against more extreme forms of misrepresentation.

Should English law do more? The large sums paid in practice for sports broadcasting and sponsorship “rights” suggest that there is no case for reform generally. However, the dependence of major events on commercial revenue (and the public importance of such events) means that greater protection of rights granted to “official” counterparties is highly desirable. Constructive legal developments would be:

- continuing expansion of the boundaries of passing-off to counter “ambush marketing” of kinds which misrepresent an association with a sporting event; and
- the introduction of special legislation to assist “protected events” along the lines of the model for the South African Cricket World Cup (at least where public funding or guarantees for that event are substantial).

Ideally, such legislation would extend not only to the Olympics but also to other selected “protected events”. Indeed, if the public interest requires legislative intervention to safeguard public TV access to certain “listed events” (thus potentially limiting the maximisation of revenue for those events), it would be appropriate to introduce legislation to protect those and other designated events against unauthorised third party activity which damages the value of sponsorship and related rights granted by the event organiser.

If we wish to hold world class sports events in this country, greater legal protection of this kind is desirable and in the public interest. ■

References

- i The government’s phrase in support of its “listed events” measures – see p. 11 below
- ii *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* [1937] 58 CLR 479.
- iii A report of the Committee on Copyright Protection which led to the Copyright Act 1965
- iv See generally articles in *The International Sports Law Journal* 2003/3.
- v s.1 Copyright Designs and Patents Act 1988
- vi Under the Trade Marks Act 1994
- vii *British Horseracing Board Ltd v William Hill Organisation Ltd* [2001] RPC 612
- viii s9(2) Copyright, Designs and Patents Act 1988
- ix [1917] 2 KB 125
- x See, for instance, *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125
- xi *Rugby Football Union and Nike European Operations v Cotton Traders Ltd (Ch)* [2002] All ER (D) 417
- xii *TV Danmark* [2001] 1 WLR 1604 is illustrative of this under equivalent Danish legislation upheld in the UK
- xiii Particularly the EC Commission under Articles 81 and 82 of the Treaty of Rome
- xiv EC Commission Press Release, 30 January 2004
- xv See, for instance, the contracts with “official” sponsors and broadcasters discussed at pp. 9 and 10 earlier
- xvi See s16(3)(a) Copyright Designs and Patents Act 1988 and *Football League Ltd v Littlewoods Pools Ltd* [1969] 2 All ER 546. [2002] EWHC 2779 (Ch)
- xvii *Trebor Bassett Ltd v Football Association* [1997] FSA 211
- xix *Arsenal Football Club plc v Reed* [2003] EWCA Civ 96
- xx *Professional Golfing Association v Evans* [25 July 1989, unreported]
- xxi *Edmund Irvine Tidewell Ltd v Talksport Ltd* [2002] EWHL 367 (CL)
- xxii Even taking the wider formulation of “an act which [the defendant] is not at liberty to commit” proposed by Lord Denning in *Torquay Hotel v Cousins* [1969] 2 Ch 106
- xxiii (1918) 248 US 215
- xxiv For instance, see *Rudolph Mayer Pictures Inc v Pathe News Inc* (1932) (exclusive grantee of film rights) or *Trantick Century Sporting Club Inc v Transradio Press Service Inc* (1937) (where NBC as the grantee of exclusive broadcasting rights was granted an injunction to enjoin the defendant’s news service which “would constitute an unlawful appropriation of the exclusive property rights of the plaintiff”)
- xxv [2001] 1 FSR 53
- xxvi Substantially wider than the present Olympic Symbol etc. (Protection) Act 1995

Time for a Mandatory Count: Regulating for the Reform of the Professional Boxing Industry in the UK

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Introduction

The debate on the legality of professional boxing is usually conducted in rather stark terms. The sport is considered either to be a 'noble art' or 'unlawful barbarism'. The polarised nature of that debate generates more heat than light, and does little to ameliorate the plight of the average professional boxer. Moreover, it often takes place with little recognition that professional boxing is, at the elite level, a lucrative if exploitative element of the UK's entertainment and leisure industry. Necessarily then, any move to prohibit the sport would have to consider not only the social and legal repercussions of boxing's proscription but also the financial and economic implications of what would effectively be the abolition of a centuries-old commercial activity.

Accordingly, the underlying question posed in this article is whether there should be a complete ban on professional boxing or whether the problems that beset the sport – both inside and outside of the ring – are more properly and adequately addressed by regulatory reforms, supported where necessary by financial and legal sanctions. Four points are noteworthy. Firstly, the case for and against the proscription of professional boxing is briefly outlined from a legal perspective. Second, it is strongly suggested that adaptation not abolition should be the preferred means of addressing the many structural defects inherent in the modern prize fight. Thirdly, a twelve-point plan of reform for the British professional boxing industry will be proposed. These reforms are the principal emphasis of this article. Finally, it is submitted that professional boxing should not draw too much comfort from the fact that the authorities have, thus far, appeared disinterested in its prohibition. Put simply, the legal status of the modern prize fight is much more vulnerable than might at first appear.

Prohibiting Prize Fights

It is contended that the operation of modern professional boxing is tainted by the following: the anomalous and ambiguous legal status of boxing under current law; the sport's poor medical record; the

financial exploitation of fighters; inadequate regulation and the dubious autonomy associated with a boxer's decision to fight for a living.

On the first point, the traditional supposition that boxing has immunity from the ordinary law of violence is not as robust as usually perceived.ⁱ The criminal law's view of the sport is that its legality lies (unsatisfactorily) in its social utility as a recognised and established contact sport.ⁱⁱ Boxing's legal immunity can, most probably, be traced to a policy compromise of the late nineteenth century, which promoted the sport because (a) as an organised sport boxing compared well to the coarseness and disorder of prize fighting (b) sports of a 'muscular' and physical nature were seen as having a cathartic purpose in society and (c) it was held that on balance boxing, in the medical opinion of the day, did not endanger life or health.ⁱⁱⁱ

In an organisational sense, boxing or sparring with gloves certainly was an improvement on prize fighting, although it should not be forgotten that the modern sport's direct physical nature is entirely similar to that of its predecessor.^{iv} The cathartic argument is, with the growth of alternative and less invasive contact sports, no longer as relevant, and could in fact be used against the sport as evidence of its intrinsically violent nature. More importantly, and as Professor Glanville Williams has observed, the anti-prize fighting cases of the nineteenth century – the source of modern boxing's legality – reserved impliedly that fighting of any kind and form might still be declared unlawful 'where the circumstances make it likely that injury or (at least) some kind of serious injury will be caused.'^v Accordingly, boxing's legal status is vulnerable to a court being persuaded by clear and comprehensive medical evidence as to its dangers and risks.

The most recent (and objective) analysis of the existing medical literature condemns the professional sport, particularly as regards the incidences of brain injury. It seems that anything up to four-fifths of professional boxers suffer from measurable brain damage as a result of their career, with one-fifth of these boxers subsequently developing chronic traumatic brain injury or

dementia pugilistica.^{vi} The apparent physical exploitation of boxers is exacerbated by their financial exploitation. Despite The Sunday Times Rich List 2005 estimating that the former world heavyweight champion, Britain's Lennox Lewis, has wealth in excess of £100million, the history of the sport is littered with boxing champions who have ended their days as penurious men. Furthermore, that history leaves unrecorded the fate of the many "journeymen" professionals – fighters with poor win/loss ratios, who have little realistic chance of ever winning a title, who are merely present, at best, to give the favoured boxer a competitive workout and, at worst, to serve as a human body bag in order to inflate the favoured boxer's fight record.

In turn, the physical and financial exploitation of fighters is aggravated even facilitated by the current operation of the professional boxing industry. Put bluntly, the professional boxing industry on a worldwide basis is an example of a failed regulatory model. The 'alphabet soup' of sanctioning organisations the currently exists – WBO, WBC, WBA, IBF, WBU etc.; shamefully weakens the sport's structural authority to the ultimate detriment of individual boxers. In addition, promoters routinely establish a dominant position within their jurisdiction and conflicts of interest between managers, promoters and sanctioning organisations abound.^{vii}

The (liberal) argument that boxers are autonomous beings voluntarily entering their chosen sport is probably the strongest and most established point made in favour of boxing.^{viii} However, given that those who participate in the sport are overwhelmingly of a socially disadvantaged background, it must be open to question as to whether, from a paternalistic perspective, their decision to pursue such a career is truly autonomous in nature. Professional boxers risk serious injury for substantial, if rarely attained, reward. It must be asked not only whether professional boxers are ever fully informed of the risks involved in their choice of career; but also whether their choice is more likely one that has been coerced by the poverty of their circumstances. In the words of one commentator, is boxing simply the 'exploitation of the disadvantaged'?^{ix}

Adaptation not Abolition

In sum, a strong prima facie case can be made for the outright proscription of professional boxing. Legislation could be based, for example, on the Norwegian provision that has prohibited professional boxing in that jurisdiction since 1981^x and which was extended in June 2001 to regulate organised fighting sports whose rules permit knockdowns.^{xi} Proscription would by definition clarify boxing's anomalous legal status. It may however serve only to exacerbate the physical and financial exploitation of boxers. The history, culture and popularity of boxing in the United Kingdom (as compared to its position in Scandinavian society) is such that a ban on the sport would probably lead to an underground (and dangerous) version of the sport. A culture of unlicensed events already exists within the United Kingdom and, it is suggested, an outright ban on the sport could see a return to the prize fighting days of the mid-nineteenth century when crudely prepared fighters and their backers sought secluded venues in which to fight. That state of affairs would expose boxers to increased levels of harm, lead to secondary criminality such as illegal gambling and be a waste of policing resources.

Consequently, even if the anti-boxing lobby is taken to have a principled prima facie case for criminalisation, they must still ask – and answer – a myriad of questions about the proposed criminalisation of the sport, notably: does the behaviour in question (boxing) pose so serious a threat to the social order that imprisonment – at the cost of the individual's liberty, and significant resources of the state – is warranted? Moreover, could the incidence or nature of the behaviour be reduced to an acceptable level by means less coercive and costly than a criminal statute?^{xii}

It is strongly argued that regulatory reform would confront and could largely overcome professional boxing's intrinsic problems. Reform of the professional boxing industry in the United Kingdom should be based on a strictly enforced, statutory licensing regime run by an independent boxing authority. The stated reforms would clarify the sport's legal status by holding that

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bouts taking place outside the license and governance of the scheme would constitute a crime. Furthermore, under the proposed reform package the welfare and dignity of boxers would be paramount. The legislative reforms would ensure that (i) boxers would not be permitted to fight unless medically fit and appropriately informed as to the risks involved; (ii) the level of physical and neurological trauma that may be caused in the course of a fight would be restricted to an acceptable level; (iii) boxers would receive appropriate and continuing medical treatment and financial advice on the completion of a bout/career.

Regulatory Reform

It is now proposed to detail a twelve point plan of reform for British professional boxing. These points relate mainly to the administrative and the health and safety advancement of the sport.

1. Underlying principle

The health, welfare and dignity of the boxer are at all times paramount.

2. Administrative reforms

Although it is unlikely that a single, worldwide professional body, equivalent to the amateur sport's governing authority, will ever (re) emerge; strong statutory-based administrative bodies in leading jurisdictions such as the United Kingdom and the United States would, if promoted, have a profound influence on the future direction of the sport as a whole. It cannot be stated strongly enough that the current (administrative) state of affairs is not just hugely detrimental to the image of the sport but, more fundamentally, is damaging to the health and welfare of the sport's participants.

The British Boxing Board of Control ('BBBC') is, in global terms, a competent, private regulatory agency – though that global standard is not very high. Given the legal vulnerability of the sport, it is suggested that an independent, statutory body, known (for sake of argument) as the British Boxing Authority ('BBA'), should be established to administer the sport in the United Kingdom. The BBA should be led by a chief executive or boxing czar appointed by and answerable to the appropriate minister – presumably the Sports Minister at the Department for Culture, Media & Sport. Under the envisaged scheme, a boxing commission, made up of representatives from all elements of the contemporary professional boxing fraternity including administrators, promoters, media representatives and former boxers, could advise the BBA's chief executive.

There are a number of models available on which to

base the legislative foundations of a putative BBA. For example, many of the statutory schemes that apply at provincial and state level in Canada^{xiii} and Australia^{xiv} are attractive. Nonetheless, the history, ethos, popularity and commercial viability of professional boxing in the United Kingdom is second only to the United States. Consequently, it is suggested that the most comparable and useful reforms are those implemented on a federal basis in that jurisdiction. Effectively, the British reforms should 'cherry-pick' from the recent raft of federal legislation promoted in the US Congress by Senator John McCain e.g., the Professional Boxing Safety Act 1996, the National Association of Attorney Generals' Boxing Task Force Report 2000, the Muhammad Ali Boxing Reform Act 2000 and the Professional Boxing Amendments Bill (currently under review by the US Congress).^{xv}

It is envisaged that the BBA would licence all aspects of the sport in the United Kingdom, including sanctioning organisations, participants, gymnasiums, those involved in the financial and contractual promotion of the sport and those who assist in the holding of boxing events such as referees, seconds, coaches, officials and medical staff. Unlicensed (professional) boxing-related activity would equate to criminal activity. In addition, as the welfare and dignity of boxers is paramount, the BBA should be charged with the maintenance of a centralised database of medical and statistical information pertaining to individual boxers, encompassing the creation of an international clearing house for the ranking of fighters and the registration of their medical records.

3. Greater medical controls and research

Although the medical controls and facilities now provided at all BBBC sanctioned events – consequent to the Michael Watson debacle^{xvi} – have improved immensely, it is contended that strict medical controls, based largely on the model provided by the governing authority of the amateur sport – the AIBA – will have to be introduced into the professional game.^{xvii}

All professional boxers should be required to undergo a thorough annual physical examination. The examination should include: a HIV test, a retina examination, a CAT or MRI brain scan and electrophysiological or neuropsychological testing. Evidence of cognitive brain abnormalities in a boxer should lead to a review of that boxer's licence to fight; evidence of chronic brain abnormalities should lead to a revocation of that license. Failure to undergo the examination should lead to a bar from participation in licensed fights. The licensing of ringside physicians, referees, coaches and 'seconds', in particular so-called 'cut men', who carry out minor acute injury repairs to fighters between rounds, should be

standardised. Only certified officials should be granted a license to supply their services. Properly trained skilful boxers, monitored and assessed after each round by paramedic-standard officials trained to identify distress in participants, would add enormously to the safety standards of all boxing matches.^{xviii}

A boxer who loses a contest following a knockout should undergo immediate and comprehensive neurological and neuropsychological examination. The boxer should be suspended from competition until the symptoms of acute traumatic brain injury abate. In order to assist future medical research on this topic, the governing authorities of the professional sport should request that a boxing injury report form be maintained on every above-examined boxer. It is noted that the collection of information and data on the incidences of brain injuries in boxers is crucial to the development and implementation of effective injury protection strategies.^{xix}

Finally, the AIBA has comprehensive requirements on all of the above, which the professional code should adopt in full. One of the more interesting AIBA requirements that should be considered is the regulation(s) that permits the ringside physician on their own initiative to stop the fight on the grounds that a (weakening) boxer is receiving undue and unnecessary punishment. In the professional code, the referee has the sole authority to stop the fight; the ringside physician can only request its stoppage.^{xx} Greater powers of intervention should be granted by the professional boxing authorities to the ringside medical official.

4. Passports

The professional sport operates by means of a licensing regime – a boxer must obtain a license from the relevant administrative body in order to box professionally. The current requirements that a boxer must fulfil in order to obtain a license are generally and inappropriately of little import. It is strongly suggested that under the proposed BBA-scheme every professional boxer will have to have a ‘fight passport’, which would have to be presented by the individual boxer prior to every professional fight.

The passport, as an officially sanctioned document (which could be in electronic form) could record, and where appropriate update, the fight and medical histories of the boxer in question. An interesting reform, which might be monitored through the fighter’s passport, is that a limit might have to be set on the number of fights that a professional can undertake during a year or possibly throughout their career. It is submitted that that curtailment, which a professional boxer might consider an unreasonable restraint of trade, is necessary and justifiable because the injuries inflicted in boxing are potentially and cumulatively catastrophic in nature.

5. Education and personal development

Early career professional boxers should undergo mandatory educational courses highlighting the likely career earnings of professional boxers and the very low percentage of fighters who ever reach the level of lucrative title fights. It is envisaged that these programmes would include advice and information ranging from boxers’ personal health, diet, physical and mental preparation to financial advice on issues such as tax, insurance, savings and pensions. Participation in this (continuing) programme could be certified in the fighter’s passport.

6. Informed consent

It is argued that all persons participating in boxing should be fully informed of its associated health risks, in particular the risk of brain injury. A license to participate in a boxing match should be extended only to those boxers who have given an informed consent to do so. The British Medical Association has suggested that boxers should sign a form of informed consent similar to that given to patients prior to major brain surgery.^{xxi} The proposal should be implemented and individual boxers’ acknowledgement and acceptance of the risks of participation in boxing could be recorded formally in their passports.

It must be remembered that the general view is that the validity of consent does not depend on the form in which it is given. Written consent merely serves as evidence of consent: if the elements of voluntariness, appropriate information and capacity have not been satisfied, a signature on a form will not make the consent valid.^{xxii} Accordingly, it is important that an individual boxer’s informed consent (under point six of the reform plan) takes place in the context of point five of this plan of reform i.e., in the context of a dedicated, educational and personal development programme.

7. Revision of rules

A review of the medical literature reveals that amateur boxing’s safety record is commendable. Although further research is needed, it is clear that brain injuries and deaths attributable to that sport have fallen continuously in the last decade. The following were contributory factors to that (admirable) decrease: the abridged duration of an amateur bout; the mandatory use of helmets; uniform weight classifications and the introduction of a less subjective computerised scoring system.

Professional boxing will have to consider the reduction of championship title fights from twelve to ten rounds. Although the wearing of head protection in amateur boxing has been demonstrated to have a limited impact in protecting boxers against serious, cumulative brain injury, they are of some effectiveness

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in protecting against acute injuries.^{xxiii} The wearing of headgear should be mandatory in all professional boxing matches and all activities relating to the sparring and training of boxers. Similarly, clear weight classifications should be re-established in professional boxing in order to avoid the dangerous practice of fighters moving up or down divisions. At present, approximately seventeen separate weight divisions operate in professional boxing. Strict control of fighters' weight requirements is a key preventative medical issue. Fighters weakened by an attempt to maintain the required weight, or fluctuating between divisions, are most susceptible to dehydration and injury hence the need for tight controls.

Arguably, the advent of computerised judging in amateur bouts, wherein five judges must button-enter their scores, has promoted 'clean' and technical fighting to the detriment of certain dangerous and negative tactics. The electronic method is held to be less subjective than the manual system that prevails in professional boxing.^{xxiv} An interesting aspect of the computerised system is that unlike the manual system it is cumulative in nature in that points accrue on a round-by-round basis. If a boxer falls fifteen to twenty points (the number can vary slightly depending on the round in question) behind his opponent the judges have the authority to advise the referee to stop the bout and save the outclassed boxer further punishment. In contrast, under the manual system a boxer even if outclassed and clearly down on individual rounds scored, may continue to withstand punishment in the hope of landing a knockout blow late into the fight. Professional boxing's history is littered with such 'comebacks' with the hero withstanding a ferocious battering but managing to 'slug it out' until the final round when he lands a knockout blow. Catastrophic boxing injuries to the brain are suffered frequently near the end of fights when boxers are at their most exhausted and vulnerable. The computerised scoring system militates against this practice and should be utilised in the adjudication of all professional fights.

8. A ban on blows to the head

Participation in boxing can lead to brain injury. The most efficient means of winning a boxing match, both at the amateur and professional level, is to knock out one's opponent. Concussive injuries – acute brain injuries – can cumulatively lead to the development of chronic brain injury and sometimes to dementia pugilistica. A ban on punches above the shoulder has been advocated.^{xxv} It would reduce the level of risk associated with boxing to an acceptable level. Undoubtedly, the boxing fraternity would object strongly to such a move.^{xxvi} However, it must be noted that the rules of boxing have continuously evolved over the centuries.

Historically, boxing has, usually as a result of external pressures, eliminated practices thought central to the popularity of the sport. The sport has, for example, prohibited wrestling, gouging, spiking and low blows despite claims by its support base that such rule changes would contribute to a degenerative 'emasculat[i]on' of the sport.^{xxvii}

On the other hand by succumbing to the regulatory scheme suggested by this chapter, boxing will already have had to consider a number of significant rule changes including the reduction of championship title fights from twelve to ten rounds; the introduction of computerised judging; the delegation of greater powers of intervention to the ringside medical staff in ascertaining whether to permit a fighter to continue; the introduction of clear weight classifications and the mandatory wearing of headgear. The above-suggested rule changes should be given priority. At this point in time, it is argued that the banning of blows above the shoulder would irreparably alter the nature of boxing and would equate to its abolition.

9. A ban on underage boxing

Competitive participation in boxing should not be permitted for those under the age of sixteen. The concentration at underage level should be on non-contact skills such as shadow boxing, exercises with the punch bag and a gradual introduction into the ethos and discipline of the sport.^{xxviii}

10. Financial and contractual transparency

All contractual arrangements in boxing should be transparent and subject to strict and regular audits. A particular effort should be made to eliminate unconscionable contractual practices in the professional boxing industry including 'options' clauses in professional boxing contracts and conflicts of interest between managers and promoters. Independent and subsidised legal advice should be provided by the BBA for the assistance of fighters in contractual negotiations.

11. Promoters

The licensing of promoters, in particular, should be predicated on a strict financial disclosure regime. Overall, any administrative or structural reforms of the professional boxing industry in any jurisdiction will have to address the oppressive dominance that boxing promoters, epitomised by Don King, exert in the modern sport. Of critical importance would be the requirement that promoters provide and underwrite the costs of 'their' fighters' medical and insurance costs. It is argued that that requirement alone would be hugely significant. On licensing a promoter, the governing authority should also request that a percentage of the

promoter's annual profits be dedicated to fund future medical research into the development of effective injury prevention strategies in boxing.

12. A bill of rights for boxers

A bill of rights for professional boxers should be considered including insurance, pension and union membership provisions.

Conclusion

The BBA-administered reforms suggested in this article would not solve all of the problems in professional boxing in the United Kingdom. Even the most advanced statutory regulation will not prevent all boxing-related injuries and deaths. Moreover, the reforms in question, and in particular the strict licensing, safety and financial disclosure regime, would initially impact severely upon certain elements of the contemporary boxing fraternity. For example, 'journeymen' professional boxers would find it more difficult to obtain a license to fight and the more unscrupulous of promoters and managers would be found out. Nevertheless, it is not unreasonable to conclude that the promulgation of strict health and safety standards and potential criminal liability would mitigate the occurrence of unnecessary loss of life or serious injury and would gradually work to the benefit of the sport as a whole.

In addition, it must be noted that increased health precautions and provisions such as contractual transparency, pension and insurance schemes might actually boost participation levels in the professional sport. It might even transpire that a sport operating on a credible statutory basis would become a more attractive marketable proposition for the major TV networks, who would undoubtedly be interested in a system whereby the proposed (federal) United States Boxing Administration and its counterpart in the UK decided to independently rank fighters and sanction their own 'world champions'.

Finally, it remains unlikely however that boxing's current and precarious legal status will see an individual boxer or the sport become subject to a prosecution. The criminal law alone is too blunt an instrument by which to proscribe the sport. A prosecution, for example on the grounds of assault, against the individual participants and/or those who aid and abet a boxing event would simply scapegoat the individuals concerned. Nevertheless, boxing should not draw too much comfort from that reticence. Recently, foxhunting, despite having a tradition that is as established as any sport and a socio-economic base far more advantaged than that of boxing's, has just been banned in England and Wales. The hurt suffered by foxes is not televised,

nor do they die in front of a baying crowd. Sometimes boxers do and the next time a high profile injury or death occurs, will boxing be able to withstand the focus groups, the abolitionists and the medical associations? In that instance, boxing's long history, its popularity, its financial robustness, its traditional immunities and assumptions even the eloquence of the many writers who are drawn to it, may not be sufficient to deter the calls for its outright proscription. Sport's 'sweet science' needs critically to consider radical reform.

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Sports Law Foreign Update

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The Foreign Update of the Sport and Law Journal monitors developments in the field of sports law abroad, in accordance with the following structure:

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1. General

Conferences, meetings, lectures, courses, etc.

Sport and the Law conference in the Netherlands

On 15/12/2004, the major Dutch publishing house Kluwer sponsored a conference on Sport and the Law in the Amsterdam Arena. Leading speakers were P. Kalbfleisch, F.C. Kollen, M. M. Kroone, J.D. Loorbach and Prof. H. T. Van Staveren.

Obituaries

Max Schmeling

In early February, this former world boxing champion died in Germany at the age of 99. He became the reluctant centre of political controversy in 1938, when he was pitted against the World Champion Joe Louis in a rematch following the German's defeat of the "Brown Bomber" two years earlier. With Hitlerism and the attendant theories about the Master Race firmly established as the political orthodoxy in his native land, Mr. Schmeling was championed not only as a sporting figure fighting for the world title, but also as a scion of Aryan racial superiority. Conversely, Joe Louis was cast in the role of a boxer fighting for the free world. When the German – who at the age of 33 was well past his best – succumbed to a first-round defeat at the hands of Louis, the radio link with Germany was cut as he was being counted out.¹ He further incurred the Führer's displeasure by refusing to join the Nazi party and defying Hitler's order to dismiss his Jewish-American trainer, Joe Jacobs. He also refused to divorce his Czech wife, Anny Ondra, and sheltered two Jewish boys in his Berlin flat during Kristallnacht, when the Nazis instigated public violence against German Jews.² As a result, he became the only top German sporting figure to be drafted into the Wehrmacht, and was wounded in the 1941 battle for Crete. He later expressed his satisfaction at losing the Louis bout, since that would have earned him a medal from the Nazis.³

Jimmy Fitzgerald

The respected Irish racing trainer and former jockey, who died in October 2004 at the age of 69, had an unfortunate brush with legal controversy when, in the course of a BBC investigation into allegations of corruption in racing – related at the time in these columns⁴ – he became involved in a confrontation with a reporter from the investigative programme Panorama. The reporter having accused him of receiving "no lose" betting accounts from a bookmaker (which would have meant that he would not have to pay up on losers in return for passing information), Mr. Fitzgerald denied

the charge in a less than dignified manner, in full view of the television camera. It was an unfortunate end to a career of considerable achievement.⁵

Oscar Heisserer

Another top sporting figure who showed considerable bravery and integrity in defying Nazi power was this captain of the French national football team, who has died aged 90. A native of Alsace, which had oscillated between France and Germany during the previous century, Mr. Heisserer began and ended his career with Racing Strasbourg. He had enlisted in the French army at the outbreak of World War II, returning to his native region after its defeat. Shortly afterwards he was forcibly taken to the local SS headquarters, who attempted to pressurise him into joining the SS. He refused on the grounds that only the previous day he had captained the French national team. He also resisted pressure from the German national team manager to play for Germany. He nevertheless kept his place in the French national side.⁶

Jerzy Pawlowski

The Polish champion fencer, who has passed away aged 72, was raised in Warsaw where he studied law during the war years. During his time in the Polish army, he perfected his latent talent with the sabre, and was to earn several World Championship and Olympic medals for his country in this medium. Towards the end of his sporting career, he became involved in a bizarre spying imbroglio. In August 1975, he was arrested and charged with activities on behalf of a foreign country. Although brief arrest notices were published in the Polish newspapers, both the specific crime and the country for which he was alleged to be working remained unclear throughout the three-month period in which he awaited trial. One leading Western newspaper, however, printed the rumour that he had been spying for France.⁷

Eventually, during his trial, he faced charges that he had been in the pay of the US Central Intelligence Agency (CIA) for 11 years. He initially faced the death penalty, but was ultimately issued with a 25-year jail sentence, the suspension of his civil rights for 10 years and the forfeiture of his entire property. He served 10 years in jail, after which he was exchanged – along with over 20 other Western spies – for four agents from the Eastern bloc, on the Glienicke Bridge between West and East Berlin. Mr. Pawlowski refused to make the crossing, on the grounds that he was a Polish patriot. It was then arranged for him to be allowed his freedom in his native land.⁸

In the early 1980s, however, there appeared a book authored by a leading sports writer⁹ in which it was claimed that Pawlowski had in fact been requested by the Polish Government to spy on his country's behalf, and

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was then accused of spying for the enemy as a reprisal for his refusal. The former fencing champion continued to protest his innocence until, in response to his passionate speeches, the Polish Government released the case file. This stated that Mr. Pawlowski had become an enemy spy only after informing in the service of the state. As such, he had reported on his team-mates until 1962, when his superiors, disenchanted by his cupidity, decided to dispense with his services. Regardless of the truth or otherwise of these statements, they scuppered the former sporting hero's ability to portray himself as an anti-Soviet folk hero. Pawlowski later published a book assuring the Polish people that he had only been motivated by a desire to seem them freed from tyranny.¹⁰

Gunder Hagg

The Swedish middle-distance runner, who in 1945 set a world record of 4 min 1.4 sec for the mile which stood for nine years until Britain's Roger Bannister ran his famous four-minute mile, has died at the age of 85. In 1946, he and his compatriot and rival, Arne Andersson, were both disqualified for life by the Swedish athletics federation for accepting expenses payments from promoters, through which they were deemed to have breached the amateur code. This effectively ended his career in athletics.¹¹

Lawyers in sport

[None]

Digest of other sports law journals

Recent editions of *Zeitschrift für Sport und Recht*¹²

The fifth edition of this German sister journal for the year 2004 commemorates the 65th birthday of Prof. Udo Steiner, one of the foremost writers on sports law in Germany who has fostered its development since the early 1980s. First, the author Gerritt Manssen provides an introduction to, and commentary on, the "German Football Constitution" (Grundgesetz für Fußballdeutschland), which was elaborated and brought to public attention by Prof. Steiner. Then Christoph Gröpl makes a number of observations on the broadcasting of major footballing events. More particularly he examines the constitutional aspects of broadcasting rights relating to major events, which raises issues of professional freedom, restrictions on the choice of profession and the rules relating to performance of the citizen's profession on the one hand, and the right to information and the entertainment and communication interests of the general public on the other hand.

In "Leisure tax and Sunday rest" (Vergnügungssteuer

und Sonntagsruhe), Peter Tettinger examines the legal framework surrounding football as it has evolved through the ages in the light of the Law on Local Taxation (Kommunale Abgabengesetz) of 1893, and in the light of the various restrictions placed on the playing of football by the decisions of the Prussian Supreme Administrative Court. In her paper on "Sport and Taxation", Monika Jachmann in the first instance concerns herself with the issues arising from the charitable status of sporting associations and the policy statements contained in the various commissions for reform and in the Tenth Report on Sporting Activity of the Federal Government, then proceeds to examine the reasons which could justify the charitable status of sport, taking into account the various aspects which the promotion of sport takes. The limits on the charitable status of sport are finally examined in the light of various public policy objectives, and the author reaches the conclusion that the traditional place occupied by sport among the various charitable objectives is entirely justified.

In an extensive contribution on doping in sport, the author Klaus Vieweg examines the fundamental question whether measures combating this evil should take the form of public anti-doping legislation or self-regulation. On the basis of an extensive set of questions relating to the pros and cons of public anti-doping legislation, the author examines the recommendations made by a major study entitled "Legal Comparison and the Harmonisation of Doping Rules". "The role of the courts in securing an internal market for sports instructors" is the title of a paper by the author Rudolf Streinz. On the basis of the duty incumbent on the European Court of Justice to safeguard basic Community freedoms on the one hand, and the fundamental freedoms owed to the member states on the other hand, the author examines the effectiveness of the restrictions placed on sporting instructors, more particularly those in the field of snowboarding, imposed by various member states, in the light of the relevant EU directive of the Council dating from 1992. He concerns himself extensively with the precedence taken by Community law over the rules of French, Italian and Austrian law which are contrary to this legislation. In so doing, he makes the proposal that, in the event of obvious infringements of these rules by the member states, the principle of state liability under EU law (i.e. the Francovich doctrine) should be applied.

Another contribution by Gerrit Manssen is entitled "Sporting installations and planning law". Under this heading, he makes an exhaustive examination of the current Regulation on restricting Sound from Sporting Installations (Sportanlagenlärmschutzverordnung) in the light of the dual effect of the noise protection regulation and planning law, and the recent case law on this subject by the administrative courts.

1. General

Sport and international relations

Cricketing links with Zimbabwe continue to cause ructions

Relations between the sporting world and the country of Zimbabwe under its current regime have been the subject-matter of much debate and controversy, much of it with serious financial implications, for a number of years, and have covered copious amounts of print in previous editions of this Journal. More particularly the extent to which cricketing nations should engage on the sporting field with representatives of this regime has been the focal point of world attention in recent times.

When this column last reported on this issue,¹³ the England and Wales Cricket Board (ECB) seemed to be resigned to meeting their commitment to play five one-day internationals against Zimbabwe as part of their tour of Southern Africa in the winter of 2004-5. Previously, during the 2003 World Cup, the Board had refused to play Zimbabwe in the early rounds of the competition, with dire financial and diplomatic consequences, which seems to have been the decisive factor in this matter. The way was left open, however, for individual players to opt out of the tour, although initially the ECB did not expect any dissidents.¹⁴ In addition, there were two provisos still capable of causing the project to be abandoned, which were that (a) it should be safe and secure for the tour to take place, and (b) there was no firm instruction by the Government to the contrary. The hapless UK Sports Minister Richard Caborn, indicated that, although the Government would have preferred that the tour be cancelled, the decision ultimately lay with the ECB. This left the security angle as the only one which could still scupper the entire plan.¹⁵

It soon appeared, however, that the ECB were quite determined to allow the tour to go ahead. First, there came the news that England's players would not be allowed to meet Zimbabwean protest groups before deciding whether or not to make themselves available for the tour – in sharp contrast to the move made by erstwhile England captain Nasser Hussain, who had instructed his players to find out everything they could about the Mugabe regime before the relevant World Cup fixture.¹⁶ This was in response to a letter received by the ECB from the Zimbabwe Defence and Aid Fund UK, which related allegations of police torture administered to those who protested against matches played in Zimbabwe during the World Cup. No doubt the ECB had become increasingly concerned at growing concern among various England players about the moral aspects of the tour, and indeed a few days later Andrew Flintoff and Steven Harmison, key members of the England squad, announced their intention to inform the selectors that they did not wish to take part, whereas others were said to have serious misgivings.¹⁷

In the meantime, another potential reason for cancelling the tour emerged in the shape of an inquiry into racism in Zimbabwean cricket, which had been prompted by a boycott staged by leading members of the national squad as a result of a complaint made by their captain Heath Streak, against the Zimbabwe Cricket Union (ZCU).¹⁸ More particularly, it was alleged that the national team were being selected by the ZCU on racial lines rather than on merit. However, it soon appeared that this was unlikely to give anyone an escape clause.¹⁹ The hearing itself took place in a tense atmosphere in the Zimbabwean capital. The investigating panel took the unprecedented step of allowing players to give evidence behind closed doors, after the rebel players refused to appear in front of certain members of the ZCU Board, on the grounds that it was unsafe for them to do so.²⁰ However, the ZCU objected to this and threatened to withdraw from the inquiry if these Board members were denied access to the hearing.²¹

As a result of this imbroglio, the hearing was abandoned, and it was decided that the International Cricket Conference (ICC) would make their findings known on the basis of written submissions made by the ZCU and the Zimbabwe rebel players.²² In the event, the ICC panel, consisting of India's Solicitor-General, Goolam Vahnavati, and Steven Majiedt, a South African High Court judge, produced a 73-page report which officially cleared the ZCU of the racism charges.²³ In fact, the panel turned the heat on the rebels, in particular Heath Streak, criticising the former captain for the letter which he had written in which he gave the ZCU Board the ultimatum that, if his demands were not met, he would resign. The panel took the view that Mr. Streak's action gave the Board no option but to dismiss his demands and accept his resignation.²⁴

This left the security angle as the only possible medium for preventing the tour from going ahead. In late October, Richard Bevan, the Chief Executive of the Professional Cricketers' Association (PCA), visited Zimbabwe together with John Carr, the ECB director of operations, in order to make an assessment of the security surrounding the England tour.²⁵ At first, it looked as though this might indeed be a serious consideration, Mr. Bevan having been reported to have found "significant political tension" in two of the cities in which the fixtures were to be held. This caused him to entertain fears for the safety not only of the players, but also of the fans, the media, and even British citizens living in Zimbabwe.²⁶

In this regard, the key issue appeared to be the response by opposition parties to England's presence during the tour. Had the opponents of the Mugabe regime indicated an intention to use the visit as a focal point for demonstrations, the inspection team would

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have been bound to report this to the ICC. However, this was thought to be unlikely because (a) the main opposition leader, Morgan Tsvangiri, had a charge of treason hanging over him, which would discourage his supporters from causing trouble at the games, and (b) the tour was not to be televised by Sky in England, which would deprive any demonstrations of their intended publicity value. Accordingly, the two officials ultimately reported to the ECB that there was no reason for the tour not to take place.²⁷ They reported that the Zimbabwean authorities and the British embassy had given certain assurances on the security aspect, and that if these undertakings were to be breached, this would leave the England players the option of withdrawing.²⁸

It thus appeared that this tour, which by now was being increasingly regarded as an embarrassment for all concerned, would definitely go ahead. However, this being international cricket, further twists in the tale could not be ruled out, and this appeared to be the case when, on the day of the England party's departure for the tour, their captain, Michael Vaughan, suggested that his team could yet refuse to fulfil their commitments if the team or any of its members received any threatening letters of the type which were sent to former captain Nasser Hussain, and which finally convinced the latter that England should not take part in the 2003 World Cup fixture in Harare. The letter in question had threatened to return the England squad back to Britain in wooden coffins, and even threatened reprisals against players' families in England.²⁹

Obviously the controversy surrounding the tour was not going to subside once the visiting party had reached Zimbabwe. Henry Olonga, the former Zimbabwe bowler who paid dearly for his visible opposition to the Zimbabwean regime,³⁰ added his voice to fears expressed by the opposition Movement for Democratic Change (MDC) where it anticipated that President Mugabe would use the England tour in order to present a picture of normality in the troubled African state, and that the tour could place opponents of the regime at risk.³¹ Mr. Olonga reminded the world that there were many issues at stake which were wider than cricket:

"There are human rights abuses, the lack of an impartial judiciary, the collapse of the health system in the face of the HIV Aids epidemic, the collapse of law and order, the targeting of political opponents: all these are or more concern than cricket. But by playing there is every chance that groups opposed to the Government may protest, and suffer the wrath of a government that is totally intolerant of opposition. I cannot censure cricketers for visiting my country, but it would have been better if they had not toured."³²

To add fuel to the fire, with days to go before the first

one-day international, the news broke that 13 cricket correspondents from Britain had been banned from the country by the Mugabe regime. Any suggestion that this might once again place the tour in jeopardy were quickly dismissed by the ECB, its Chairman, David Morgan, arguing that this circumstance did not constitute a force majeure which would enable the tour to be cancelled.³³ No doubt the ECB were once again mindful of the financial consequences of any decision to withdraw. However, there were other highly-placed personalities in the sport who gave vent to their opinion that the time had come to take a firm stand with the Mugabe regime.³⁴ The England players appeared to share these sentiments, since they promptly cancelled their flight to Zimbabwe from Johannesburg. The ECB Chairman, David Morgan, had already flown to Harare and spent the day with the British Ambassador in an attempt to have the media ban overturned – to no avail. The Zimbabwean Information Ministry had issued a statement explaining the ban on the basis that bona fide media had been given clearance, whereas those which were "political" had not.³⁵

The ECB then approached the ICC, asking whether the media ban constituted a breach of the latter's Future Tours programme. They were told that this would not be the case, but also that, should England decide to pull out of the tour as a result, the rest of the cricketing world were likely to support them. This would mean that the ECB would not be hit with any fine or compensation claim. The ZCU would have to convince at least five Test-playing nations that the ECB had withdrawn from the tour without an adequate reason, and the prevailing feeling was that this threshold would not be reached.³⁶ This appeared to blow a large hole in the oft-repeated defence put forward by the ECB that withdrawing from the tour was not feasible on financial grounds.

Ultimately, accreditation was granted to the 13 banned journalists, and the England party duly made their way to Harare, but the delay incurred in Johannesburg meant that the first of the scheduled international fixtures could not be played. At first, the ZCU requested that the ECB should allow them to rearrange the schedule so that five fixtures could still take place. However, this proved something which David Morgan was unwilling to do.³⁷ As a result, Zimbabwean cricket stood to lose money, not only because of the cancelled fixture, but because the truncated schedule would also affect advertising revenue and sales of tickets for the remaining matches. Morgan, however, disclaimed any ECB liability for such losses, blaming them directly on the delay incurred in granting accreditation to the media referred to above.³⁸ Fortunately for the ECB, the ICC Future Tours Programme only insists on a minimum of three one-day internationals to take place on any tour.³⁹

All these woes, which were added to a tour already

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laden with controversy from the outset, appeared to have hardened the England cricketing authorities' stand on cricketing relations with Zimbabwe. The very next day, the news broke that the ECB were planning to offer the Zimbabwean cricket board compensation rather than make another tour of the country whilst President Mugabe was in power, and that they would immediately withdraw from the impending four one-day matches if the Zimbabwean leader or any members of his Government attended the games. The latter stance would be fully justified on the basis that, before the tour commenced, one of the undertakings made by Zimbabwe was that no attempt would be made to politicise the tour, which would be broken merely by Mr. Mugabe's presence. It was also announced that the team would also withdraw if members of the media suffered harassment or if any spectators attempting peaceful demonstrations inside or outside the ground were arrested.⁴⁰

Any hopes that the political overtones of the tour would diminish were dashed by the events which followed the first international, which was one fairly easily by the visitors. England batsmen Ian Bell made an impressive 75 as his contribution towards the win, and afterwards was asked at a press conference what his impression of Harare was. He replied:

"I didn't know what to expect in Zimbabwe and I have been pleasantly surprised. We are very comfortable at the moment, being treated very well and can get down and play some cricket."⁴¹

This statement was presented in The Herald, a state-backed newspaper, under the headline "England players appreciate Zim" as the main article on its inside back page, with the opening sentence reading;

"One by one the England cricket players are beginning to queue to give their approval to the tour to this country."⁴²

The article also lifted quotes from a column authored by England fast bowler Simon Jones in which he praised Zimbabwean cricket's hospitality by saying that "nothing was too much" for the England party's hosts. Thus the players' words were presented in a manner which conveyed the impression that any controversy surrounding the tour was misplaced. This caused ECB communications manager Andrew Walpole to protest at this attempt to "politicise" what was essentially "a bit of sightseeing".⁴³ It did nothing to dispel the suspicion that the England team's presence was helpful to the ruling ZANU/PF party.

Further evidence that the tour had entered the political arena appeared to come when Opposition leader Morgan Tsvangari, attacked England's decision to go ahead with the tour in a speech held in Brussels. England manager Duncan Fletcher, speaking for the first

time since returning to the country of his birth, was very guarded in his comments when prompted by the media, but claimed that the politicisation of the tour had affected the players.⁴⁴

The controversy surrounding the tour then took on an internal dimension, when it transpired that the Zimbabwean game could be faced with its second player rebellion of the year. Leading newspapers carried reports of unrest among the host nation's players after it was revealed that players from the influential Takashinga club were being compelled to yield 10% of their match fees to the club, apparently to ensure their continued selection for the national and provincial teams. Letters written by the players to the Zimbabwean cricket authorities, and to the national coach, former West Indies batsman Phil Simmons, alleged that three of the club's administrators, including the club chairman and national selector Stephen Mangongo, demanded that all players, from the junior level upwards, should give up part of their match fee. The paper also claimed that one player had received a death threat for complaining about the alleged extortion.⁴⁵

The controversy deepened when the Takashinga club claimed that the money was being used to fund their development programmes, but the Zimbabwe cricketing authorities disputed this, alleging that all development is centrally funded. There was further bad news for the host team when it was reported that Zimbabwe Cricket (ZC – as the Zimbabwe Cricket Union had in the meantime been rebranded) were considering punishing the players for their poor performances in the one-day internationals, by demanding the return of sponsored cars and even by installing a boot camp prior to matches.⁴⁶ Obviously such plans were not likely to improve morale among the squad members.

However, once the tour had ended to the relief of all, it appeared that the Zimbabwe cricket authorities were beginning to appreciate the full measure of the damage which had been caused during the previous three years over which they presided. In early January, they held an emergency meeting to discuss ways of attracting rebel cricketers back to the national game. However, even here it seemed impossible to steer a course away from controversy, when it transpired that ZC had invited the country's provinces to talks on this issue, but had decided to exclude Mashonaland, which provides 80% of the nation's leading players.⁴⁷ The province in question requested its lawyers to challenge the validity of that decision. The imbroglio appeared to stem from the fact that the elected chairman of the Mashonaland Cricket Association, Clement Mandenge, as well as most of Zimbabwe's top players, wanted the national board to resign or agree to a special general meeting aimed at electing new board members. The latter would then reform Zimbabwe Cricket's constitution and

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replace the administrators, including Ozias Bvute, the recently-appointed managing director. Mr. Bvute had been at the centre of the disagreement which gave rise to the white cricketers' rebellion referred to earlier.⁴⁸

Israel's minority communities struggle to make their mark in international football

In a previous edition of this Journal,⁴⁹ it was reported that Palestine, a state without an official territory and at the centre of the international conflicts which constantly disrupt peace in the Middle East, had succeeded in gaining entry to the early stages of the football World Cup, thus providing a ray of hope for this tormented region. However, life has been far from easy for this the youngest of footballing nations, which was admitted to world governing body FIFA in 1998. Thus when, in early September, they were due to play a World Cup qualifying match against Uzbekistan, five of their players were barred by the Israeli authorities from crossing the border of the Gaza Strip at Rafah, thus weakening a team which already has very slender resources.⁵⁰ This apparently was the result of a number of suicide bombings which took place in the Israeli town of Beersheba the previous month.

Later that month, another marginalized Israeli community was attempting to leave its mark on international football. Sakhnin is a small town perched on the Galilee hills of Northern Israel, which is home to 24,000 Israeli Arabs. These are Palestinians who remained when the state of Israel was established in 1948, and now have Israeli nationality. Earlier last season, its football team, Bnei Sakhnin, defied all the odds by winning the State Cup of Israel. As such, the team qualified for the UEFA Cup, and were drawn to play Newcastle United in the first round. However, the town does not have a stadium of its own, and its matches are played in Tel Aviv, the nearest major centre. This is a source of major frustration to that community, since it means that the visiting fans are denied an opportunity to witness the poverty and dispossession affecting this community.⁵¹

When the team won the trophy, there was excited talk of this win helping to foster co-existence between Arabs and Jews in Israel. However, this optimism has largely evaporated among the townspeople, for whom the main event of that week was not so much the impending European fixture as the mass demonstrations held across various Arab towns in Israel to protest at the inequalities which beset the country's 1.2 million Arabs. After the sensational Cup win referred to, the Israeli government had pledged £600,000 aimed at building a modest stadium. This sum never materialised, even though in the meantime a new offer of more than double that amount had been pledged by the authorities.

Sponsorship by Israeli firms is minimal. In addition, the team and its supporters face continuous hostility from many sections of the Israeli public and some of its politicians. Former transport minister Avigdor Lieberman was reported to have said, in the aftermath of Sakhnin's Cup victory, that if it were left to him, the team would not only be banned from the Israeli competition but also banished to the West Bank. Opposition fans are even less sophisticated in their approach and often greet the team with cries of "Death to the Arabs" and chants against the prophet Mohammad. Clearly, much more will need to be done if football is to play the healing role so eagerly expected of it after that unexpected win.⁵²

Sport and the tsunami disaster

On 26 December, the entire world looked on in speechless horror as television screens were filled with pictures of one of the major catastrophes to be visited upon this earth, in the shape of the tsunami disaster which ravaged various South Asian nations. Naturally, the sporting communities of that part of the world have been seriously affected by this disaster. At the same time, it has brought into focus the more humane side of an activity sometimes reviled for its cupidity and ruthlessness, as witness the help and support which has been forthcoming from the representatives of various sports in order to help relieve the suffering.

One of the countries most seriously affected was Sri Lanka, thousands of whose citizens perished in the disaster. The material damage caused was also enormous, and one of the victims was the attractive cricket ground at Galle, which has hosted many of the country's Test matches and internationals, reduced to ruins by the force of the wave which overwhelmed it on that fatal day. It is estimated that it will take at least two years to rebuild.⁵³ The MCC has in the meantime pledged an immediate £25,000 towards the cost of reconstruction.⁵⁴ However, any such considerations took second place to the more pressing needs of assisting with the relief effort. At the time, the Sri Lankan cricketers were engaged in a tour of New Zealand. Within days of the disaster, it was decided that the tour should be postponed as the players of the visiting side indicated a desire to return home and assist the victims of the disaster⁵⁵. (The tour was later rescheduled to take place in April 2005.)⁵⁶

On their return home, many of the players hastened down to the coast in order to assist in any way they could. Their most celebrated player, spin bowler Muttiah Muralitharan, who had missed the tour because of injury, had already made his way there and immediately made his presence felt. He called up doctors from Australia, including the surgeon who had operated on his troubled shoulder, and arranged the arrival of five relief trucks as an instant response to a request.⁵⁷

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However, as an ambassador of the World Food Programme, established by the United Nations, he was greatly concerned that the corruption which is a major blight on his country would impair the relief programme. He took charge of major parts of the operation, brushing aside petty bureaucracy and distrust between the country's volatile ethnic communities. He also persuaded WFP officials to draft in independent volunteers to monitor food distribution to help limit the opportunity for local officials to "line their pockets".⁵⁸

Another welcome gesture by the cricketing fraternity took the form of a one-day fixture between a World XI and an Asian XI in Melbourne aimed at raising money for the disaster appeal. The World team was captained by Australian batsman Ricky Ponting, with Shane Warne coming out of limited-overs retirement for the occasion.⁵⁹ However, other areas of sport have also made their contribution. Thus Germany's national football team played an all-star Bundesliga international side at Schalke 04's ground in Gelsenkirchen in order to raise relief funds.⁶⁰

Cricket continues to heal wounds between India and Pakistan

In an earlier edition of this Journal,⁶¹ this column reported that India and Pakistan had decided to resume cricketing relations as part of the process of restoring peaceful relations between the two nations, which had been soured by various disputes, the most salient being the status of the Indian state of Kashmir. Thus it was that in March 2005, a series commenced between the two sides which comprised three test matches and six one-day internationals.⁶² The wider significance of this event was obviously not lost on the countries' leaders, with Pakistan's president Musharraf even dropping heavy hints for a ticket at the first Test in Mumbai.⁶³ One of the many positive aspects of this renewal of cricketing relations was the fact that thousands of visas were issued by the Indian authorities to Pakistani followers of their team, thus enabling a further breakdown in mutual distrust and acrimony.⁶⁴

Japan v. North Korea football fixture passes off peacefully and may heal wounds of history

Another sporting contest between representatives of two Asian nations which was heavy with political overtones was the World Cup qualifying fixture between Japan and North Korea, held in Tokyo in February 2005. Historical animosity aside, the game could not have come at a more sensitive time diplomatically. In addition to voicing concern about North Korea's nuclear weapons programme, Tokyo was demanding details of the fate of eight Japanese nationals whom North Korea had admitted it abducted during the Cold War. Japan was on the verge of imposing

sanctions after discovering that a set of returned ashes, which were alleged to be those of a 13-year-old girl of whom Pyongyang had admitted that she had been abducted in 1978, were not in fact hers. The Japanese authorities had also received a petition signed by five million people demanding punitive steps against the Communist state. The latter responded that it would regard the imposition of sanctions as an act of war.⁶⁵

As a result, security for this game, in a country without any history of football violence whatsoever, was of the kind normally reserved for visits by some of the more notorious English hordes of football "fans". Around 3,500 security personnel were on duty and strict segregation between the fans was enforced.⁶⁶ In the event, however, the match took place without any trouble, in spite of the boos with which the home supporters greeted the arrival of the away team. There were no reports of violence, and the presence of Japan's fanatical right wing, which had been the most vociferous advocates of the sanctions referred to above, was restricted to some elderly, bearded men chanting tired old slogans outside the stadium.⁶⁷

Bosnia v Serbia match heavy with significance, but passes off peacefully

Another region with a particularly troubled history, especially in recent years, is the Balkans, with memories still fresh of the atrocities committed during the Yugoslav wars in the 1990s. These reached their lowest point with the siege of the Bosnian capital Sarajevo by ethnic Serbs which lasted for over three years and caused many fatalities. It was obvious that any fixture between Bosnia and Serbia would arouse many unpleasant memories and reactions, particularly if it were to be staged in Sarajevo itself, which is precisely what was scheduled to happen in early October 2004 as part of a World Cup qualifying group. Trouble was anticipated during the build-up and aftermath, particularly as this is not uncommon in Balkan football. Here too, an enormous security operation was mounted, including closing all the city centre bars and cafes and having entire streets blocked off.⁶⁸ In the event, however, the fixture was not marred by much trouble.

Other issues

Dissertation prize in sport and the law organised in the Netherlands

In February 2005, the Netherlands Association for Sport and the Law (Vereniging voor Sport en Recht) launched its annual competition for the most significant academic dissertation on the subject of sports law. The prize is worth €1,000.⁶⁹

2. Criminal Law

Corruption in sport

German football corruption scandal

Even at the best of times, the world of football has seldom been in a position to be complacent about its probity. Although the majority of its practitioners may doubtless lay claim to the highest levels of integrity, a sleazy undercurrent of corruption has always gnawed away at the game's foundations at various times of its history, from the match-fixing scandals in England of the 1960s to the shenanigans which have attended the manner in which certain officials in the game's controlling bodies have acquired and subsequently held onto power. It now seems that the blight of corruption has once again started to fester at the professional end of the game, and more particularly in German football.

The first reports of such dubious proceedings surfaced in mid-December 2004, when it was reported that the German football federation (Deutsche Fußballbund) had commenced an urgent investigation into the question whether a relatively unimportant second division fixture may have been fixed, after the discovery of an abnormally high incidence betting in countries which included Britain, where no fewer than £500,000 was staked in all on the outcome of the match.⁷⁰

The game in question was between Erzgebirge Aue and Rot-Weiss Oberhausen, which the home side won 2-0, but on the basis of two extremely dubious goals.⁷¹ In the eighth minute, the home defender Tony Tiekü headed the ball unchallenged into his own net, whereas early in the second half another Oberhausen player conceded a penalty by pulling an opponent's shirt in full view of the referee.⁷²

The Oberhausen president at first reacted with fury to any suggestion of match-fixing, and for a while it did seem as though this may have been at best an unfortunate coincidence, at worst an isolated incident without wider repercussions or associations. (Indeed, when Oberhausen applied to the public prosecutor's department (Staatsanwaltschaft) of Duisburg to start an investigation, this was turned down on the grounds that investigators had "little to go on"⁷³.) Any such illusions, however, had to be abandoned when, just over a month later, a referee who had been suspected of fixing a different game (a cup tie), suddenly resigned. Robert Hoyzer had been under scrutiny of the German football authorities following the first-round fixture in which third division team Paderborn overhauled a 2-0 deficit to defeat leading Bundesliga club Hamburg 4-2. During the first half, Hoyzer had dismissed Hamburg striker Emile Mpenza for insulting him, and awarded two penalties to the third-division side.⁷⁴ This caused the governing body to announce that it was looking into five other matches refereed by Mr. Hoyzer in which match-fixing was suspected.⁷⁵

In a bizarre sequence of events, Hoyzer at first issued a statement through his lawyers that he had been summoned to the initial investigation under false pretenses and unduly pressurised into signing a statement in order to avoid any further disadvantage to himself. He even went so far as to describing the relevant DFB hearing as an "execution".⁷⁶ The very next day, however, his lawyers released another statement in which the former referee admitted that the allegations of match-fixing made against him had in essence been true.⁷⁷ Sepp Blatter, President of world governing body FIFA, expressed his concern not only that the referee in question had infringed all the standards expected of referees, but also that his actions went undetected for such a long period.⁷⁸

Inevitably, the German media started to investigate Mr. Hoyzer's background and actions during the period leading up to his resignation. Rumours began to spread that he was linked to shadowy Croatian mafia figures who acted as front men for him in Berlin, placing sizeable wagers on matches to be refereed by him, thus earning him more than €1 million in successful bets. The tabloid BZ claimed that Hoyzer often met his underworld contacts in Café King. The newspaper also claimed that, in October 2004, Hoyzer had also sought to manipulate the outcome of a fixture between Essen and Cologne by persuading the linesman, Felix Zwayer, to fall in with his match-fixing plans, but the latter refused.⁷⁹ It was after Hoyzer tried to persuade him a second time that Mr. Zwayer became thoroughly alarmed and notified a respected senior referee of Hoyzer's machinations. As other match officials also became suspicious of his actions, the DFB Board of Control was alerted.⁸⁰

The Hoyzer affair also aroused the interest of the German police, particularly after Hoyzer agreed to act as key witness for the public prosecuting authorities – clearly hoping for some leniency in return. This meant that he was in a position to give information on others involved in the scandal, including not only other referees but also players. First, four people were arrested after police raids were held in Berlin.⁸¹ A few days later police raided houses across Germany as they widened the probe into the scandal to cover three more referees, including one from the top division, as well as 14 players.⁸² One particular raid focused on First Division referee Jürgen Jansen, alleged to have fixed a result between Kaiserslautern and FC Freiburg in November. The possible involvement of a Bundesliga referee in the scandal seemed to mark a turning point, since up to that point football officials had insisted that the scandal was limited to Second Division clubs or lower (though why this should in any way diminish the force of the scandal is unclear to the present author). The police also raided the Café King (see above), seizing property and assets, mostly luxury cars.⁸³

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The German football authorities, concerned not only by the intrinsic nature of the scandal but also by its potential for adversely affecting the 2006 World Cup, to be held in Germany, also started their own inquiry and announced that it would ban for life any referee found to have fixed matches. It also announced plans to ban anyone involved in football from betting, and to put into place an early warning system aimed at identifying irregular gambling patterns.⁸⁴ Later that month, it was also announced that Hamburg were to receive £1.3 million, as well as being allowed to host an international friendly, by way of compensation for the Cup defeat against Paderborn which had sparked off the Hoyzer affair. As a result, Hamburg agreed to abandon their appeal to be reinstated in the cup competition.⁸⁵

Finally, Mr. Hoyzer's attempts to ingratiate himself with the prosecuting authorities appeared to have backfired when he was himself arrested after prosecutors questioned him about new evidence which suggested that he had knowledge of attempts to fix matches prior to those which he had confessed to fixing the previous year.⁸⁶ He was held on eight counts of suspected organised fraud, and the latest information was that a Berlin magistrate dismissed a request to release him from custody.⁸⁷ At the same time, the Board of Control of the DFB recommended that he be issued with a €50,000 fine and a lifetime ban. In addition, referee Torsten Koop was suspended by the DFB for failing to inform the German federation until the previous week that he Hoyzer had told him about his match-fixing activities.⁸⁸ In March, the DFB announced that it was to drop its case against the coach and players of Paderborn for accepting money from a Croatian gambling gang if they agreed to pay a fine to charity.⁸⁹

It is clear that this affair will have further repercussions, including the outcome of the prosecution brought against Mr. Hoyzer. As ever, this column will continue to monitor future developments with the keenest of interest.

The Panionios affair

Unfortunately, allegations of match-fixing have not been restricted to the above German scandal. In early December 2004, betting patterns described as "the most suspicious ever in football" prompted the European governing body in the sport, UEFA, to commence an investigation into a UEFA Cup match. In the course of the fixture concerned, between Panionios of Greece and Georgian side Dinamo Tbilisi, the home side overcame a 1-0 deficit at half time to win 5-2. Bookmakers in various European countries, including Britain, suspended betting before kick-off after what gambling sources described as a "huge gamble" on "unlikely permutations". In other words, punters were gambling hundreds of thousands of pounds at least,

predicting the outcome that Panionios would first fall behind but then easily overhaul their deficit.⁹⁰

One of the most extreme cases of peculiar betting patterns was noted on the betting exchange Betfair. On this site alone, some £375,000 were wagered, which was over five times the amount which would normally be expected of this type of match. In addition, £14,000 were specifically staked on the Greek side losing at half time but rallying after 90 minutes. Even more remarkably, whoever wagered that sum did so at odds of little more than 4-1, whereas that type of gamble would normally be priced at 33-1. Those placing this bet were so certain that it would win that they appeared unconcerned at its poor value. The European governing body immediately announced that it intended to gather the necessary information from a number of sources and take appropriate action⁹¹. Officials from the Greek club denied any claims of impropriety in relation to the outcome of this fixture.⁹² The Greek public prosecuting authorities, however, ordered an investigation into the match.⁹³

The outcome of this case was not yet known at the time of writing. However, UEFA, concerned at the rise in allegations of match-fixing in Europe, took a number of preventative measures. Thus it signed an agreement with Betfair which would enable it to consult the online bookmaker's records. Thus UEFA will be able to request Betfair for the betting records of individual bettors if it suspects foul play. Likewise, Betfair will alert the authorities where it notices any unusual betting patterns or a flood of money on a particular result. In order to comply with the (British) Data Protection Act, all Betfair customers will be advised that their details may be transmitted to UEFA and other governing bodies in the event of suspicious betting patterns. This "memorandum of understanding" concluded with UEFA is the tenth such agreement signed with governing bodies throughout the world. However, the UEFA agreement is regarded as one of the more significant ones because of the increase in match-fixing allegations of late.⁹⁴

Australia threatens British ban over Betfair⁹⁵

The name Betfair has arisen on a few occasions in this section of this column. Whilst thus far there has been nothing to suggest that this internet betting firm has engaged in anything remotely unlawful, there are some doubts in certain sporting circles about the effect its operations have on the probity of their sport. This aspect was very much in evidence when, in October 2004, Greg Nichols, the Chief Executive of the British Horseracing Board (BHB), reacted to a threat by the Australian Racing Board to ban British-trained horses from next year's Melbourne and Caulfield Cups and the Cox plate unless the British-based betting exchange was banned from the country.

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The Australians allege that betting exchanges constitute a threat to the integrity of the sport. Mr. Nicholls, however, denounced this threat in the following terms:

“The inference that British racing is rife with corruption is a suggestion which I utterly repudiate. Betting exchanges present opportunities and threats to horseracing, but it is outrageous to impugn British racing’s integrity to advance an Australian agenda”⁹⁶

Implicit in Mr. Nicholls’s observations may be the fear that the amount wagered on betting exchanges reduces the amount which is bet through the Australian state-owned betting system.

Cricket corruption scandal – an update

Following the troubled years in which the world of cricket was racked by a succession of serious corruption scandals, the various measures taken by the sport’s governing authorities, including the establishment of the Anti-Corruption Unit (ACU), seem to have produced much of the desired effect. However, this does not mean that cricket has become an entirely corruption-free zone. This particularly the case in Asian cricket, where much of the betting fixes which distorted some major fixtures in previous years emanated.

It was for this reason that the Pakistan tour of India, so welcome in terms of healing historically-inflicted wounds between the two countries (see above), was viewed with some trepidation, not only by cricket’s controlling bodies, but also by the host nation’s public authorities. Accordingly, the latter set in motion a number of measures aimed at preventing any illegal betting activity. This policy was principally aimed at the port city of Mumbai, which has been identified as the leader in cricket’s underworld; it is there that the various odds are set and adhered to in other betting centres such as Karachi, Dubai, Delhi and even London. The city’s police force is currently directed by A.N. Roy, a new arrival with a reputation for zero-tolerance policing. He would not reveal how many preventative arrests would be made for this purpose (as had happened during the 2003 World Cup and the 2004 India tour of Pakistan).⁹⁷

It would seem that the tough stance taken by Asian police authorities is also producing an effect on the betting underworld, which is becoming increasingly conscious of the intensity of police monitoring – if not always that which is intended. One anti-corruption official confided to a leading British newspaper that those who set and manage the odds in cricket betting were simply becoming harder to track down, and had developed such techniques as moving around in a van or car with a laptop in order to evade detection.⁹⁸

Inevitably, some of the ghosts of cricket’s inglorious past in the area of corruption continue to haunt the

game at inopportune moments. Thus in early November, Stephen Fleming, the New Zealand captain, claimed he was offered £200,000 during the 1999 World Cup, held in England, to join a match-fixing syndicate.⁹⁹

In a book which he published in early November 2004, called *Balance of Power*, Mr. Fleming claims that he was approached by an associate of the alleged Indian bookmaker, Sanjeev Chawla, who informed him of the money-making possibilities which existed with a syndicate which spanned the entire world and which speculated on the likelihood of certain results or occurrences. He added that he turned down the offer and informed the management of his national team, as well as giving evidence later to detectives from Scotland Yard. Six months later, England’s all-rounder Chris Lewis made similar claims.¹⁰⁰

These ghosts of malpractices past also from time to time keep revisiting South African cricket, in view of the prominent part played by some of its international representatives in this affair. It may be recalled from the pages of this Journal¹⁰¹ that, in late 2000, Test batsmen Herschelle Gibbs and Henry Williams were found guilty by the relevant disciplinary body of having accepted offers of £10,000 for underperforming in a one-day international in India earlier that year. Gibbs was banned for six months as a result. This affair returned to haunt him when the South African team were due to perform a tour India in November 2004, for which he was naturally selected in view of his current batting form.

Shortly before the tour was scheduled to commence, police in New Delhi sent a list of questions to the United Cricket Board of South Africa (UCBSA), requesting that Mr. Gibbs should provide appropriate answers. The UCBSA indicated that they were willing to co-operate with any official enquiry, but Gibbs himself was more reluctant. He claimed that the questions set were very similar to those which he answered at the time of the relevant enquiry. His lawyers also issued a statement in which they claimed that this renewed interest in the affair amounted to an unwarranted cross-examination. Accordingly, he decided to make himself unavailable for the tour.¹⁰²

Crackdown on corruption in Chinese football

All is definitely not well in Chinese football. Having once cherished ambitions to become a world force in the game, China has found it a struggle just qualifying for the final stages of the 2006 World Cup. In addition, since the introduction of professional football 10 years ago, the game has been plagued with allegations of mismanagement and corruption. According to an online survey conducted by Chinese state television recently, fans believe that more than half of the First Division games played in the course of 2003 were fixed, and indicated that they were boycotting live matches by way of silent protest. Matters also came to

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a head some months later when the coach of top side Beijing Hyundai took his players off the pitch after the award of a penalty to their opponents. Following the inevitable disciplinary sanctions which followed, the coach in question, Yang Zuwu, responded with a public tirade in which he claimed that certain clubs, players, coaches and even referees were involved in gambling on matches, and other misdemeanours. He was supported in these comments by a wealthy industrialist, Xu Ming, chairman of the Dalian Shide club.¹⁰³

After a further incident involving a questionable refereeing decision, seven of the 12 leading teams insisted that the Chinese Football Association (CFA) should publish its balance sheet for the past 10 years in order to settle the allegations of match-fixing – failing which they would refuse to play in any further matches. The CFA cautiously agreed to make public its financial records for 2004, but nothing for the previous 10 years. However, a commission was established in order to consider ways of cleaning up the domestic game. This saga had come to grip a nation angered by widespread government corruption in all fields.¹⁰⁴

Depardieu in football match attendance admission

In early November 2004, Gérard Depardieu, France's most successful film actor for many years, reportedly informed police that he had been paid the equivalent of £20,000 to attend a football match by an Algerian business tycoon whose empire collapsed later and was on the run from the police. In the latest development in a "cash-for-friendship" scandal which also embarrassed another French screen idol, Cathérine Deneuve, Mr. Depardieu admitted that Abdelmoumen Rafik Khalifa once paid him to watch top team Marseille play against an Algerian side. On that occasion, Mr. Depardieu had described the businessman as the "saviour of modern Algeria" and had earlier denied taking any money for his appearance at that event. He also admitted that later, he had become aware that there were "problems" with the Khalifa group.¹⁰⁵

Ms. Deneuve has also admitted that she was paid money to attend the same fixture. Mr. Khalifa is wanted by police in Algeria for fraud and money laundering after his business empire, which included pharmaceuticals companies, a bank, an airline, a luxury limousine rental firm, and various media interests, collapsed in April 2003. In France, criminal investigations have started into the participation of a number of prominent people in Mr. Khalifa's dealings. Although taking money to appear at football matches is not illegal in France, Depardieu and Deneuve could face charges of benefiting from the embezzlement of corporate funds or fraudulent bankruptcy. They may also have to explain themselves to the tax authorities.¹⁰⁶

Paris bid officials face corruption investigation

Paris may, at the time of writing, be one of the hot favourites to win the bid for the 2012 Olympic Games (see below), but if the French capital is successful in this endeavour it will be in spite of a number of allegations of corruption which have recently been levelled against certain prominent members of the bid team and could lead to prosecutions. Investigations have started into the conduct of Guy Drut, a member of the French International Olympic Committee and former sprinter, and Jean-Paul Huchon, president of the Paris Council, as well as Christian Bimes, President of the French Olympic Committee. As ill luck (?) would have it, the allegations were made at the time when the Olympic evaluation commission was making its exploratory visit to Paris.¹⁰⁷

More particularly, Mr. Drut is featured in an investigation into allegations of accepting £3 billion by way of backhanders from companies associated with building contracts for the renovation of Paris schools. Drut, who was sports minister at the time, is accused of being a beneficiary of the fraud. Mr. Huchon was questioned by police on an unrelated allegation. As for Mr. Bimes, his home was raided by fraud officers following a complaint lodged by five members of the French tennis federation, of which he used to be the President.¹⁰⁸

As these allegations surfaced just before this issue went to press, there are no further details available at the moment.

Israeli football referees jailed for bribery

In mid-December 2004, two Israeli referees were issued with six-month jail sentences after having been found guilty of accepting bribes in order to fix matches. Meir Amsili and Uri Biton were found guilty by a court in Tel Aviv of receiving £835 each to fix the result of various league and cup fixtures. According to prosecutors, various incidents were staged during matches which took place between 1997 and 2000, including the award of penalties and the showing of yellow and red cards.¹⁰⁹

Hooliganism and related issues

Crackdown on AS Roma after referee attack

Italian football has for some years now experienced problems with those who profess to follow the game but are in fact intent on causing trouble. This aspect of the game was unfortunately in evidence once again at an early stage of the 2004-5 season, when their European Champions league match with Dynamo Kiev had to be abandoned at half time after the referee, Anders Frisk, was struck by an object thrown from the crowd. The incident saw the Swedish match official sink to his knees with blood pouring from a wound in

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the middle of his forehead after having been hit with what appeared to be a cigarette lighter, which was hurled from the crowd at the Stadio Olimpico.¹¹⁰

Moments earlier, Mr. Frisk had dismissed Roma's defender Philippe Mexes from the field for kicking out at Kiev striker Maris Verpakovskis. At the time, the Italian side were trailing 1-0. The referee required medical attention and, following a 40-minute delay, it was announced that the match was to be abandoned as the safety of the referee and his assistants could no longer be guaranteed. Television pictures showed a bearded spectator in a black T-shirt hurling an object towards the match official, although it was unclear whether this was actually the object which caused the injury.¹¹¹

This affair was naturally heavy with disciplinary consequences, and as a result of a UEFA hearing held a few days later Dynamo were awarded a 3-0 win over Roma. The Italian side were also ordered to play their next two home European fixtures behind closed doors, i.e. those against Bayern Leverkusen and Real Madrid.¹¹²

Hooliganism mars Ferencvaros v Millwall tie

Hungarian football has thus far not been noted for attracting a particularly violent following. However, its reputation was severely tarnished in early October when English side Millwall visited the Hungarian capital for a UEFA Cup tie. Trouble already flared before the match, and one man was stabbed in the course of scuffles in the city centre before kick-off between home and visiting supporters.¹¹³ There was also trouble inside the stadium, with missiles being thrown during the match and Millwall's black players, Paul Ifill and Mark McCammon, being subjected to racist chants. The Millwall chairman, Theo Paphitis, claimed that he and other visiting officials were unable to leave their seats during the game because of the extra police who were called in to protect them, and that a wide variety of missiles were thrown.¹¹⁴

However, the skirmishes outside the stadium also resulted in a number of Britons being arrested, two of whom were issued with suspended sentences and expelled from the country after having been found guilty of disorderly conduct and criminal damage.¹¹⁵

Other footballing incidents (all months quoted refer to 2005, unless stated otherwise)

London. On the occasion of FC Porto's visit to English Premiership side Chelsea in September 2004, visiting fans spat at former Porto and current Chelsea manager Jose Mourinho. A Portuguese newspaper later reported that those responsible included a man who allegedly threatened to kill Mr. Mourinho if he won the previous summer's European Cup final against Monaco. He apparently feared that if Porto emerged victorious from the final, Mourinho would be lured away to another team.¹¹⁶

China. Following a series of violent incidents which have attended leading football fixtures in this country, the Chinese authorities have proposed new penalties for hooliganism, including imprisonment and stadium bans. Fans found guilty of violent and/or illegal acts would be held for up to five days and face maximum fines of 200 yuan.¹¹⁷

Further incidents of cricket hooliganism

Although never reaching the same heights of folly as have been in evidence in the world of football, hooliganism at cricket matches has experienced an unfortunate rise in recent years, as has been reported in successive issues of this Journal. This unpleasant aspect of the game was once again in evidence in Wellington, New Zealand, in late February 2005 on the occasion of a one-day international against Australia. Missile throwing twice caused play to be halted during the visiting side's ten-run victory. This was followed by calls for greater security from Australia's captain, Ricky Ponting.¹¹⁸

There was also a disturbing note during England tour of South Africa in the winter of 2004-5, when it was learned that a South African advertising company proposed to feature members of England's "Barmy Army" in one of its slots. Some commentators saw this as giving unwelcome encouragement to this group of "fans" who have arguably disgraced virtually every Test ground in the world with their yobbish behaviour.¹¹⁹

Golf tournament marred by spectator unruliness

Golf is also a sport which, although normally associated with the less disruptive followers of sporting activity, has recently attracted the attentions of undesirable spectators. Some years ago, unruly scenes disgraced the Ryder Cup match in the US, and it was the latter country which once again was featured in a recent incident involving English golfer Paul Casey as he was competing in the Ford Championship in Miami, which took place in March 2003.

Two marshals had to be assigned to Mr. Casey for all 18 holes after he was subjected to lengthy heckling during the event. The heckler emerged during the third round, then reappeared later when Mr. Casey and his fellow competitor, Australian Scott Hend, were on the 13th tee. Because the incident occurred at the far end of the course, and there was no security personnel nearby, the players had to wait for more than 10 minutes for officials to arrive at the scene and apprehend the offender, who was later ejected from the course. The heckler shouted messages such as "Shank it up the trees – you won't catch Phil (Mickelson), he's American, you're not".¹²⁰

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“On-field” crime

Nine players banned after “basketbrawl” (US)

A serious incident took place during a top basketball fixture between Detroit Pistons and Indiana Pacers in mid-November 2004. Visiting players Ron Artest, Jermaine O’Neal and Stephen Jackson charged into the courtside seats to fight with Piston fans after Artest had been hit on the head by a cup of ice hurled by a spectator. As the fight took place in the stands, other Indiana players were showered with food and drink and even a chair thrown from the crowd. The fight, which left several spectators requiring hospital treatment, has been described as the ugliest brawl in the history of US sport. The match was abandoned.¹²¹

Disciplinary retribution from the game’s authorities was prompt, with the National Basketball Association banning nine players from both teams involved for a total of 143 games. Worst hit was Mr. Artest, who was banned for the remainder of the season. All suspensions are without pay.¹²² Two months later, five Pacers players appeared in court on assault charges resulting from the incident. They were later released on bail.¹²³

Golfer Ballesteros accused of assault

Spanish golfing star Seve Ballesteros has always been a mixture of the charismatic and the volatile, and it was the latter aspect which was allegedly to the forefront when the PGA European Tour officials were called upon to investigate an incident in which he allegedly assaulted a competitor at the Spanish Amateur Championships, held in Pedrena in late October 2004. The player involved was Jose Maria Zamora, a plus handicap golfer who is at the same time a full-time tournament official on the professional circuit. This incident may have its origins in a slow-play warning issued to by Mr. Zamora to the former US Masters winner a few years ago.¹²⁴

Mr. Ballesteros later eluded a possible suspension from the European tour after issuing an apology to Mr. Zamora.¹²⁵

Test umpires receive death threats (SA)

The Test matches between South Africa and England played during the winter of 2004-5 turned out to be an exciting and skillful series. However, it also revealed a darker side when, the week after the series ended, it emerged that umpires Steve Bucknor and Aleem Dar had received death threats on the final day of the fifth test at the Supersport Park, Centurion. At the conclusion of the match, Mr. Bucknor, international cricket’s senior and most respected umpire, was informed that a telephone call had been received by the Chief Executive’s office at the ground during the last day, and

that the caller had threatened to kill both umpires. Mr Dar returned home immediately, but Mr. Bucknor had to remain in South Africa as he was due to officiate during the subsequent one-day series. He was given extra police protection for the next few days.¹²⁶

The threat may or may not have been serious, but in a country which has an endemic gun culture, and at a ground where the previous week a 24-year-old man was shot dead returning to his car after enjoying a day out at the cricket, it was advisable not to take any chances.¹²⁷

Journalist involved in Olympic doping story assaulted

The saga of Greek athletes Costas Kenteris and Katerina Thanou is an element which soured an otherwise triumphant outcome of the Athens Olympics for the host nation, and is extensively reported on elsewhere in this Journal (below, p. 000). It also appears to have spawned a series of other issues which may have even more sinister overtones, and which came to the fore in October 2004. It was then that an investigative journalist who had become a key witness in the scandal was stabbed and beaten with crowbars in what his editor described as an “assassination attempt”. The journalist in question, Filippos Sirigos, had testified that the sprinters in question had staged a motor cycle accident in order to avoid a drug test on the eve of the Athens Games. The assault, which happened as Mr. Sirigos left a radio station, has provoked a storm of protest, with the Greek Prime Minister, Costas Karamanlis, describing it as an attack on freedom of expression and journalistic investigation.¹²⁸

The assailants, who had disguised themselves beneath motorcycle helmets, ambushed the journalist, who is the sports editor of the newspaper Eleftherotypia, after he had finished presenting his regular radio show. He was stabbed several times and battered. Police also reported that gas canisters and a bottle of petrol had also been sent to the home of the newspaper’s owner. Christos Tegopoulos. The timing increased suspicion that the attack on Mr. Sirigos was intended to intimidate or even eliminate a key witness in the scandal.¹²⁹

The substantive issues involved in this continuing story are adumbrated below (p. 000).

Korean skating coaches resign over beating allegations

In November 2004, it was learned that two South Korean speed skating coaches had resigned after an investigation was launched into allegations made by several leading female skaters that they were subjected to violent attacks during training. More particularly they accused coaches of making their lives intolerable by beating them and prohibiting them from using mobile telephones or

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contacting male athletes. The skaters then stormed out of the training camp in protest at the abuse, causing the Korean Skating Union to disband the world-class squad.¹³⁰

Accusations of brutality by coaches are no novelty in South Korea. During the Athens Olympics, a judo coach was suspended for striking a female judoka.¹³¹

Baseball player arrested on battery charges

In mid-September 2004, it was learned that Frank Francisco, who plays for Texas Rangers, was arrested on a charge of aggravated battery after he threw a chair into the seats and hit two spectators on the head during a tie with Oakland Athletics. One of the spectators in question broke her nose.¹³² No further details are available at the time of writing.

Security issues

Bomb scare causes abandonment of Real Madrid match

There was mass confusion at the Bernabeu stadium, home to Spanish champions Real Madrid, in mid-December 2004 when a bomb scare forced the abandonment of a match between the home side and Real Sociedad. With the scores level at 1-1, a message was received that a bomb was set to explode at 9pm local time, and the stadium had to be evacuated after 88 minutes.¹³³ It was later decided to play the six remaining minutes of the fixture at a later date.¹³⁴

Australian hockey squad withdraw from Lahore fixture on security grounds

In mid-October 2004, the Olympic hockey champions Australia withdrew from the Champions' Trophy match in Lahore, Pakistan, because of security concerns.¹³⁵ The previous week a suicide bomber had killed four people at a mosque in the city.¹³⁶

Indian Test venue affected by security concerns

In February 2005, the Indian cricketing authorities decided not to use Ahmedabad as a test Match venue for the home series against Pakistan after the visitors raised security concerns. Ahmedabad had witnessed some of the country's worst religious riots in the course of 2002, in the course of which around 2,000 people died.¹³⁷

Two months earlier, the first test between India and Bangladesh had to be postponed by a day after the Indian team's arrival had been delayed because of a threat issued by an Islamic militant group.¹³⁸

British Davis Cup squad in security alert

In late February 2005, the British tennis team were involved in a Davis Cup tie with Israel. Unfortunately, a few days before the fixture was to take place there occurred a suicide bombing in Tel Aviv, which was to host the event. The blast killed four people in the queue for a seafront nightclub just a few miles away from the venue. This raised major security concerns, and the British team members were instructed not to venture out of their hotel during their stay.¹³⁹

"Off-field" crime

Brazilian footballer's mother kidnapped

Brazil has produced a wealth of talented footballers over the ages, which is a reflection of the overwhelming popularity enjoyed by the sport in that country. Unfortunately, such popularity is likely to attract the attentions of some of the less desirable citizens of that country, as witness a spate of kidnappings which have occurred recently and which have involved leading footballers and their families. In fact, the preferred method seems to be to kidnap a relative, leaving it to the player to negotiate his/her return. One of the country's most talented young players, Robinho, experienced this trauma towards the end of the year 2004.

The player's mother, Marina de Silva Souza, was preparing a barbecue with friends in the Praia Grande, a working-class area 45 miles from Sao Paulo, when gunmen burst into her house and bundled her into the boot of her car. The hosts were locked into a bathroom and the kidnappers fled. The car was later found abandoned in Sao Paulo¹⁴⁰. Forty-one days after her dramatic abduction, Mrs. de Souza was freed. Following a week of speculation that her release was imminent, the 43-year-old was ushered into her Santos apartment in a Golf with tinted windows at 13.20 local time. Her head, which had been shaved by the kidnappers, was covered by a cloth. The kidnappers left Dona Marina on a small road in the small Perus neighbourhood. "She wasn't terrified or shaking or anything," said local resident José Pedroso, who helped call for police. She then spent more than two hours in hospital, undergoing blood tests and x-rays, before arriving home. According to doctors she was dehydrated and had lost 4.5 kg.

The case has been shrouded in mystery since police declared a media blackout in November 2004. According to one radio station in São Paulo a ransom was paid, something not confirmed by police. Police have also yet to announce a motive. Rumours had also surfaced in the Brazilian press that Dona Marina's kidnapping was due to a personal vendetta.

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Kobe Bryant case collapses

In an earlier edition of this journal¹⁴¹ it was reported that basketball star Kobe Bryant, who plays for Los Angeles Lakers, had been arrested and charged with sexual assault. The case seemed to proceed with fits and starts ever since, but came to an abrupt end in September 2004 when it was learned that the prosecutors had requested the trial judge to drop the charges.

The case had experienced trouble for several months because of conflicting evidence surrounding an encounter between Mr. Bryant and a young receptionist at a hotel in Colorado. The accuser alleged that Bryant had forced himself on her in his room, thus contradicting the player's assertion that their encounter had been consensual. However, a DNA test had traced hair and semen found in the receptionist's underwear to someone other than Mr. Bryant, which seemed to indicate that she had more than one sexual partner at the time of the alleged assault.¹⁴²

The prosecution had fought hard to keep that evidence out of the courtroom, arguing that the victim's sexual habits and history were her own private affair, and that airing them in court would merely increase her trauma. However, judge Terry Ruckriegle ruled that the usual "rape shield" rules did not apply in this case because any sexual encounters during the period immediately preceding or following the alleged assault were too relevant to ignore. The Colorado Supreme Court refused to hear a prosecution appeal on the rape shield issue.¹⁴³

However, until 1 September it appeared that the case would go ahead regardless. Jury selection had already started, and lawyers on both sides predicted that the trial itself would get under way the following week. New problems arose, however: potential jurors were asked in a questionnaire whether they thought Mr. Bryant was guilty or innocent. So many of them answered either "definitely not guilty" or "probably not guilty" that the prosecution made a special plea to the judge to have every juror falling in these two categories removed from the jury. It is not clear what the judge responded. However, a filing by the defence had in the meantime alleged that a forensics expert consulted by the prosecution had information which undermined the accuser's allegations and the prosecution's case, and corroborated Mr. Bryant's case on several issues – the cause and significance of the accuser's alleged injuries. Accordingly the case was dropped.¹⁴⁴

Lawyers representing the accuser indicated they would continue to pursue a civil case against the basketball star. However, legal experts believed that any civil proceedings had been significantly undermined by the collapse of the criminal case.¹⁴⁵ Later, in fact, it was learned that the eventual lawsuit brought by the alleged victim was resolved out of court – in undisclosed terms.¹⁴⁶

Imran Khan robbed

In October 2004, it was learned that the former Pakistan all rounder and captain, Imran Khan, was robbed by men wielding semi-automatic weapons on the outskirts of Islamabad. Imran, who took up politics following his retirement from cricket, was returning to Islamabad with his two sons and their maid when a car overtook his vehicle and forced him to stop. Two men emerged from bushes and forced the group to hand over mobile phones, credit cards, a camera and a purse. No-one was injured.¹⁴⁷

Football chairman drives car at referee

In mid-November 2004, a first-division football fixture was abandoned in Moldova after a club chairman, angered by a penalty decision, drove his car onto the field and attempted to run over the referee, according to the football federation of that country. The man in question, Mihai Macovei, who chairs the Roso Floreni club, was later fined £1,100.¹⁴⁸

Rugby League star pleads guilty to assault (New Zealand)

In early May 2004, Logan Swann, the New Zealand international, had, whilst in a drunken state, assaulted another man in Queen Street, Auckland, after having earlier joked about his tackling ability. The victim was thrown onto the pavement, with Mr. Swann landing on top, only to be assaulted by two of the rugby man's associates. As a result, he sustained bruising to his chest and head, and his right eye was swollen shut. Before Auckland District Court several months later, Mr. Swann pleaded guilty to the resulting assault charge. He was subsequently "remanded at large" whilst the court considered sentencing options. The ultimate verdict was not known at the time of writing.¹⁴⁹

"Paralympic" star turns out to be former terrorist (Spain)

At the "Paralympic" Games of Athens held in 2004, Spain succeeded in winning a gold medal through Sebastian Rodriguez, a paraplegic swimmer, who added this trophy to an already impressive tally. However, for at least some members of the Spanish public, elation has given way to anger when it was discovered that their latest sporting hero was in fact a convicted terrorist. Rodriguez had lost the use of his legs after engaging in a 432-day hunger strike in 1990. This represented an attempt to persuade the Spanish prison authorities to release members of his violent group, called the First of October Revolutionary Group (Grapo) who were held in the same jail.¹⁵⁰

In 1983, Mr. Rodriguez had taken part in the killing of Rafael Padura, a business leader, as well as in other

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terrorist attacks. He was captured two years later and sentenced to 84 years for his part in the murder of Mr. Padura, who was one of the 75 people killed by the group since 1975. When Rodriguez embarked upon his hunger strike, he instructed his lawyers to resist any attempt to force-feed him. However, they failed in an application to a court aimed at preventing the prison authorities from keeping him alive. Having been released from jail in the mid-1990s, he started to sell tickets for blind and disabled people.¹⁵¹

As a terrorist organisation, Grapo has been relatively restrained in recent years, and most of its leadership were captured in 2002. Rodriguez first took part in the "Paralympics" in Sydney (2000), where he allegedly claimed to have lost the use of his legs in a car accident. On that occasion, he won five gold medals.¹⁵²

Other cases (all months quoted refer to 2004, unless stated otherwise)

Atlanta (US). In mid-October, the star shortstop of the Atlanta Braves (baseball), Rafael Furcal, was sentenced to a jail sentence of 21 days after pleading guilty to his second drink-driving offence. However, the judge ruled that the sentence would not take effect until the Atlanta team were eliminated from the National League Division series.¹⁵³

Uganda. In early October, it was learned that he newly-crowned IBF middleweight champion, Ugandan Kassim Ouma, may never return to his country for fear of being prosecuted as an army deserter. He is wanted for having deserted in 1997.¹⁵⁴

Maryland, US. In November, Michael Phelps, the six-time Olympic swimming champion, was arrested and charged with drunken driving. A trooper had seen Mr. Phelps drive through a Stop sign in Salisbury, Maryland, and noticed signs of intoxication. The swimmer was also charged with violation of a licence restriction and failure to obey a stop sign. (In Maryland, the legal minimum drinking age is 21).¹⁵⁵

Indianapolis, US. In late November, British basketball player Michael Olowokandi spent a night in gaol after police had to use stun guns to subdue him. Mr. Olowokandi, who plays for Minnesota Timberwolves, was arrested after refusing to leave a nightclub in Indianapolis.¹⁵⁶

Finland. In October, the former Olympic Champion, Matti Nykaenen, from Finland, was charged with attempted murder for allegedly stabbing a friend in the course of a drunken brawl. The 59-year-old victim had to be taken to hospital in a serious condition after the

alleged stabbing, by the former star and his wife, who were both taken into custody. Mr. Nykaenen won the first of his four world titles in 1982, and obtained gold and silver at the 1984 Winter Olympics in Sarajevo.¹⁵⁷

Other issues

Posthumous pardon sought for first black heavyweight champion (US)¹⁵⁸

Although it seems difficult to believe to a present-day readership, there was a time when heavyweight boxing was a sport ruled almost exclusively by whites. The first black man to break this stranglehold was Jack Johnson, who won the world title just before World War I. Mr Johnson was a flamboyant personality who flaunted his relationships with white women in an era when many parts of the US still had segregation. In the end, he paid the price for irritating the white establishment by serving a year in jail on what legal experts allege to have been trumped-up charges. In recent years, a group of political and civil rights leaders have combined forces to seek a posthumous presidential pardon for Mr. Johnson.

The boxer's conviction, in 1913, for infringing a vice law was widely regarded as a punishment for his romantic relations with white women. The prosecution followed Johnson's defeat of Jim Jeffries, dubbed "The Great White Hope", in a world championship fight which was the US's first high-profile inter-racial athletic encounter. His victory sparked off a wave of race riots throughout the States, in which many blacks died. Newspapers warned Mr. Johnson and the black community not to be too proud, and the US Congress adopted an Act banning the inter-state carriage of films showing the fight, for fear that pictures of Johnson beating white opposition would lead to further unrest.

The committee seeking pardon for Johnson includes Senators John McCain, Edward Kennedy and Orin Hatch, biographers Geoffrey Ward and Randy Roberts, as well as boxers Sugar Ray Leonard, Bernard Hopkins and John Ruiz. The committee has requested President Bush to pardon Mr. Johnson on the grounds that "his conviction was the result solely of contrived charges reflecting attitudes and mores that America has long since outgrown".

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Media rights agreements

Pakistan tour of India goes ahead in the face of broadcasting rights dispute¹⁵⁹

As is reported elsewhere in this Journal (above, p. 000), the cricket tour of Pakistan in India was an event which had considerable significance outside the sporting arena. However, arrangements for the tour were not entirely free from legal problems, and at a certain point a serious dispute arose as to the television coverage of the tour, which arose between the two main bidders for the broadcasting rights, i.e. Zee Telefilms and ESPN Star.

The tour would have been cancelled had there been no television coverage, which is a requirement set by the International Cricket Council (ICC). An interim ruling by the High Court in Madras held that the Indian cricketing authorities would be permitted to arrange television coverage pending settlement of the dispute referred to above, and that both companies involved would be ruled out of the broadcasting process for the tour. This was in fact the second occasion in fewer than six months that the dispute had threatened a tour in India, since ESPN had challenged Zee's four-year agreement, worth £170 million, with the Indian Board the previous autumn.

Legal issues arising from transfer deals

Compensation clause applies in the event of transfer of amateur footballer. Belgian court decision¹⁶⁰

In this case, a dispute arose concerning the applicability of a clause in a membership agreement associating an amateur footballer to his club, which was invoked when the footballer was transferred to another club. More particularly, an agreement had been concluded between the claimant club and the defendant whereby the latter undertook to defend the claimant's colours during the 2001-2 season. That agreement contained a clause to the effect that, in the event of the player breaching the agreement, he was to pay the sum of Bfrs 50,000 to the club. Before that season commenced, the player wished to join a different club, and wrote to his original club a letter to this effect. In this communication, he also informed the club that the agreement which contained the compensation clause no longer applied.

In support of this contention, he relied upon the Decree of 24/7/1996 relating to the status of the non-professional sporting performer. Section 3(1) of this Decree states that the amateur sporting performer has the right annually to terminate the agreement between himself and his professional association. Section 3(2) prohibits the payment of any compensation, whatever

form this may take, to the association in question if the membership agreement is lawfully terminated as a result of the performer being transferred to a different association. Moreover, this provision has the status of public policy (*openbare orde*) and cannot therefore be departed from by mutual agreement.

The District Court (*Vredegerecht*) of Westerlo dismissed this argument. It held that the prohibition of compensation only applied in the event of the lawful termination of the membership agreement. The agreement terminated in this case did not constitute a membership agreement, since, according to the aforementioned letter issued by the defendant, the latter remained a member of the claimant club. Accordingly, the disputed agreement became an ordinary agreement governed by the general rules of contract law, and Article 3(2) of the Decree therefore did not apply.

The Court added that, even if it were accepted that the letter issued by the defendant constituted a lawful termination of the membership agreement, the termination of the agreement in question would be null and void, since Article 3(1) of the Decree states that such termination must occur between 1 and 30 June by means of a registered letter. It was possible for these dates to be departed from for individual sporting activities by means of a Ministerial Decree, which did indeed happen in the case of football through a Decree of 22/6/2000. The latter provided that the registered communication in question should be communicated between 1 and 30 April of each year. However, the letter in question had been sent on 28 March, i.e. before the official deadline of 1 April.

As a result, the prohibition contained in Section 3(2) was not relevant to the instant case, and the compensation clause contained in the disputed agreement applied.

Employment law

NHL season cancelled because of industrial dispute (US)

It is perhaps difficult to imagine that, in England, the entire Premiership programme for a season could be abandoned in its entirety because of a pay dispute. But that is exactly what has occurred with one of the most cherished sporting programmes across the Atlantic, i.e. the National Hockey League. The origin of the trouble concerns the desire of the team owners to impose a salary cap, a contingency which the players' association had steadfastly refused. The dispute reflects deep-seated financial difficulties besetting the sport. The league claimed that, the previous season, teams lost a total of £119 million, whilst an economic assessment commissioned by them

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concluded that the players' wages accounted for 75 per cent of revenues – a figure which had been challenged by the players' representatives.¹⁶¹

The 2004-5 season was to have commenced in October of last year, and finished the following April. The deadlock between the two sides had caused a lockout from the theoretical start of the season. By mid-December, the two sides appeared to have moved to a certain extent to close the chasm between them, in that, with an announcement on the cancellation of the entire season imminent, the players' association finally agreed to the principle of a salary cap – although they still disagreed on the form which the team owners wanted this cap to take. The league for its part, stepped back from demands that revenues should be linked to expenditure on players. However, the sides were still too far apart for a definitive settlement, since the players had offered to accept a salary cap of \$52 million per team, whereas the owners sought a \$40 million limit.¹⁶²

In the end, the death-knell of this year's programme was sounded in mid-February when Gary Bettman, the NHL Commissioner, officially announced that what remained of the 2004-5 season was to be cancelled, making the NHL the first league in the history of US professional sports to lose an entire season because of a labour dispute. The announcement came two hours after the expiry of a deadline imposed by the League for reaching a deal with the players' union. It had made a final offer of raising the cap to \$42.5 million, but the union indicated they were not prepared to go any lower than \$49 million. The loss of the season meant that the Stanley Cup, the oldest prize in US professional sport, would not be awarded for the first time since 1919, when an influenza epidemic forced cancellation.¹⁶³ The entire episode has cast doubts on the very future of the sport, at least in the US. In Canada, where ice hockey is a national passion, the sport could recover from this setback, but there are grave doubts whether the US big cities, where ice hockey is a relative newcomer, will be so forgiving.¹⁶⁴

International cricket racked by industrial disputes

Over the past few years, a number of disputes have upset the smooth operation of international cricket. Two years ago, a major dispute over sponsorship contracts between the world's players and the International Cricket Council almost disrupted the 2003 World Cup, as was reported in these columns at the time.¹⁶⁵ Since then, other disagreements have surfaced, involving notably the West Indian and Australian national sides.

The teams representing the West Indies on the cricket field have not had their most successful period recently, having been soundly beaten by every major power in the game over the past few seasons. To these

woes have now been added those of a dispute over sponsorship rights and personal endorsements, which has involved the most senior of its Test players.

In late November 2004, the news broke that Brian Lara, the captain, as well as other established West Indies players, had been barred from playing in an impending tournament against Australia and Pakistan after refusing to sign a contract concerning sponsorship and personal endorsements. The dispute centred on the players having individual endorsement deals with Cable and Wireless, a competitor of Digicel, which had just signed a multi-million dollar sponsorship deal with the West Indies Cricket Board (WICB). The players' association argued that West Indies cricketers were not paid on the basis of retainers, and made most of their income from advertising. If they signed the contract, they risked losing their image rights to the WICB.¹⁶⁶

Mediation, which involved the Grenada Prime Minister Keith Mitchell, provided a temporary respite in the dispute, and the leading players concerned were able to compete in the triangular series in question. However, the fundamental issues of the dispute had not been resolved, and so the disagreement rumbled on for the next few months, and came to a head with another series imminent – this time in the Caribbean against South Africa and Pakistan. The seven players in question – Lara, Sarwan, Gayle, Bravo, Smith, Edwards and Rampaul, were requested by the WICB to provide details of their personal contracts in order to avoid conflict with the Board's arrangement with Digicel, which is worth £20 million to West Indian cricket. The players declined so to do, and as a result, the selectors decided to drop all seven for the series.¹⁶⁷

Naturally, this bode extremely ill for the success of the team, and immediately attempts were set in motion to resolve the crisis. The next day, a compromise was put forwards whereby the WICB could buy the players out of their contracts with Cable and Wireless.¹⁶⁸ At the time of writing, no solution had as yet been found, although there were optimistic noises that this might be the case before the forthcoming series got under way.¹⁶⁹

Australian cricket has also had its disagreements over payments at the top level. During the run-up to their home Test series with Pakistan, which commenced in December 2004, a dispute arose over the basis of the players' remuneration. Cricket Australia, the national controlling body, wanted this to shift away from the agreed percentage of the organisation's income, i.e. around 25 per cent of the entire revenue gained from television rights and ticket sales. This proposal was met with rigorous opposition from the players, led by their captain Ricky Ponting.¹⁷⁰ The dispute had not been settled at the time of writing.

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G14 clubs threaten to take FIFA to European Commission over player compensation dispute

The regular reader of this column will doubtless recall that, at various stages over the past few years, the top European football clubs, who have organised themselves into the G14 lobby group, have adopted an increasingly militant stance over the financial implications of their players being called up for international duty. The G14 group is not officially recognised by the world governing body, Fifa, but has considerable influence in Europe. Increasingly, they have been pressing for a share in the revenues from World Cup and European Championship campaigns, in part in order to offset the very high salaries being paid by the clubs to their top players. As was reported in the last issue of this Journal,¹⁷¹ the G14 group lodged, early last year, an official complaint in relation to this matter before the Swiss Office of Fair Trading in Bern, the capital of the country which hosts Fifa's headquarters. That case was still under review at the time of writing. However, since then the group have been actively considering taking their case to the European Commission, which oversees EU competition policy. The general manager of the G14, Thomas Kurth, explained the position in the following terms:

"This is certainly being envisaged. We need to know whether Fifa's regulations comply with the law or not. We don't think they do. If you are a company and your workers walk away to generate revenue for a competitor, is that fair? The success of tournaments like the World Cup is down to those on the field who are paid by their clubs"¹⁷²

Speaking at the European Football Finance conference in London, Mr. Kurth denied that clubs were simply being avaricious and attempting to steal vital income streams away from Fifa's grass-roots development programmes in Third World countries, which benefit enormously from World Cup revenues. He argued that all the G14 clubs wanted was a joint venture instead of the rules on this subject being decided by those who reap all the benefit without assuming any of the risk.¹⁷³

External industrial disputes cause difficulties for major sporting events

Paris. With the International Olympic Committee taking their soundings amongst the cities which have bid for the organisation of the 2012 Games, the last thing the candidates would wish for is a major industrial dispute which causes major disruptions in the smooth operation of the city's public services. But this is precisely the fate which befell Paris in early March 2005. Various strikes and demonstrations were called by the major

trade unions in order to protest at Government plans to alter the 35-hour working week. However, the Chief Executive of the Paris bid, Philippe Baudillon, insisted that the strikes would not affect the visit.¹⁷⁴

Bormio, Italy. In early February 2005, the men's giant slalom event in Bormio, Italy, had to be postponed because of a strike by television workers.¹⁷⁵

Israel. In late September 2004, the UEFA Cup first-round tie between Maccabi Petach Takvi and Dutch side Heerenveen had to be postponed because of a strike by 400,000 Israeli public sector employees, which prevented the visiting side from flying to Israel.¹⁷⁶ It was subsequently decided to play the return fixture in the Netherlands as a single tie.¹⁷⁷

Sporting agencies

Edman wins agent payment dispute

The extent to which sporting agents profit from transfer fees has been the subject of much controversy in recent years, some of it adumbrated in these columns. This issue was once again to the forefront on the occasion of a dispute arising from the recent transfer of Swedish international Erik Edman from Dutch club Heerenveen to English Premiership side Tottenham Hotspur in July 2004. Mr. Edman and his agent Roger Ljung have been fighting a case against his former club before a tribunal of the Netherlands football federation (KNVB) in order to seek the recovery of what they consider to be their share of the deal. According to a contract made between Edman and Heerenveen, the Swedish player was due 20% of all transfer fees which the club received for his sale. The Dutch club maintained that Edman waived this entitlement in order to expedite his transfer to Spurs. This is an assertion which is disputed by Ljung, who claims that Edman had forfeited £226,000 as a result.¹⁷⁸

The Dutch club had asked agents Rodger Linse and Zoran Lemic to find a club willing to buy the Swede. When Edman was informed of the €700,000 paid by way of commission by Heerenveen to the two agents, he was outraged. He claims that he never requested any agent to find him another club, for the good reason that he had his own in the shape of Mr. Ljung, and questioned the sheer amount of the fee paid to Linse and Lemic, amounting as it did to 30 per cent of the transfer fee.¹⁷⁹

The Dutch club for their part claimed that, when Portuguese club Benfica expressed an interest in buying him, Edman had waived the 20 per cent share of the transfer fee which had been part of his contract with

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them. This is hotly denied by Edman. Shortly afterwards came the expression of interest by Tottenham, which Heerenveen claim was due to the efforts made by Linse. Heerenveen agreed a commission of 25% of the total fee and 50% of any amount in excess of €2 million, thus providing Linse and Lemic with the €700,000 payment. Edman claims that he had agreed to waive the 20% share only on the understanding that the transfer fee to Tottenham amounted to 41.5 million. When he found out that the actual fee was €2.4 million, he felt he had been cheated.¹⁸⁰

In the event, the KNVB tribunal found in Edman's favour, at least in part, by awarding him €180,000, Edman having originally asked for €307,000 plus costs. There is no right of appeal.¹⁸¹

FIFA rules on sporting agents are not contrary to EU competition law

This issue is dealt with below, under the heading "EU Competition Law" (p. 000).

Sponsorship agreements

West Indian cricket in turmoil over sponsorship agreements

This issue has already been dealt with under the heading Employment Law (see above, p. 000)

Other issues

Liquid assets – German beer dispute settled for World Cup¹⁸²

German sporting prowess has taken something of a downward turn in recent years, but at least its sporting enthusiasts will not suffer any injury to their national pride when it comes to the nationality of the beer which will be consumed during the 2006 Football World Cup. Initially, it had been learned that a US company had bought the exclusive rights to sell beer during the tournament, which gave rise to widespread outrage throughout the host nation. However, in late December 2004, the American firm in question, Anheuser-Busch, which paid £27,8 million for the rights, announced that it had reached agreement with the German Bitburger company, which will be allowed to sell its beer at the 12 World Cup venues. In return, Bitburger agreed to discontinue its long-standing legal battle to prevent Anheuser-Busch from advertising its "Bud" brand in Germany on the basis that consumers might confuse it with the German's "Bit" brand.

Sports instructor not held contractually liable for karate injury to pupil. French court decision¹⁸³

During a training session, a karate instructor hit one of his charges in the head and caused him an injury, as a result of which the victim brought an action in compensation against the instructor on grounds of breach of contract. The Court of Appeal (Cour d'Appel) of Nimes accepted that the instructor was bound by an "obligation of means" to ensure the pupil's safety. However, it also ruled that, even though the sport of karate required a degree of self-control in avoiding any hits to the opponent's face, physical contact between the combatants could not be avoided and was not necessarily indicative of a fault. Accordingly, it held that it was impossible to find fault with the instructor. The Supreme Court confirmed this ruling.

4. Torts and Insurance

Sporting injuries

Australian Rugby League players ordered to pay compensation for illegal tackle

In late February 2005, two Melbourne Storm players were held liable by an Australian court to pay damages for an illegal tackle which ended the career of New Zealander Jarrod McCracken. In the New South Wales Supreme Court, judge Robert Hulme held that Stephen Kearney and Marcus Bai – and therefore also the Melbourne club – were negligent in performing a tackle during a National Rugby League fixture against West-Tigers in May 2000. As a result of the tackle, Mr. McCracken sustained serious neck and spinal injuries which prematurely terminated his playing career. He launched his court action claiming that Kearney and Bai had intended to injure him with the tackle.¹⁸⁴

Sporting club held liable for loss caused by breach of rules by one of its members. French court decision¹⁸⁵

On the occasion of a training session, a member of a rugby club, repeating a tactical manoeuvre coming out of a scrum, missed his tackle, fell and injured himself. The Court of Appeal of Pau held the club liable for the loss thus sustained, ruling that it followed from a statement signed by the relevant club official, and from various witness statements taken, that during a training session, whilst repeating a tactical move outside the scrum, the club member failed to tackle his opponent who had side-stepped him and, having lost his balance, fell, experienced a sharp pain in his spine, and was unable to move. It was therefore established that the victim's fall was caused by one of the club members who had avoided the tackle intended for him. Even if the phase of play during which the victim became injured was perfectly in accordance with the rules, the victim's fall was caused by one of his team mates who was a member of the same club. Even though this action took place in the course of a training session preceding a fixture, this session, which was organised by the club, was an essential part of its support and preparation. Even in the absence of any fault on the part of any of the club's players, the first court was correct in holding the club liable since it had been proved by the victim that one of the players of that club had played an active part in the causing of the injury.

The Supreme Court of France (Cour de Cassation), however, held that in so ruling, the Court of Appeal – given that its own findings had indicated that no player of the club had committed any fault which constituted an infringement of the rules of the game during the phase of the training session in which the victim had injured himself – had misapplied Article 1384(1) of the Civil Code (which deals with vicarious liability). The

Court therefore set aside that decision and ordered that the case be retried before a different Court of Appeal.

Award of compensation for victims of crime must take into account infringement of sporting rules. French Supreme Court decision¹⁸⁶

Under Article 706(3) of the French Code of Criminal Procedure, the provisions which relate to the compensation of victims of a criminal offence only apply to the competitors in a sporting event where the rules of the sport engaged in have been broken and this breach constitutes an offence. In the case under review, the event in question was a car rally, in the course of which a driver lost control of his vehicle in the bend of a road which was covered by sleet as a result of a sudden shower. The co-pilot of the vehicle sustained injuries, and made an application to a Victim Compensation Board in order to obtain the appointment of an expert assessor and the obtention of provisional compensation. The Board having made the award, the matter landed before the Court of Appeal of Lyon.

The latter confirmed this award in principle, ruling that, for Article 706(3) to apply, the offence in question should only be taken into account as an objective fact regardless of the personality of its perpetrator. It was not necessary for the applicant to prove that all the essential requirements of a criminal offence were present; it was sufficient for the applicant to provide evidence of the decisive factor in the offence, and that the co-pilot had, because of the actions of the driver, had definitely been the victim of events which presented all the characteristics of the offence of involuntary physical injury as laid down by Article 222(19) of the Criminal Code. This decision was challenged before the Supreme Court (Cour de Cassation), which held that, in so ruling, without requiring evidence of a fault consisting in an infringement of the rules governing car racing, the Court of Appeal had failed to provide a statutory basis for its decision. The Supreme Court therefore set aside the Court of Appeal's decision and ordered that the case be retried before a different Court of Appeal.

Sports club incurs no vicarious liability for assault by one player against another outside competitive context. French Court of Appeal decision¹⁸⁷

In March 2004, the Court of Appeal of Aix-en-Provence had to adjudicate in the case of a competitor who was unable to play because of injury, and had voluntarily assaulted another player outside any competition or sporting context. The Court ruled that this was an action which constituted a purely personal act, which could in no way engage the tort liability of the sporting club to which the author of the injury belonged.

4. Torts and Insurance

Liability for personal injury arising from recreational services. Article in Australian academic journal¹⁸⁸

In this article, the author, a lecturer at the Australian National University, points out that recent changes in the Australian Trade Practices Act (TPA) and to the rules of tort law at State level have significantly altered the law relating to liability arising from personal injury incurred in the course of participation in recreational services. More particularly, where a service provider seeks to waive liability for negligence and breach of contract, the interaction between the TPA, the common law of contract and torts, and State legislation has led to inordinate complexity. In the context of recreational services, the author suggests that recent "tort reforms" are a failure according to the criteria of consistency and simplicity.

Kobe Bryant settles civil suit brought by alleged rape victim

This issue has already been dealt with under the heading "Off-Field Crime" (see above, p. 000).

Libel and defamation issues

Marion Jones sues Conte over doping claims

This issue is dealt with below, under the heading "Drugs legislation and related issues" (below, p. 000).

Insurance

Insurance company withholds Armstrong bonus

This issue is dealt with below, under the heading "Drugs legislation and related issues" (below, p. 000).

Other issues

Clay-pigeon shooting club held liable for lead pollution. French court decision¹⁸⁹

In this case, the dispute surrounded the presence of 3 to 4 tonnes of leaded pellets on properties belonging to neighbours of a clay pigeon shooting club. The lead which was found on that surface area necessarily emanated from the adjoining club in view of the position occupied by the properties concerned in relation to shooting range operated by the club. It was also established that the latter had caused the discharge of 7.2 tonnes of lead, and that the entertainments committee of the municipality which used its services was responsible for the discharge of 1.859 tonnes. The Court held that the presence of this

lead constituted an abnormal neighbouring nuisance, the liability for the pollution thus caused coming largely within the liability of the club, in that the shooting sessions organised by the said entertainments committee could only have been organised with the club's agreement and under its responsibility, since they took place on the club's very premises.

The fact that administrative authorisation had been secured for this activity was irrelevant to the existence of neighbouring nuisance. Moreover, there was a major risk that the ground water would be contaminated because of the risk emanating from the oxide released by the lead under the influence of the water, which was carbonated up to the layer of clay containing the ground water. It was therefore necessary to appoint an expert assessor.

Olympic organising committee not justified in procuring termination of agency agreement. Australian High Court decision¹⁹⁰

In this case, proceedings arose in connection with a dispute between the appellant and the Sydney Organising Committee for the Olympic Games (SOCOG). One of the SOCOG's duties was to conclude agreements relating to the distribution, marketing and sale of goods and services associated with the Olympic Games. For this purpose, the "Olympic Club" was established. A third party company acted as trustee to the club. The appellant concluded an agency agreement with the trustee company and was accordingly authorised to sell international memberships of the club in China, and, in so doing, to use the images and indicia of the Olympic Games. The trustee company later incurred financial difficulties and ownership of the club was transferred to SOCOG. The trustee company and SOCOG executed a deed of release and termination. It was only subsequently that the appellant learned that SOCOG no longer wanted the international memberships in the club to continue. When the appellant protested the termination, SOCOG claimed that the appellant had infringed the agency agreement by using the indicia and images of the Olympics abroad, and that the termination was justified.

At first instance, the court ruled that the trustee company was wrong to have repudiated the agency agreement, and that SOCOG was not justified in procuring its termination. On appeal to the Court of Appeal, SOCOG admitted that it had knowingly induced the trustee company into terminating its agreement with the appellant. The issue was whether that inducement was justified. The Court of Appeal ruled that SOCOG's justification could be based exclusively on its statutory rights and responsibilities. The appeal judges found that the agency agreement wrongly permitted the appellant to use the indicia and images of

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the Olympic Games in China. Under the Sydney 2000 Games (Indicia and Images) Protection Act 1996, the trustee company had no authority to grant such rights outside Australia. Accordingly the superior rights of SOCOG were absolute, and that justified procurement of the termination of the agency agreement.

The issue which arose before the High Court of Australia was whether SOCOG's actions were justified. The Court allowed the appeal, on the following grounds:

- (a) the defence of justification was not open
- (b) the defence of justification rests upon the principle that an act which violates the legal right of another person may be justified where that act is "reasonably necessary" to protect an "actually existing superior legal right of the person performing the act. An equal rather than superior, right is not sufficient to find justification
- (c) an "actually existing superior legal right" is a right in real or personal property; it is not merely a right to contractual performance. A right in real or personal property, being a proprietary right, is superior to a right of contractual performance. Superiority is conferred by the proprietary nature of that right; temporary priority of pure contractual rights is not sufficient. Superiority may also be conferred by statute.
- (d) For an act to be "reasonably necessary" to protect an annually existing superior right, attention must be drawn to the way in which a reasonably prudent person would have behaved if they were in the position of the person performing the act.
- (e) SOCOG did not have any proprietary rights. Instead, its rights were contractual and were therefore not superior to the rights of the appellant. In addition, the actions of SOCOG were not reasonably necessary to protect its rights. Furthermore, the fact that the terms of the agency agreement were inconsistent with the exclusive right held by SOCOG to use the indicia and images of the Olympic Games under the aforementioned 1996 Act did not justify it procuring the termination of the agreement. There were various other, more reasonable, ways in which SOCOG could have sought to bring the agency agreement to an end.

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Sports policy, legislation and organisation

From the sublime to the ridiculous? The race for the 2012 Olympics intensifies (and dirtifies)

That the organisation of such a major event as the Olympic Games can assume a very high profile in the public policy of the bidding cities – and the countries in which they are located – is a proposition few would care to challenge. However, (pace the late Bill Shankly) a matter of life or death it is definitely not, although one may have been forgiven for entertaining a different impression from some of the more histrionic sections of the media (one British tabloid even has a “2012 Diary” feature). In addition, the contest for the bid has been a far from edifying one, to the point where the International Olympic Chairman has even been required to intervene, as will be noted below.

Indeed, it was on such a sour note that this column left this question in the previous issue,¹⁹¹ reporting as it did on certain accusations – or at least suspicions – that a BBC Panorama programme alleging corruption amongst Olympic officials was being used by Madrid in order to discredit the London bid. Indeed, this tawdry affair was to resurface during the bidding process – see below). Unfortunately, this is the tone and atmosphere in which the race seemed fated to continue. In late September, the US had no broadcaster at the Athens “Paralympics”, which led some senior sporting administrators to raise doubts over the bid submitted by New York (conveniently omitting that it is cities, and not countries, which bid for the Games).¹⁹² Later that year, it was reported that the English Football Association, the BBC and officials of the London 2012 bid were set to monitor closely the Spain v. England football international in November in order to spot any attempts, real or imagined, by Spain to promote the Madrid candidacy. One of the reasons given was that the Spanish Queen, who is of Greek origin “relentlessly buttonholed” IOC members at their hotel to promote her adopted city (shock, horror).¹⁹³ In the event, these fears proved totally groundless.

The notorious BBC Panorama programme which alleged corruption on the part of a leading IOC official also provide to be a spectre at the feast. It will be recalled from the previous issue¹⁹⁴ that the programme in question showed Ivan Slavkov, the Bulgarian IOC member, being secretly filmed and informing undercover reporters that he would be prepared to secure votes in return for various favours. Once again, the vultures were circling overhead to discredit a bid – this time by London – even though there was no connection whatsoever between the programme editors and the leaders of the London bid.¹⁹⁵

Another crowning moment came when the French contingent, amidst the deafening sound of mutual accusations between kitchen implements of adopting a certain colour, officially launched their bid by complaining about the “arrogance of the British” amidst a studied exercise in humility which the present author is certain had nothing whatsoever to do with striking the right note for the IOC.¹⁹⁶ So acrimonious and petty did the jousting become that, at a certain point, Jacques Rogge, the IOC President, announced in early December that he intended to admonish the various contenders for their constant bickering and sniping. He said:

“I would ask them – with no exception – to focus on their own bid, stop looking at what the others are doing and stop bickering and accusing each other. I'm not happy about the atmosphere and I would call on the five (bid cities) to behave with respect for each other and to have a more constructive attitude”¹⁹⁷

A further indication that those involved in the bidding process may benefit from counselling came when they proposed the organisation of a televised debate between representatives of the bid cities “going head-to-head” (to use that obnoxious cliché so beloved of the media), as though this were something truly serious, like a presidential election.¹⁹⁸ (The reader may wish to check the date of this question and reassure him/herself that it was the first day of January rather than of the fourth month). The major cities had all agreed to take part in the debate on 27 January in Turin. However, reality finally took a hold, not least because there were problems with the strict guidelines imposed by the IOC, which had insisted that debates involving all the bid cities in the same room would not be allowed.¹⁹⁹

Inevitably, because Madrid was involved, the name of David Beckham was mentioned in connection with the bid (come to think of it, the name of David Beckham would be mentioned if the Spanish Archbishop bid for the papal vacancy). As he took the field for his club, Real Madrid, in front of a number of IOC members, the England international was cast in the role of ambassador for the London candidacy, and his potential involvement in the bid was the centre of speculation. Fortunately Mr. Beckham proved somewhat more mature than most members of the bid circus and played down any role he could play in the process. Mr. Beckham's prudence was no doubt partly inspired by an exploit from the unclean tricks department who had been at work during the Spain v. England international referred to earlier, when officials from the Madrid bid had attempted to set up a photograph with the Real team as promotional material. Not only David Beckham, but also team-mates Michael Owen and Zinedine Zidane (the French international) wisely declined to be involved because of their national allegiances.²⁰⁰

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These various sideshows apart, some bids seem to be more favoured by fortune than others. The New York bid suffered a serious blow in mid-February 2005, when plans to build a showpiece stadium were thrown into disarray less than a week before the IOC evaluation team was due to visit the city. Long-standing plans to offer exclusive rights to build the West Side stadium, which would serve as the key Olympic venue, to the New York Jets football franchise were undermined when the Manhattan Transportation Authority (MTA) announced that it was to offer the rights to the highest bidder. The MTA had initially been seeking \$300 million for the 13-acre site. The Jets had offered merely \$100 million, but now that the tender had been opened up, the Jets would almost certainly have to increase their offer considerably or opt out. Only recently Cablevision, the parent company of Madison Square Garden, had offered \$600 million for the site. The proposed stadium had been a controversial topic already, with some in the city opposing the exclusive Jets deal and claiming that the money would be better spent on education and other public services.²⁰¹ The massive BALCO doping scandal, extensively related in another part of this Journal (below, p. 000) was also scarcely calculated to boost the chances of the Big Apple.²⁰²

At the time of writing, expert opinion still put Paris firmly in the lead, ahead of London and with Madrid as the best outsider.²⁰³ Another significant finding came with a poll conducted in order to establish which city inhabitants most wanted to stage the Games. This put Madrid firmly in the lead with 91%, Paris second with 85%, Moscow third with 77% and London fourth with 68%.²⁰⁴

The bidding process will, to the immense relief of most observers, officially come to a halt in early July when the IOC makes its final decision. The present author will faithfully, but unenthusiastically, cover the final stages of this process until its dénouement.

Other bids for major events

Kenya bids for 2016 Olympics

In early November 2004, it was learned that Kenya was to declare its candidacy for the 2016 Olympic Games. Even though the cost of holding this event could amount to more than seven times the Government's annual revenue, the Sports Minister, Ochillo Ayacko, insisted that his country's bid was a serious proposition. Jacques Rogge, the IOC, expressed his surprise. Kenya is 13 times poorer than Greece, which staged the 2004 Games.²⁰⁵

Valencia wins America's Cup bid, but battles with government for support

In December 2003, the Spanish city of Valencia was awarded the right to host this major yachting event. However, the city's mayor, Rita Barbera, lost her

political allies when the government of Jose-Maria Aznar was replaced by the socialists in the election which followed the 11 March 2003 bombing in Madrid. Fighting for control of the Cup consortium and the supply of funds from Madrid had paralysed work on Valencia's old port of Darsena. However, in late October 2004, Barbera Gerardo Camps, the minister of economic affairs for that region, as well as the minister of public administration, Jordi Sevilla, announced a new consortium, with Madrid winning control at Valencia's expense, but guaranteeing funding in return. Thus funds have been released in order to commence delayed infrastructure projects for the 2007 Cup.²⁰⁶

Berlin wins world athletics championships for 2009

In early December 2004, Berlin was awarded the 2009 World Track and Field Championships. In so doing, the German capital beat off rival bids by Valencia and Split in a vote by the International Association of Athletics Federations Council.²⁰⁷

Montreal to host swimming world championships after all

In mid-February 2005, it was learned that FINA, the world governing body in swimming, had reconsidered their decision to take the organisation of this year's World Championships from Montreal, Canada, and confirmed that the event would take place in the city in July.²⁰⁸

Recent Belgian sports legislation

Recently, the (Flemish) Decree of 19/3/2004²⁰⁹ was adopted to amend the Decree of 27/3/1991 relating to medically justified sporting activity. This amendment was inspired by certain social developments and technical advances made in this field, more particularly in the field of anti-doping measures. The objectives which inspired the 1991 legislation, however, remains unchanged, i.e. to protect the sporting performer's health, and to enable each sporting performer to compete on equal terms. The most significant changes to have been made to the 1991 decree have, inter alia, sought to extend the notion of "doping practices" (dopingpraktijk). It creates the possibility of establishing committees of experts in this area. It allows the organisation of out-of-competition tests, as a result of which tests may take place outside competitive events or their preparation. In addition, it has made improvements in the way genetic doping is handled. The powers of doctors licensed to perform tests have been extended, and the decree has introduced the possibility of enabling physiotherapists and nurses also to become licensed to perform such tests. The range of practices open to criminal prosecution is also extended. By establishing a databank, the amending decree

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promotes a more efficient way of disseminating information about infringements. Certain combat sports may be subjected to a more strict system of regulation, or even be prohibited, by the Flemish Government.²¹⁰

Another Flemish decree concerned certain compensatory measures adopted in the field of horse racing. Over the past 15 years, employment in horse racing has declined, and with it the tax revenue from this activity, more particularly from horserace betting. In order to counter this trend, the Decree of 26/3/2004 was adopted.²¹¹ The decree contains a number of measures aimed at restoring the fortunes of this sport, and empowers the Flemish government to co-operate in setting up the Flemish Horseracing Federation (Vlaamse Federatie voor Paardenwedrennen), which has the objective of, inter alia, issuing licences for the opening of a racing track and for the organisation of horse races and to monitor observance of the conditions under which the licence was issued. In addition, the decree lays down a detailed set of rules concerning the authorisation which must be issued before bets on horse races can be accepted, and fixes the tax rates charged on the amounts thus wagered.²¹²

Aftermath of Athens 2004 (and looking ahead to Beijing 2008)

Those who still regard being awarded the organisation of the Olympic Games as an unalloyed blessing have plenty of examples which are likely to cool their ardour. Most of these concern the repayment of the cost of the jamboree, which can mortgage a city for up to half a century, as the good citizenry of Montreal can testify. Others relate to the white elephant syndrome affecting many of the state-of-art facilities on which the world gazed in wonder for a fortnight, but which subsequently prove difficult to sell and expensive to maintain. Other still face a combination of these and other long-term tribulations, as is proving to be the case with Athens now that the short-lived glamour of the event is beginning to recede into memory.

Given that the total bill of the 2004 Games was likely to exceed €9 billion, i.e. more than double the original budget,²¹³ some Greek citizens are entertaining the not unnatural fear that they may be paying for the various venues for many years to come. The return from the sale of 3.6 million tickets (two-thirds of the number available) will not cover the cost by far. Usually, the politicians on such occasions put the best possible face on it with some anodyne pronouncement, and in this respect Costas Karamanlis, the right-wing Prime Minister of the country, did not (or rather did) disappoint, making the following epoch-making observations:

"[They are] an investment in the new period that Greece is beginning, the capital for the years ahead. We will prioritise, making the best possible use of all the assets that the Games have given us"²¹⁴

The only surprise about that speech was the absence of the words "window of opportunity", and could not hide the fact that, after the Games, only the fate of non-competition venues such as the highly-praised Olympic village and the large media centre had been decided. The former is intended to house low-income public sector workers and their families, whereas the latter will be used as an exhibition and conference centre. The undetermined status of the other venues has raised fears that, as has happened with many other Olympic games, the sites may end up at best as expensive luxuries, at worst as an urban catastrophe which ultimately proves to be, in the very sense of the word, a monument to the futility of hosting the Games.

Although some of the venues, such as the football stadiums, will resume their previous use, those built for an array of less popular sports mandated by the International Olympic Committee (IOC) will almost certainly be dismantled. Other buildings may (or then again, they may not) be used for such purposes as accommodating ministries and other public utilities. Most of the 35 venues were built from scratch.²¹⁵

It is true that some of the infrastructure built for the Games has served a useful purpose – at least in part. The improvements made to the suburban railway system and the metro operating between the airport and the city centre will be a definite asset; the various routes to some of the Olympic site may not. However, it has to be remembered that the costs of constructing these was not included in the €9 billion figure referred to above. And that is not to mention the cost of the "Paralympics" ...²¹⁶

Bearing all this in mind, it is only natural that concern should be expressed about the cost/benefit outcome of organising the Games. The next Olympics will take place in Beijing, and already there are some worried frowns on the financial front. It was therefore not surprising to learn, whilst the dust was still settling on the Athens arenas, that the Chinese capital had decided to scale down its construction plans for the Games. Given that the initial cost was assessed at a figure amounting to three times that which attended the Athens Games, as referred to above, they may have decided that extravagance could horrify rather than impress the world in three years time.²¹⁷

Beijing had initially embarked on the most ambitious building exercise ever in Olympic history, intending to use the Games as a "coming-out" party for a country enjoying a fast-growing economy which wishes to be recognised as one of this globe's leading civilisations. New metro systems and roads, an airport terminal and thousands of toilets are being built at an estimated cost of \$30-40 billion. However, reports of overruns and corruption have caused alarm in government circles,

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coupled with fears that excessive lavishness could highlight social inequalities in a country where millions live on the equivalent of approximately 50p per day, and spending on healthcare is among the lowest in the world.

Accordingly, since the mayor of Beijing, Wang Qishin, called for a more frugal Olympics. Building work ceased and designers have been sent back to the drawing board. It was expected at the time of writing that between five and ten stadium projects were to be scrapped.²¹⁸

Public health and safety issues

“Hell of the North” becomes safer

In early January 2005, it was announced that the Paris-Roubaix annual one-day cycling race for professionals, known as the “Hell of the North”, will avoid its notorious cobbled section (some of it dating back to Napoleonic times) because of safety concerns, and will take an alternative route. A spokesman for the race organisers stated that the condition of that road had seriously deteriorated in recent years, and that a 200-metre section had collapsed and turned into a pool.²¹⁹

More than half of US footballers “dangerously obese”, says study

Concerns over obesity among young people have increased in various countries over the past few years, none more so than in the US. This unfortunate aspect of present-day life has even affected that national institution, the National Football League, since a recent study has borne out that more than half its players are dangerously obese. Using the standard formula of dividing weight by height in order to determine whether a person is overweight, researchers found that 56% of American footballers had a Body Mass Index (BMI) of at least 30, which medical sources consider constitutes obesity. Nearly half of those were labelled as “severely obese” and 3% “morbidly obese”, with a BMI of at least 40.²²⁰

The NFL has, however, hotly disputed these findings, which appeared in the *Journal of the American Medical Association*, on the grounds that the ratio of body fat to muscle had not been taken into consideration. Dr. Joyce Harp, one of the University of North Carolina researchers who carried out the project, admitted that without measuring body composition it was difficult to tell how many were truly obese, but added that it was unlikely that the high BMIs were “due to a healthy increase in muscle mass alone”.²²¹

Nationality, visas, immigration and related issues

Uefa to enforce quotas of home-grown players – to some major club’s disgust

Concern has been expressed in recent years at the number of foreign players appearing for the leading professional sides in European football. On some occasions, top teams have included not one single player bearing the nationality of the club, let alone having some local association. It is in order to rectify this state of affairs that the thoughts of leading football administrators have recently ventured in the direction of restricting the number of “imports” which teams may field in top competitions. Thus in November 2004, the executive of Uefa, the body controlling the sport at the European level, met to finalise plans to introduce a quota system along these lines. This would compel all clubs in Europe to have between six and eight players in their squad who are regarded as “home-grown”.²²² Later, more details of the Uefa plans emerged. The plans would see the clubs qualifying for European competitions initially restricted to 25 players, four of whom should be home-grown. Of these, two must have been trained between the ages of 15 and 21 by the club’s own youth training programmes, whilst two others could be developed by other clubs, provided that these clubs are part of the same national association as the buying club. As from the 2008 season, the number of home-grown players will increase to six (three and three) and in 2009 this contingent should reach a maximum of eight, i.e. four and four.²²³ Thus there would be a transitional system starting from the 2006-7 season, building up to full implementation of the rule three years later.²²⁴ The plans were confirmed at the Uefa meeting held at Nyon, Switzerland, in early February 2005.²²⁵

This move certainly had the support of the President of the world governing body, Fifa, who in so doing seemed to condemn the top teams who abandon their roots, and employ overseas players instead of the local talent which he believes spectators wish to see.²²⁶ No such enthusiasm was on display by most of the leading clubs, particularly in the English Premiership, who at the meeting called to discuss the plan voted against it 16-4. They vowed to fight the proposals every inch of the way if necessary through the courts. Uefa responded by stating that theirs was a very reasonable proposal, since even when the maximum of eight home-grown players was reached, the rule would still only cover less than one-third of the squad. They also insisted that the players did not need to be qualified to play for their national association – thus the eight Chelsea home-grown players could be qualified to play for the Republic of Ireland or Italy.²²⁷ Manchester United’s Portuguese winger Cristiano Ronaldo could therefore qualify as a

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home-grown player once he had completed three seasons with his present side.²²⁸ Uefa's legal advice was that by so doing they did not violate the Bosman ruling of the European Court of Justice.²²⁹

The leading Premiership clubs, however, refused to be mollified by these reassurances, and vowed to join forces with other leading clubs in opposition to the new rules through the influential G14 group of leading sides. Their fear was that the European governing body would attempt to impose the rules on domestic competitions as well as for European ones. Arsenal chairman David Dein commented:

"Few Premier League squads meet these proposals and the quality would suffer. At the moment we have the most successful league in the world. If it were introduced, clubs would have to restrict themselves and we don't think that is a very good thing for English football. All the Premier League clubs have academies and are spending millions on developing young players"²³⁰

Exactly how successful any challenge by the G14 clubs will be remains to be seen.

Kenya loses athletes to other countries – and may retaliate²³¹

When he was a tender lad, James Kwalia dreamed of bearing his country's famous red running vest, which had been worn by so many distinguished predecessors. However, once he had acceded to manhood, he found that a purple singlet made life a good deal easier, since he, as one of Kenya's most promising athletes, moved his allegiance to Qatar two years ago. In so doing, however, he was not compelled to adjust to a different culture, change his religion or learn another language. In fact, he still lives and trains in his native land – only his wallet is a little bulkier than it used to be. Nor is he alone in this. Kenyan runners who in their own country stand little chance of international selection, because of the wealth of talent in their own country, often fall for the blandishments inherent in the facilities and comforts offered by countries such as Qatar and Bahrain. There, they are guaranteed a place in the national squad and are given money for training and food – a luxury which is denied to many Kenyan athletes.

For the sad reality is that the Kenyan flag is losing its battle with the dollar, threatening the country's eminence in distance running, and the country's authorities have been compelled to take action. Incensed by reports that 40 athletes have defected already or are about to become citizens of Qatar or Bahrain, the Kenyan Sports Minister, Ochillo Ayacko, announced that athletes who have switched their nationality will be treated as foreigners, and visas permitting residence in Kenya will be issued at the Government's discretion. The

Government's ire was all the more pronounced because, thanks to the defectors, Qatar stood a good chance of beating Kenya at the forthcoming World Championships. However, Gianni Demaddonna, Mr. Kwalia's manager, maintains that it would be hard to prevent the former Kenyans from training in their country, because athletes from all over the world are issued with visas to train there. He did, however, admit that this kind of "trade" in human beings could have far-reaching consequences for the sport.

Sporting figures in politics

George Weah to stand for Liberian presidency

Given that the previous incumbent was indicted for war crimes and forced into exile, his predecessor had his ears mutilated, and the latter's predecessor was disembowelled, the presidency of the African state of Liberia would not appear to be a vacancy which the masses are falling over themselves to fill. Yet all this has failed to deter George Weah, the former Chelsea striker, from wanting the position. Early this year, the former Footballer of the Year returned to the war-battered land of his fathers to make his bid for the presidency.

Thousands of supporters lined the route from the airport in order to cheer his motorcade, convinced that the man they call King George can deliver Liberia from totalitarianism and chaos. After more than ten years of civil war, which has shattered the economy and left entire cities in ruins, an interim government, assisted by 15,000 UN peacekeeping troops, has disarmed the warring factions and presided over a year of relative calm. The challenge awaiting the next President will be to consolidate the peace process and piece the nation together again.²³²

Mr. Weah has little formal education, but has proved versatile off the field of play, and has been dubbed African Pride by no lesser figure than Nelson Mandela, a rare honour indeed. Born as one of 13 children in a small village just outside the capital, Monrovia, he showed precocious talent and made his way up through local football clubs and then in European football. He played for Monaco and Paris St. Germain, before finding greatness with AC Milan. As an ambassador for Unicef, he campaigned to demobilise Liberia's soldiers, many of whom were not much taller than the horrific weapons they bore.²³³

The present author is sure that his readership will forgive an exceptional departure from impartiality in such matters by wishing this most unassuming and generous of sporting figures well in his quest for the Presidency.

Footballers enlisted to promote EU constitution

The EU Constitution, which is currently making its way through the EU member states' constitutional procedures, is a blueprint for European socialist tyranny or a charter for merciless multinational capitalism, depending on one's political proclivities. Regardless of such ideological niceties, it is a fact that the governments of the member states are experiencing considerable problems in gaining acceptance for this document from the population, particularly in those countries where it has been decided to subject constitutional approval to a referendum.

Even in Spain, a country which has embraced the EU ideal from the moment it acceded to it in 1986, there were some doubts as to whether the project would find favour with the populace. It is this reason that the Spanish government, which sponsored acceptance of the Constitution, enlisted the services of several leading footballers in support of the desired "yes" vote – football enjoying even greater levels of deification in Spain than it does in this country. With a month to go before the referendum which took place in December 2004, such leading figures as Emilio Butragueno and Johan Cruyff, who represented Real Madrid and Barcelona respectively, agreed to front a campaign urging the citizenry to vote.²³⁴ Mr. Cruyff was even persuaded to read sections from the Constitution in daily television advertisements.²³⁵

The Spanish voters ultimately approved the Constitution.

Croatia football coach aims for presidency

In October 2004, it was learned that Miroslav Blazevic, Croatia's popular football coach, who led the national team to third place in the 1998 World Cup, announced his desire to stand for the country's Presidency. To date, however, no firm commitment or timetable to that effect has been established.²³⁶

Former Pentathlon champion sworn in as Minister

In mid-December 2004, Liese Prokop, the former Olympic pentathlon medallist, was sworn in as Austria's Minister of the Interior, the first woman ever to hold the post. Mr. Prokop won the silver medal in the pentathlon at the 1968 Mexico Games.²³⁷

Other issues

Berlusconi resigns as AC Milan president under conflict of interest laws

In late December 2004, Silvio Berlusconi, the Italian President, resigned as president of leading Italian side AC Milan as a result of new legislation prohibiting government members from holding key positions in major companies. Mr. Berlusconi owns three of Italy's four private television networks, as well as the country's largest advertising company.²³⁸

China bans basketball star advertisement

In December 2004, it was learned that a television advertisement for the Nike sportswear company, depicting US basketball star LeBron James fighting a cartoon Kung Fu master, has been banned in China. The commercial, entitled "Chamber of Fear", was shown on the national sports channel, as well as on local and state television, before being withdrawn amid claims by the public authorities that it was an insult to national dignity. It shows Mr. James in a video game-style setting defeating the Kung Fu master, two women in traditional Chinese attire, and a pair of dragons, who are considered a sacred symbol in China.²³⁹

Coach suspected of spying is suspended

In mid-November, Wolfgang Nitschke, the freestyle wrestling coach for the Germany national team, was suspended by the German Wrestling Federation (DRB) after documents were found which purportedly show that the coach once worked for the Stasi, the East German secret police. Mr. Nitschke, who is also the DRB sporting director, reportedly spied for the Stasi from 1985 to 1989, when he was head coach to East Germany's wrestling team. He pronounced himself "surprised" by the allegations.²⁴⁰

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Planning law

Santander Bank chairman sued over golf planning permission

In early December 2004, it was learned that Franco Otegui, a shareholder in the Spanish bank Santander, had filed a suit against Santander's chairman Emilio Botin, accusing the bank of digging a well to provide water for a golf course without the correct permission. The action also claims that the golf course itself was built without a "mandatory declaration of environmental impact".²⁴¹ No further details were available at the time of writing.

Judicial review (other than planning decisions)

French football club should not be penalised for fielding player not featured on list of suspended players. French court decision²⁴²

On 25/5/2004, the French Football Federation (FFF) published on its internet site an "approved league table" for the national football championship for the 2003-4 season. This league table was also made available through various press agencies. Because of its subject-matter, this publication was such as to indicate that the Federation had, on the same day, taken the decision to confirm the results for that season and to open the period in which any challenges to this decision could be brought. Taking into account the challenges which were made to the decision, the results of the matches in dispute had not become definitive. The decision to confirm the final league table was taken as a result of these decisions, the lawfulness of which is under challenge. Accordingly, the court before which the dispute was brought held that the plea of illegality made against that decision was admissible.

From the provisions of the Professional Football Charter (Charte du football professionnel) it follows that the entry into effect of professional footballers' contracts of employment is dependent on their approval by the Professional Football League. The same applies to the approval given to any codicils to these contracts, including termination codicils.

Habib Sissoko, a player employed by the club Nimes Olympique, concluded with this club a codicil terminating this contract which was confirmed by the Professional Football League. Although such confirmation was necessary in order to enable the codicil to enter into effect. It did not prevent that codicil from applying retrospectively on the date fixed by the parties. As a result, Mr. Sissoko, who had been issued with a five-match suspension by the FFF disciplinary committee – which was reduced to three matches on

appeal – could no longer be regarded as a player of Nimes once the termination of his contract on 15 April 2004 had been confirmed.

From the provisions of Article 226 of the General Rules of the FFF, it follows that only a player able to take part in official fixtures can serve a suspension penalty which has been imposed on him. Because Mr. Sissoko was excluded from the right to take part in the competition as from 14/3/2003, because of the termination of the contract which associated him with the Nimes club, which took effect on that date. He had therefore not served the three-match suspension when he took part in the first three matches of the National Championship of 2003-4 with Stade Brestois, the club to which he had in the meantime been transferred as from August 2003, whereas he had not played in the four matches completed by the Nimes club during the period in which the termination of his contract had not yet been officially confirmed. The FFF was therefore in error where it considered that Mr. Sissoko could lawfully participate in the first three fixtures in August 2003.

Under Article 150 of the general rules of the FFF, no suspended player may take part in any official fixture of the Federation, and Article 187 stipulates that any club which is deficient in respect of this rule will be deemed to have lost the matches in question. The Stade Brestois club allowed Mr. Sissoko to play in the fixtures dated 2, 9 and 13 August 2003 at a time when the player in question was not, at the start of the 2003-4 season, featured on the list of suspended players disseminated by the FFF on its internet site. Nor did he figure on the notice addressed to the various clubs at the beginning of the 2003-4 season informing them of those who still had suspensions to serve. There was no other part of the case file which allowed the conclusion that neither Mr. Sissoko nor the Brestois club considered that the player was still under suspension. Therefore the actions of the Stade Brestois, whose error was attributable entirely to the information with which it was provided by the Federation, could not be regarded as "deficient" within the meaning of the rules cited above, and should not therefore be penalised by means of the loss of the matches in question.

Ladbrokes lose Netherlands online case

In mid-December 2004, one of the world's leading bookmakers, Ladbrokes, was barred from offering internet betting services to customers in the Netherlands as a result of a ruling by the Netherlands Supreme Court (Hoge Raad). The ruling followed an action brought by the Dutch Lotto after Ladbrokes had placed advertisements in a number of Dutch newspapers in the course of the 2002 World Cup. The bookmaker did not hold a permit to offer bets in the

6. Administrative Law

Netherlands, and has no shops in the country. A spokesman for Ladbrokes commented that the ruling was entirely expected under Dutch law, but that recent rulings of the European Court of Justice (ECJ) could compel member states to relax their controls on betting. At the time of writing, Ladbrokes were pursuing parallel cases in the Netherlands and elsewhere in order that the issue may be referred to the ECJ by means of a preliminary ruling.²⁴³

This column will naturally monitor these developments very closely.

7. Property Law

Land law

[None]

Intellectual property law

Nike loses Chinese copyright action

In late December 2004, it was learned that leading sportswear manufacturer Nike had lost a copyright action over the use of a Chinese cartoon character. The Beijing Intermediate Court ordered Nike to remit 300,000 yuan by way of compensation to cartoonist Zhu Zhiqiang for having used his "Little Match Man" in its "Stickman" campaign. Mr. Zhu had brought the case in July 2004, suing the sportswear group for 2 million yuan.²⁴⁴

President Bush forced to change website over use of word "Olympics"

The presidential election campaign in the US between the incumbent G. Bush and his Democrat challenger J Kerry was an extremely rumbustious one, not least through the cyberspace. One of the ways in which president Bush sought to poke fun at his opponent was by featuring a parody entitled "John Kerry's Flip Flop Olympics" on his electoral website. This did not turn out to be the happiest moment of the Bush campaign, since the latter was accused of infringing US intellectual property law by using the word "Olympics". Legislation in the US confers on the US Olympic Committee (USOC) exclusive rights to the use of the word "Olympics", and the latter had not given Mr. Bush authorisation to use it.²⁴⁵

In fact this was the second occasion on which USOC had protested to Bush about his attempts to link his campaign to the Olympics. The International Olympic Committee was angered by a Bush advertisement aired during the final week of the Athens Olympics in August 2004, which attempted to credit the President's foreign policies with making it possible for Iraq and Afghanistan to compete at the 2004 Games. It requested USOC to contact Bush in order to have the advertisements removed – to no avail, since they continued to be aired.²⁴⁶

Dispute concerning copyright in photographs taken of golf club. Canadian court decision²⁴⁷

In this case, the claimant, a photographer, had, without being invited, taken a number of photographs of the corporate defendant's golf course and facilities. In June/July 1999, he approached the individual defendant, being the Chief Executive Officer of the corporate defendant, with a proposal to overhaul significantly the corporate defendant's brochures and website. At that time, the claimant issued the corporate defendant with an album of the photographs which had been taken.

The individual defendant had rejected the claimant's

proposal. However, the claimant was retained by the defendant to take photographs of a wedding at the golf course in question, and to update the corporate defendant's website. During the period between July and October 1999, the claimant took a number of additional photographs of the golf course and updated the website to include a number of these additional photographs. On the claimant's written proposal for these website updates, and in reference to the materials posted on the site, the individual defendant had written "we own copyright".

The corporate defendant had used some of the claimant's photographs in additional promotional advertising for its golf course without specific authorisation from the claimant. The claimant thereupon brought an action for infringement of copyright, and the trial judge dismissed the action. The claimant appealed against this decision.

The Ontario Superior Court of Justice ruled that this appeal be dismissed. The corporate defendant's promotional materials made it evident that the photographs used in those materials came from three sources: the album of photographs gifted by the claimant in June/July 1999, the photographs taken between July and October 1999, and the wedding photographs. The trial judge had concluded that, in making the gift of the album of photographs, the claimant had mentioned nothing about ownership of copyright and had imposed no conditions upon the gift, and that the gift constituted an irrevocable licence from which the claimant could not resile. In making this finding, the trial judge had preferred the evidence of the individual defendant to that of the claimant.

A copyright licence that is a mere authorisation to do a thing does not confer an ownership interest in the copyright. This can be contrasted with an exclusive licence which can grant a property interest. As a result, a licence which is a mere authorisation to do a thing does not fall within the requirement of s. 13(4) of the Canadian Copyright Act, i.e. that this be put in writing. The oral licence granted to the corporate defendant was such a licence and therefore did not need to be reduced to writing.

The authorisation to use the claimant's photographs arising from the redesign of the corporate defendant's website did not constitute a grant of an exclusive licence. The use of the term "we own copyright" was inadequate to constitute such a grant. With respect to the wedding photographs which the corporate defendant commissioned, by reason of s. 13(2) of the Act the corporate defendant was the owner of copyright and entitled to possession of all the negatives in the possession of the claimant. Subject to vacating the trial judge's order that the defendants owned copyright in the July to October photographs, the appeal was dismissed.

7. Property Law

Other issues

Lightning strikes twice – another Bonds ball dispute hits the courts

Unfamiliar though the present writer is with the science of statistics, he would conjecture that the chances of the same baseball player hitting a ball into the crowd and that ball becoming the subsequent subject-matter of a protracted court dispute would be on the minimal side. Yet this is exactly what has happened in recent months.

The reader will recall from earlier editions of this journal²⁴⁸ that an earlier similar saga had also gone down litigation road. When San Francisco Giants player Barry Bonds hit a historic 73rd home run of the season into the crowd, there ensued a violent struggle between spectators Alex Popov and Patrick Hayashi over the question as to whom caught the ball first. The resulting court dispute lasted over a year before a judge ordered the men to sell the ball and split the proceeds. At an auction, the ball fetched \$450,000 – just enough to cover their legal fees.

Undeterred by the seeming futility of such exercises in litigation, two baseball fans have once again called upon the judiciary to settle their opposing claims to own the ball with which the very same Barry Bonds hit a record 700th home run. Timothy Murphy, a supporter of the Giants, claimed in the court papers that he caught the ball when it was hit into the stands during the game, which took place in September 2004, but that Steve Williams wrested the historic object from him. Mr. Murphy added that he had already established “possession, domination and control” over the ball by sitting on it and securing it with his right leg. He claims that Mr. Williams and other fans stole the ball from him by wrestling and striking him. Mr. Williams vehemently denies the claims.²⁴⁹

This column will naturally monitor future developments in this saga with the keenest of interest.

8. Competition Law

National competition law

Canal Plus football deal unlikely to trouble French competition authorities

This issue is dealt with below, under the heading "EU Competition Law".

EU competition law

Commission declines to investigate Canal Plus football deal

The European Commission, in its capacity of "watchdog of the EU Treaty", has as one of its main tasks the monitoring of the business world in order to ascertain whether any infringements of EU competition policy have occurred. It was therefore a matter of some surprise when, in mid-December 2004, the news broke that the Commission had decided not to tackle a deal which confers on the French broadcaster Canal Plus exclusive rights to first-class football in France. Just days before, the French broadcaster had agreed to pay £1,24 billion for live coverage of the next three seasons of Ligue 1. In so doing it outbid pay-TV platform TPS and France Télécom for four packages: two sets of live matches, a highlights package, and a pay-per-view game.

Many legal experts were taken aback by this news, particularly when it is considered that, as was reported in these columns last year,²⁵⁰ the English Premier League, whose fixtures are broadcast exclusively by BSkyB, was ordered by the EU authorities to share its next television rights agreement with at least two companies. It will be recalled that the Competition Commissioner, Mario Monti, ordered the English compromise after objecting to the collective selling of fixtures by the Premier League. He threatened to annul BSkyB's £1 billion bid for the 2004-7 seasons altogether, but ultimately compromised on an agreement that the current deal will be the last of its kind.²⁵¹ A spokesman for Canal Plus commented that the Commission had commenced no investigation because no-one had made a complaint.

Nor is the broadcaster expecting any intervention from the French competition authorities either. The previous season, it had been compelled to share live coverage of Ligue 1 after its closest rivals, TPS, complained to the French competition commission about the auction of rights for the 2004-7 seasons, which Canal Plus obtained. TPS was not expected to object on this occasion, after analysts applauded its financial discipline in the latest bidding round.

Tom McQuail, a managing partner in the Brussels firm of a leading firm which specialises in EU competition law, commented that there was no particular logic in the Commission's course of action in the light of the

Premier League affair, but that the replacement of Mr. Monti as Competition Commissioner may have had something to do with this. He stated:

*"You would have thought that, having reached this deal with Sky they would have imposed something like that in France. But maybe there were not many agitators (against the Canal Plus deal) in France. It has also come up around the change in the Commission – maybe the new Commissioner, Nelie Kroes, does not think it a big issue to take up at the beginning of her tenure."*²⁵²

Changing the Competition Commissioner may be a reason; however, in the present writer's opinion, it cannot serve as an excuse, since the EU competition authorities have hitherto prided themselves on their consistency of approach in the prosecution of infringements, regardless of the personnel involved.

IOC anti-doping rules not subject to EU competition law, ECJ decides²⁵³

David Meca-Medina and Igor Majcen are two professional long-distance swimmers. In the course of the World Cup in this sporting medium, they had tested positive for the anabolic steroid nandrolone. As a result, FINA, the world governing body in swimming, suspended them under the Olympic Movement's Anti-Doping Code for four years, which was subsequently reduced to two years on appeal to the Court of Arbitration for Sport. The swimmers lodged a complaint with the European Commission, challenging the consistency of the anti-doping legislation adopted by the International Olympic Committee (IOC) with the EU's competition rules and the free movement of services. The Commission having dismissed the complaint, Messrs. Meca-Medina and Majcen brought an action before the EU Court of First Instance (CFI).

The CFI noted that, in accordance with the case law of the Court of Justice, sport is subject to EU law only to the extent that it constitutes economic activity. The provisions of the EC Treaty on the free movement of workers and services apply to rules adopted in the field of sport which concern the economic aspect which may be presented by sporting activity. This is so, inter alia, in the case of the rules which make provision for the payment of fees for the transfer of professional sporting performers between clubs (transfer clauses) or those which restrict the number of professional players who are citizens of other Member States which those clubs may field in fixtures. On the other hand, purely sporting rules which, as such, have nothing to do with economic activity, such as those on the composition of national teams or the "rules of the game" which fix, for example, the length of matches or the number of players on the field, are not covered by EU laws.

8. Competition Law

The ECJ had not as yet been required to rule on the question whether sporting rules are subject to the Treaty competition rules. The CFI, however, considered that the principles developed in relation to the free movement of workers and services are equally valid for the EC Treaty provisions relating to competition. Purely sporting legislation is, therefore, not subject to the Community provisions in respect of the freedom of movement of persons and services or of those relating to competition.

More particularly in relation to anti-doping measures, the CFI considered that, even if top-level sport had to a large extent become an economic activity, and such measures may have economic repercussions for sporting professionals, they do not pursue any economic objective. They are intended to preserve the spirit of fair play, as well as the health of athletes. Thus the prohibition of doping, as a particular expression of the fair play requirement, forms part of the cardinal rules of sport.

The CFI therefore dismissed the application as unfounded.

FIFA rules on footballers' agents not contrary to EU competition law, rules CFI²⁵⁴

In 1994, in order to discontinue certain practices which were deemed to be harmful to both the players and their clubs, FIFA, the world governing body in football, adopted a number of regulations governing the occupation of player's agent. As he considered that these rules infringed the provisions of the EC Treaty on competition because of the allegedly excessive, opaque and discriminatory restrictions on access to the profession which they brought about, Mr. Piau brought a complaint to the European Commission.

As a result of the European Commission having initiated competition proceedings, FIFA agreed to amend its regulations. As a result of the improvements and deletions made in the new regulations, the Commission decided to take no further action on Mr. Piau's complaint. Under the new FIFA regulations, the following applies:

- to perform the occupation of player's agent, a person will be required to hold a licence issued by the appropriate national association for an indefinite period;
- the applicant will be required to pass an examination in the form of a multiple choice test;
- the relations between the agent and the player must be the subject-matter of a written contract for a maximum of two years, which is renewable. The contract should specify the agent's remuneration, to be calculated on the basis of the player's gross basic salary;
- in the event of these regulations being infringed, a system of penalties for clubs, players and agents has been established;
- the agent is required to contract professional indemnity insurance.

In spite of these changes, Mr. Piau maintained his complaint to the Commission, which dismissed it on the basis that there was no EU interest in continuing the proceedings. It is this dismissal which was the subject-matter of the action brought by Mr. Piau in the instant case.

As to the nature of the FIFA regulations, the CFI notes, in the first instance, that football clubs and the national associations to which they belong were undertakings and associations of undertakings respectively for the purposes of EU competition law. As a result, FIFA, which is a grouping of national associations, was itself an association of undertakings. The Court next observed that the regulations governing the occupation of players' agent constituted a decision by an association of undertakings. The object of the occupation of player's agent is, for a fee and on a regular basis, to introduce a player to a club with a view to concluding a contract of employment, or to introduce two clubs to one another with a view to the conclusion of a transfer agreement. It was therefore an economic activity for the provision of services, which does not fall within the special nature of sport as defined by the case law of the ECJ.

As far as FIFA's authority to adopt such regulations are concerned, the CFI pointed out that the very principle of the regulation of an economic activity, not relating to either the special nature of sport or the internal freedom of organisation of sporting associations, by an organisation governed by the private law and not having any regulatory powers delegated by the public authorities, such as FIFA, cannot be regarded from the outset as being consistent with EU law, particularly in the context of the respect due to civil and economic freedoms. Such regulation fall, in principle, within the jurisdiction of the public authorities. However, the action brought by Mr. Piau concerned the lawfulness of a decision made by the Commission following a complaint made in the context of competition law. The Commission could not therefore exercise any powers other than those it has in this context. Judicial review was necessarily restricted to the competition rules and the Commission's assessment of the alleged infringement of them by FIFA regulations. That review could extend to compliance with other provisions of the Treaty and with fundamental principles of EU law only if they disclosed a breach of the competition rules.

On the question of the removal of the most restrictive provisions of the original rules, the CFI found that the Commission did not may any manifest error of assessment by considering that the changes made by FIFA to its original regulations removed their main anti-competitive features. More particularly the Commission was able to consider that the examination provided

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sufficient guarantees of objectivity and transparency, that the obligation to contract professional indemnity insurance did not represent a disproportionate requirement, and that the rules in the regulations relating to the remuneration of players' agents did not constitute the fixing of imposed prices within the meaning of competition law.

As regards the compulsory nature of the players' agent's licence, the CFI observed that the requirement of a licence to perform the profession of player's agent constitutes a barrier to that economic activity and affects the competition mechanism. It can therefore be accepted only inasmuch as the modified regulations contribute towards promoting economic progress, allow consumers a fair share of the resulting benefit, do not impose restrictions which are not indispensable to the achievement of those objectives and do not eliminate competition, in which case exemption could be granted.

The CFI considered that the Commission did not make a manifest error of assessment by taking the view that the restrictions which follow from the compulsory nature of the licence could enjoy such exemption. Thus the need to introduce professionalism and morality to the occupation of players' agent in order to protect players whose careers are short, the fact that competition is not distorted by the licence system, the almost total absence (except in France) of national rules, and the lack of a collective organisation of players' agents are circumstances which justify the rule-making action on the part of FIFA.

As regards the possible abuse of dominant position by FIFA, the CFI disagreed with the Commission and considered that FIFA, which constitutes an emanation of the clubs, thereby holds a dominant position in the market of services for players' agents. Nevertheless, the FIFA regulations did not impose any quantitative restrictions on access to the occupation of players' agent which harm competition, but qualitative restrictions which may be justified, and do not therefore constitute an abuse of FIFA's dominant position in that market.

9. EU Law

French ban on indirect TV advertising for alcohol drinks at sporting events consistent with EU law. ECJ decision²⁵⁵

French legislation discouraging smoking and alcoholism (Loi Evin) bans direct or indirect advertising for alcoholic drink in France, any breach of these provisions being treated as a Category 2 offence (délit) under French criminal law. A Code of Conduct, drawn up by the French authorities and the French television companies, sets out the detailed rules for the application of that ban to the broadcasting in France of sporting events taking place in other member states. The Code of Conduct makes a distinction between multinational sporting events, pictures of which are broadcast in a large number of countries and which are therefore not regarded as mainly concerning the French public, and bi-national sporting events, the broadcasting of which is specifically aimed at French audiences. The Code provides that, in relation to the latter events, French broadcasters must use all available means to prevent the appearance on their channels of advertising for alcoholic beverages.

In this connection, two cases were referred to the ECJ. One concerned an infringement action brought by the Commission under Article 226 of the EC Treaty; the other resulted from a reference for a preliminary ruling. In the infringement action (C-262/02) the Commission requested the Court to confirm that the French rules are inconsistent with the freedom to provide services as guaranteed by the EC Treaty, on the grounds that the Loi Evin creates obstacles to the broadcasting in France of foreign sporting events.

The reference for a preliminary ruling (C-429/02) was based on the fact that Télévision française TF1 requested the Group Jean-Claude Darmon and GiroSport, commissioned to negotiate on its behalf for television broadcasting rights for football matches, to prevent the appearance on screen of alcoholic drinks. As a result, a number of foreign football clubs refused to rent to Bacardi France, which produces and markets a number of alcoholic drinks, advertising hoardings around their laying fields. Bacardi France accordingly brought an action against TF1, Darmon and GiroSport before the French courts, seeking an order that they should cease to exert pressure on foreign football clubs to refuse to rent advertising hoardings around their playing fields. In this connection, the French Supreme Court, the Cour de Cassation, sought to establish whether the French rules were contrary to the provisions of EC law, in particular the freedom to provide services laid down by the EC treaty, and the EC Directive "Television without Frontiers".²⁵⁶

The Court observed first of all that indirect television advertising for alcoholic drinks resulting from hoardings visible during the broadcasting of sporting events does

not constitute a separate announcement broadcast in order to promote goods or services, within the meaning of the "Television without Frontiers" directive. It was impossible to broadcast that advertising only during the intervals between the various parts of the television programme concerned. The "Television without Frontier" directive was therefore not applicable.

Next, the Court found that the French television advertising rules constituted a restriction on the freedom to provide services for the purposes of the EC Treaty. This was so in the first instance because the owners of the advertising hoardings must refuse, as a preventative measure, any advertising for alcoholic drinks if the sporting event is likely to be broadcast in France, and, secondly, because the rules impair the provision of broadcasting services for television programmes. French broadcasters must refuse to broadcast all sporting events in the course of which hoardings bearing advertising for alcoholic beverages marketed in France are visible. Furthermore, the organisers of sporting events taking place outside France cannot sell the broadcasting rights to French broadcasters where the broadcasting of television programmes devoted to such events is likely to contain indirect television advertising for alcoholic beverages. Moreover, although it is true that it is technically possible to mask the pictures in order selectively to conceal the hoardings displaying advertising for alcoholic beverages, the use of such techniques involves substantial extra costs for the French broadcasters.

Finally, the Court considered the question whether the prohibition may be justified. The Court stated that the French television advertising rules seek to protect public health and that they are appropriate to ensure that this objective is achieved. The rules restrict the situations in which advertising hoardings for alcoholic drinks can be seen on television and, consequently, are likely to restrict the broadcasting of such advertisements, thereby reducing the occasions on which television viewers may be encouraged to consume alcoholic beverages. The Court accordingly held that the principle of the freedom to provide services laid down in the EC treaty did not preclude a ban such as that imposed by the French rules on indirect television advertising for alcoholic beverages.

Football and horseracing databases not protected by EC directive. Decision of the ECJ²⁵⁷

Here, the European Court of Justice dealt with four joined cases concerning the Directive on the legal protection of databases²⁵⁸ and, more particularly, the scope of that protection in the context of sporting databases (football and horseracing). The Fixtures marketing company and the British Horseracing Board (BHB) claimed that other companies had infringed their

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rights in these databases. Fixtures Marketing, acting on behalf of the various professional leagues, issues licences for the utilization, outside the UK, of the fixture lists for the top English and Scottish football leagues. The fixture lists (for around 2,000 matches per season) are drawn up at the beginning of each season by the organisers of the leagues. They are stored electronically and set out in, inter alia, printed booklets.

The BHB, which organises the British horseracing industry, compiles in its database detailed information about the races and the official register of thoroughbred horses in the United Kingdom. Some racing information is made available to the public by radio, television and the written press and through a specific information service for those concerned. Oy Veikkaus, Svenska Spel and Organismos Prognostikon Agonon Podofairou (OPAP) organise pools betting in Finland, Sweden and Greece. They use data relating to fixtures in the English and Scottish football leagues, although none of these companies has a licence granted by Fixtures Marketing.

William Hill is one of the leading providers of odds in horseracing. In addition to traditional sales methods (licensed betting offices and telephone betting) it offers internet betting for all the major horse races in the United Kingdom. The information displayed on its internet sites comes from newspapers and from an information service for subscribers which in turn obtains its information from the BHB database. The information on its internet site only covers a small part of the entire BHB database and is arranged in a different manner.

Fixtures Marketing and the BHB consider that the companies which are using their data for the purposes of taking bets on football matches or horseracing have infringed the right conferred on them by the directive. The Finnish Vantaan Käräjäoikeus, the Swedish Högsta Domstolen, the Greek Monomeles Protodikeio Athinon and the English Court of Appeal, before which these proceedings were pending, had referred several questions to the ECJ for a preliminary ruling on the subject-matter and the scope of the *sui generis* right conferred by the directive.

The Court pointed out that the directive reserves *sui generis* protection for databases whose creation required substantial investment. The directive prohibited extraction and/or reutilisation of the whole, or a substantial part, of a database and, under certain conditions, of insubstantial parts of a database as well.

The Court held that the term "database" used in the directive referred to any set of works, data or other materials, separable from each other without the value of their contents being affected, which includes a method or system of some kind for the retrieval of each of its constituent materials. However, the directive reserved the protection of the *sui generis* right for

databases which show that there has been, qualitatively or quantitatively, a substantial investment in the obtaining, verification or presentation of their contents.

As regards the football fixture lists, the Court decided that the expression "investment" in the obtaining of the contents of a database referred to the resources used in seeking out existing materials and collecting them in the database. It did not cover the resources used for the creation of materials which make up the contents of a database. The fact that the maker of a database was also the creator of the materials contained in it did not exclude that database from the protection given by the *sui generis* rights, provided that he/she establishes that the obtaining of those materials, their verification or their presentation required substantial investment in qualitative or quantitative terms, which was independent of the resources used to create these materials.

Although a football fixture list may be regarded as a database within the meaning of the directive, finding and collecting the data which make up such a list does not require any particular effort on the part of the professional leagues. Those activities are indivisibly linked to the creation of those data, in which leagues participate directly as those responsible for the organisation of football league fixtures. Obtaining the contents of a football fixture list therefore does not require any investment independent of that required for the creation of the data contained in that list.

Nor do the professional football leagues need to put any particular effort into monitoring the accuracy of the data on league matches when the list is made up because those leagues are directly involved in the creation of those data. Even the verification of the accuracy of the contents of fixture lists during the season (for example, following the postponement of a fixture) does not involve any substantial investment. The presentation of a football fixture list is also linked to the creation as such of the data which make up the list and does not require investment independent of the investment in the creation of its constituent data. It follows that neither the obtaining, verification nor presentation of the contents of a football fixture list attests to substantial investment which could justify protection by the *sui generis* right conferred by the directive.

In relation to horseracing, which was the subject-matter of Case 203/02, it was not disputed that the BHB database which contains lists of horses entered for a race, constitutes a protected database under the directive. The issue was whether William Hill was performing actions which were prohibited by the *sui generis* right. The Court pointed out that acts of extraction (i.e. transferring the contents of a database to another medium) and acts of re-utilisation (making it

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available to the public) of the whole or a substantial part of the contents of a database require the authorisation of the maker of the database, even where he/she has made that database accessible as a whole or in part to the public or has authorised a specific third party or specific third parties to distribute it to the general public.

The expression "substantial part", in quantitative terms, of the contents of a database refers to the volume of data extracted from the database and/or re-utilised, and must be assessed in relation to the total volume of the contents of the database. In qualitative terms, it refers to the scale of the investment in the obtaining, verification or presentation of the contents extracted or re-utilised.

The Court observed that the resources used by the BHB, in the course of organising horse races, to decide the date, the time, the place and/or the name of the race and the horses running in it, represent investment in the creation of the materials contained in its database. It added that the verification prior to the entry of a horse on the list (verification of the identity of the person entering the horse, the characteristics of the horse, the identity of the owner and the jockey) takes place at the stage of the creation of the data and cannot, therefore, be considered to constitute investment in the verification of the contents of a database. Since the materials extracted and re-utilised by William Hill did not require investment by the BHB which was independent of the resources required for their creation, those materials did not constitute a substantial part of the contents of the BHB database.

The directive prohibits unauthorised extraction and/or re-utilisation of insubstantial parts of the contents of a database by unauthorised acts the cumulative effect of which is to reconstitute and/or make available to the public the whole or a substantial part of the contents of that database and thereby seriously prejudice the investment made by the maker of the database. The acts of extraction and/or re-utilisation carried out in a repeated and systematic manner by William Hill on the occasion of each race held concern insubstantial parts of the BHB database. However, there is no possibility that, through the cumulative effect of its acts, William Hill might reconstitute and make available to the public the whole or a substantial part of the contents of the BHB database. William Hill therefore do not seriously prejudice the investment made by the BHB in the creation of that database.

Eurobarometer survey shows that Europeans are in favour of a reference to sport in the Constitution²⁵⁹

On the occasion of the closing ceremony of the European Year of Education through Sport 2004, the European Commission published the results of a special Eurobarometer survey conducted in October 2004 in

the 25 Member States. The survey stresses that European public opinion is overwhelmingly in favour of the objectives pursued through the programme for the Year, in particular the importance of sport in conveying certain essential values such as team spirit, discipline and comradeship. The people interviewed reasserted their desire to see sport feature more prominently in the school curriculum. Finally, 62% of Europeans feel that there is a case for a reference to sport being included in the Constitutional Treaty.

The European Commission's Education and Culture DG was eager to repeat its 2003 survey on the practice and image of sport in the European Union. It was conducted between 2 October and 8 November in the 25 Member States and consists of four parts:

The practice of sport in the European Union

- Some 4 out of 10 people do sport at least once a week. The Scandinavians are the most "sporty" in the European Union.
- Lack of time is the main reason given for not doing sport, whereas the cost or the lack of facilities is seldom mentioned.

The benefits of sport

As in 2003, the main benefits of sport are perceived primarily in terms of improved physical and psychological wellbeing. 90% of those interviewed feel these benefits to be particularly significant in the drive against obesity.

The social dimension of sport

- Team spirit (52%) and discipline (46%) top the list of values which sport develops best. Nearly three out of four Europeans see sport as a means of promoting the integration of immigrant populations.
- Four out of five people interviewed are in favour of seeing sport feature more prominently in the school curriculum.
- A clear majority of these (86%) consider the practice of a sport as a sufficiently attractive alternative to indoor pursuits such as television, video games and surfing the Internet.

The European Union and sport

- The greatest level of expectation (80%) in relation to European Union action is in the fight against doping.
- Two out of three people interviewed (65%) agree that the Union should take action to ensure that the worlds of education and sport work together.
- In addition, 62% of Europeans feel that there is a case for a reference to sport to be included in the future European Constitution. If the draft constitution is ultimately ratified, the Union will have a legal basis for action which draws on the social, educational and cultural dimensions of sport.

10. Company Law

Bankruptcy (actual or threatened) of sporting clubs & bodies

[None]

Other issues

Wembley group remains – in name only (US)²⁶⁰

In early February, it was learned that Wembley, the US greyhound track and casino company, was selling off both its US business and its last remaining UK dog tracks, leaving the firm with no assets except its name. Chief Executive Mark Elliott said that the deal, which ended a five-year process of dismantling the company, was “fantastic” for shareholders, but conceded that it was by no means certain. BLB, the consortium backed by South African gaming magnate Sol Kerzner, had offered \$339 million for Wembley’s US business. BLB is the group which made an 860p-per-share offer last year following a fierce bidding war. However, BLB suddenly withdrew over the failure to agree a settlement with the Rhode Island government, which takes 74 per cent of its revenue from its Lincoln Park complex. The site generates 10 per cent of Rhode Island’s fiscal income. Grey Feehely, an analyst at Altium Securities, commented that the biggest problem has been the politicians – now that they had moved the chance of success was greater this time.

The Rhode Island governor, as well as leaders of the State legislature, supported BLB, saying that they wished to discuss a revenue-sharing deal with the group. In an effort to persuade BLB not to walk away again, Wembley had ring-fenced all potential liabilities arising from a US court case in which various directors faced corruption charges. At the time of writing, Wembley was also engaged in talks with a number of parties, including property companies, to sell its dog tracks in the UK. These include the 14-acre Wimbledon dog track, reckoned by analysts to be worth £50 million.

Mr. Feehely also said that shareholders could see between 836p and 873p per share returned to them, depending on the value of the UK tracks. The company would then be left exclusively with its name, which Mr. Elliott admitted was “worthless on its own”. He added:

“All the rights to the Wembley Stadium were sold along with the stadium. The Wembley name also belongs to a suburban town in London. Down the road there’s also a Wembley launderette and a Wembley tandoori”

However, he insisted that the deal was just as good value as BLB’s offer made the previous year. He nevertheless pointed out that shareholders could have expected more, considering Wembley’s profits had

improved during the past year. He insisted that greyhound racing was not a dying sport.

UEFA clears Abramovich of double fault

Mr. Roman Abramovich, the multi-millionaire owner of Chelsea FC, is a controversial character in football – or indeed in any other walk of life to which he has dedicated his considerable talents. His financial interest in football is mainly that which has seen him take a controlling interest in English premiership side Chelsea, but was also at a certain point said to extend to his native Russia. More particularly, he was linked at a certain point to leading side CSKA Moscow.

The problem with this was that the Russian side were drawn to meet Chelsea in the European Champions League, which is why the matter was brought to the attention of the European governing body of football, UEFA. It examined the potential conflict because its rules prevent anyone from having a controlling interest in two teams involved in the same competition. CSKA are sponsored by SIBNEFT, the oil company of which the Chelsea owner is a majority shareholder. Chelsea and Sibneft had stated that Mr. Abramovich had no direct interest in CSKA, and this was confirmed by UEFA.²⁶¹

Strictly speaking this was true, though the present writer may not be the only commentator to feel slightly uneasy at this state of affairs, which suggests that the current UEFA rules may not be entirely satisfactory on this point.

Toyota racing team is handed ultimatum by parent company

Ferrari have ruled the roost in Formula One motor racing for so long that it the two have become almost synonymous, especially under the reign of ace driver Michael Schumacher. Naturally this has not been to the taste of other brand names in the car industry, and in early January the Toyota team were warned that they must raise their game dramatically if it was to continue to justify its parent company billion-dollar investment. That was the stark message emanating from the Japanese company’s senior management on the eve of the unveiling of the new Toyota TF105 at Barcelona’s Estacio de Franca railway station.²⁶²

More particularly, the Toyota vice-president Akihiko Saito demanded that the Toyota team should score its first top-three finish in a Grand Prix event this year. He conceded that Formula One racing had been harder than the company expected, but that just made it a challenge worthy of its attentions

11. Procedural Law and Evidence

[None]

12. International Private Law

[None]

13. Fiscal Law

ICC in tax evasion manoeuvre

In early March 2005, the International Cricket Council (ICC) announced details of the tax evasion manoeuvre which will see them vacate Lord's in August of this year. The new ICC base will be in Dubai. The MCC did their best to retain their most prestigious tenants, lobbying the British Government over the summer of 2004 in order to induce them into offering tax concessions. However, although the ICC agreed to await the Budget statement in December 2004, the Chancellor of the Exchequer, Gordon Brown, refused to offer any "sweeteners". This prompted a vote later that month amongst the ICC leadership. Singapore made an attractive bid, but it was the position of Dubai, as home to the ICC Global Cricket Academy, which proved to be the clinching factor.²⁶³

14. Human Rights/Civil Liberties

Racism in sport

Racism in Spanish football – Spain v England matches reveal extent of problem

Introduction

It is an unfortunate fact that, among those who express support for professional football and its various teams in Europe, there has arisen a nasty undercurrent of racialism ever since the first black players made their appearance in these sides. Britain, France, and Italy have at different times been faced with this problem, but in these countries a determined effort seems to have gone some way towards eliminating this cancer. However, recent events appear to have shown that the problem remains a serious one in Spain. This was brought home to millions of television viewers during the infamous Spain v. England fixture in November, but racialism has been a problem in Spain for some considerable time now.

This has been particularly the case amongst the football neo-fascists whose support has been tolerated – and, some would maintain, even encouraged – by top clubs and whose racist and violent credo has disfigured many an encounter at the domestic level. At Real Madrid, and its home, the Santiago Bernabeu Stadium, they are known under the sobriquet of los Ultras Sur and appear to enjoy a special status at their home ground. Apart from the colour of their scarves, the Ultras Sur are almost indistinguishable from the ultras at the other leading Spanish clubs. When their sides meet in competition, the rival gangs indulge in blood-stained cacerias (hunts) of one another. However, when the national team are engaged, they swap their traditional colours for the red and gold of their national flag, and assemble in a recently-formed alliance called Orgullo Nacional (or National Pride). The group first emerged at the Euro 2004 championships in Portugal, where its members had everything planned before a ball was kicked in anger. Since then they have gone, by their own standards anyway, from strength to strength.²⁶⁴

The role played by Spain's national coach

It is true that the shady groups described above need no encouragement or assistance for their disgraceful behaviour. However, the growth and increasingly high profile of these gangs has not been discouraged by the attitude displayed by the national team coach, Luis Aragones, who has given vent to some extremely unpleasant sentiments in this regard. During a training session for the national team at the Spanish FA headquarters of Las Rozas, just outside Madrid, he locked horns with José Antonio Reyes, the Arsenal striker, and attempted to motivate him by instructing him to tell that Negro de mierda (black sh*t), meaning

Reyes's team mate Thierry Henry, that he was much better than the latter, repeating the offending expression a second time. These exchanges were heard in full by journalists in attendance at the training camp, and repeated in full in Spanish television the following evening.²⁶⁵

Spanish press agency reports and sporting websites initially glossed over the report, but the French news agency France Presse erroneously accused the coach of having used the word nigger, presumably mistranslating the word Negro (black) because at that stage the full text had yet to emerge. Aragones did not deny what he had said, but refuted the accusation that his observations were racist (although he did not help himself by uttering that most caricatured of vacuous exculpations when he stated that "some of his best friends were black").²⁶⁶

Naturally, condemnatory reactions were not slow in coming. Robert Pires, Thierry Henry's team-mate, both at the club and the international level, led the tide of condemnation, and even suggested that it might be necessary for Mr. Henry to take the Spanish coach to court. However, the President of the Spanish Football Federation, Angel Maria Villar, defended Aragones, claiming that he had coached many black players in his time and had been correct and respectful towards them.²⁶⁷ Reaction in the Spanish media and footballing circles was also muted, with Spanish defender Michel Salgado making the inevitable claim that the media had exacerbated the incident and taken the coach's remarks "out of context. However, mindful perhaps of an official reaction at a higher level of football authority, Mr. Aragones at length made an apology which was posted on the Spanish Football Federation's website, although it cannot be described as either fulsome or unconditional:

"In the first place, I want to make it clear that my intention was never to offend anyone. For that motive, I have to say that I have a clear conscience. What I said can only be interpreted in the atmosphere of the team and of a coach who has the obligation to motivate my players to obtain the best results. To do this, I was using colloquial language. All I can do is to apologise to the people who could feel offended and repeat it was never my intention to disrespect anyone."²⁶⁸

However qualified, it was an apology of a kind, and few in the French or the British media seemed inclined to pursue the matter any further. However, on the eve of the Spain v. England fixture in mid-November, Mr. Aragones once again appeared to reach for the self-destruct button when, amidst remarkable scenes at the pre-match press conference, he brought the entire episode to life again with an incoherent tirade against the British media (or even perhaps Britain as a whole) by hurling the following at them:

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“You are kids compared to me. You don’t know anything whereas I am nearly 70. I know who are the racists. I remember the colonies. I have a lot of black friends and I have fed black people at my table, in my house. They have explained to me the English were after them in the colonies. I repeat: I have a lot of black friends and I am a citizen of the world. In my job I have been to many countries. I always respect different cultures and I have many friends from different places. I cannot understand the reaction to what I said.”²⁶⁹

He also appeared to make another attempt to elude any blame for his remarks about Thierry Henry by stating inconsequentially that “racism was a matter of conscience” and that his own conscience was clear. Whilst it was clearly exaggerated to blame the coach for the racist abuse which followed during the actual match, as some in the British media undoubtedly did, he definitely kept alive the flames of racism which, as is stated above, were already eating away at the moral basis of Spanish football – as had already been demonstrated the previous evening during the traditional under-21 fixture between the two countries.

Racism flares up at under-21 match

At the said under-21 encounter, racist chants emanating from the crowd in Alcalá, 20 miles from the Spanish capital, had been in evidence for much of the match. England’s Carlton Cole and Darren Bent had to run the gauntlet of monkey chants during the first half from supporters behind one of the goals, and during the second half, it was the visiting captain, Glen Johnson, who was subjected to the same treatment during the second half.²⁷⁰ In the heated atmosphere that ensued, Mr. Johnson was sent off in the 70th minute for dissent after disputing a challenge on visiting defender Nicky Hunt.²⁷¹

The Football Association immediately announced that it would forward a letter of complaint to European controlling body UEFA, in the expectation of punitive measures against the hosting football authorities.²⁷² Once again, it appeared to be ultras of various descriptions who were mainly to blame for inciting the hatred. However, worse was to follow at the full international fixture at Real Madrid’s ground, Estadio Bernabeu, which was to reveal to the entire world the extent to which Spanish football was in thrall to this malign influence.

Night of shame – Spain v England at Bernabeu

It had all started in such an earnest, symbol-laden and well-meaning atmosphere. England’s players had worn T-shirts bearing an anti-racism message during their training session in preparation for the fixture²⁷³. Just before the match commenced, both sides had lined up behind a banner stating “all united against racism in

football”, and the crowd were treated to recorded entreaties for tolerance from Thierry Henry and his French team-mate Lilian Thuram. The visiting players wore black armbands as a sign of respect for the recently-deceased former internationals Emlyn Hughes and Keith Weller, which seemed to enhance the solemnity of the occasion. Even the England supporters (well, most of them) seemed to have undergone a charisma transplant and were behaving themselves. Yet the match soon disintegrated into an unseemly exhibition of much of what so many people find extremely distasteful about the game (and were not only referring to the racist abuse here).

The more distasteful members of the Spanish crowd had already made their intentions clear by displaying banners such as “Aragones 1, Henry 0”. The match was not very old before the monkey chants which had disfigured the under-21 international the previous day made their unwelcome appearance. When England defender Ashley Cole dived in on Michel Salgado (earning a booking in the process), he was subjected to a volley of bigotry from one corner of the stadium. From that point onwards, the racism intensified in the most vicious of ways. Sean Wright-Phillips (supposedly targeted for a possible transfer by Atletico Madrid) was also disgracefully abused after he replaced captain David Beckham when the latter sustained a rib injury.²⁷⁴ Some of the chants were unbelievable in their viciousness, one of the kinder ones being “if you are not f***ing black, jump up and down”²⁷⁵.

The tension clearly got to the England players, although this cannot entirely explain the lacklustre form displayed by the England side as a whole – or indeed some of the less attractive aspects of the visitors’ demeanour, such as the persistent foul play and paranoid posturing of Gary Neville and the incredible and persistent volley of abuse towards the referee (and, as he left the field, towards the England bench) indulged in by Wayne Rooney until he was, as much for the England team’s sake as his own, substituted in the course of the second half.²⁷⁶

Unsurprisingly, the reactions were not slow in being forthcoming, and within hours of the final whistle the British Sports Minister, Richard Caborn, joined England manager Sven-Göran Eriksson and the English Football Association in condemning the behaviour of the Spanish fans. Mr. Caborn announced his intention to write to the Spanish sports minister, Jaime Lissavetsky to complain about the abuse, and called upon the world governing body FIFA and the European controlling body, UEFA, to start an investigation into the event.²⁷⁷ Mr. Aragones, for his part, refused to make any comment at a post-match press conference which bordered on open hostility. David Beckham, on the other hand, who was playing before his home crowd at the club level, declared

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himself “ashamed” of the Spanish fans.²⁷⁸

Although the Spanish media played down the chanting in its match coverage, the Royal Spanish Football Federation condemned the racist attitude on display. The English FA also received a formal apology from its Spanish counterpart for the incident. In a letter emanating from Jorge Arias, the General Secretary of the Spanish FA, deplored the behaviour engaged in and emphasised his country’s stance against racism.²⁷⁹ On behalf of the Government, the relevant Spanish minister, Maria Jesus San Segundo, also added his condemnation:

“I condemn without doubt the racist displays that may have happened. These kind of comments are deplorable and we do not want them to be made at all, either in sporting events or in society in general.”²⁸⁰

It would be pleasurable to be able to report that the aftermath was entirely responsible and praiseworthy in all its aspects. Unfortunately, this was far from being the case, as will appear from the section below.

The measures imposed by the footballing authorities

Certainly everyone made all the correct noises to begin with. Following the complaints lodged by the English FA, the world governing body FIFA launched its own investigation into the affair, emphasising that it wished to rid football of the “scourge” of racism. The case was to be the first test of FIFA’s seriousness of intent since it introduced the new and wide-ranging Code of Ethics the previous month. The code covers issues from doping to on-pitch incidents and crowd behaviour. As a result, the Spanish football authorities stood to be heavily fined at best, to be ordered to play several games behind closed doors at worst. It was generally agreed that, if the world governing body failed to take a lead, football would be seen to be “talking tough and acting soft” – and not for the first time either. Up to that point, the world body had never issued a fine to any club or nation for racism on the part of their fans.²⁸¹

The FIFA President, Sepp Blatter, also seemed to be full of determination that the body over which he presided should take a tough stance. Days after the Madrid imbroglio, he delivered himself of the opinion that he would have supported the England players if they had walked off the pitch at Bernabeu in protest at the racist abuse they had encountered. He even said that FIFA were considering a recommendation which would encourage players to leave the field if racially abused.²⁸² He also proposed that racist fans should be shamed in the middle of the pitch, whilst the match which they had tarnished would be suspended. More particularly this would involve identifying the people

responsible, then take them to the middle of the field to be booed by the other spectators.²⁸³ Leaving aside the sheer impracticability of such a plan, with all the logistical problems that this would entail, Mr. Blatter’s words seemed to indicate a firmness of resolve which had hitherto seemed to be lacking from FIFA’s actions in this field. Equally encouraging noises came from Jim Boyce, a highly influential member of FIFA’s disciplinary committee, and President of the Irish FA. Mr. Boyce also waxed lyrical about the virtues of setting a firm example, even if it meant “spectators missing one or two games,”²⁸⁴ which seemed to indicate a resolve to impose penalties which rose above the merely symbolic.

In the event, the penalty imposed by FIFA seemed to confirm its reputation as a toothless monster in this regard, consisting as it did of a fine amounting to £44,750.²⁸⁵ This amount, described as paltry by many commentators, hardly smacked of an iron determination to translate these leading personalities’ wishes into reality. One member of the relevant disciplinary panel had, according to one British leading newspaper, proposed that Spain should play their next two 2006 World Cup qualifying ties behind closed doors. However, it was decided that, for a first offence, Spain should merely be fined.²⁸⁶ Publicly, the English FA had to be seen to back FIFA’s decision, but privately, senior FA figures were astonished that such a light penalty was administered.²⁸⁷

No such inhibitions were experienced by the British sports minister, Richard Caborn, who left no doubts about his opinion that FIFA, by administering this light punishment, had laid itself open to the criticism that it had failed to treat the incident with sufficient seriousness. He commented:

“I think it is an opportunity missed for FIFA to have stamped its authority on the incident and shown that football and sport in general is (sic) not going to tolerate racism. We were looking for some symbolic (sic) action to say that we cannot allow this sort of behaviour – and FIFA has not done that.”²⁸⁸

Condemnation was also forthcoming from the anti-racist campaign “Kick It Out”, whose director, Piara Powar, gave expression to the campaign’s expectation that no penalty such as an order to play matches behind closed doors had been imposed.²⁸⁹ The indignation felt by many at the relative innocuousness of the penalty was compounded when it came to light that the racist incidents complained of did not even feature in the report submitted by the referee on the night, George Kasnaferis. Without the referee’s testimony, there was a fear that a penalty harsher than the one inflicted could have led to a legal challenge in the Spanish courts. This naturally led to calls for FIFA to review its procedures in dealing with incidents of this kind.²⁹⁰

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Disappointment was also the predominant sentiment when it was learned that the Spanish manager, Luis Aragones, whose remarks were regarded by many as having at least contributed towards the incident, was fined a mere £2,060 by the Spanish Football Association for the incident, referred to above, in which he called Thierry Henry a “black sh*t”. This was particularly the case when it emerged that, in the course of the same incident, Mr. Aragones had referred to Jose Antonio Reyes, whom he happened to be haranguing at the time, as a “gypsy”. He was called – several months later – by the Spanish FA to account for his remarks, and by delivering their verdict, the Spanish footballing authorities clearly indicated that they found him in the wrong, but that his offence was not sufficiently serious to warrant a suspension or even his dismissal – in theory, he could have been suspended for two years. However, it was plain that the Spanish FA wished to play down the incident. Once again, the Kick It Out campaign condemned the relative lightness of the penalty.²⁹¹

Nor was criticism of these relatively light sentences confined to British commentators. In mid-February 2005, a leading Spanish referee attacked the failure of his country’s football authorities to deal with racist abuse, and pledged his support to any black players who decided to walk off the field in protest. Writing in the Spanish sports daily newspaper Marca, Eduardo Iturralde Gonzalez, one of the most respected match officials in the Primera liga opined that the people who should be facing up to this kind of problem were not doing so, this creating a “massive problem.”²⁹²

Other reactions

The reluctance of the relevant football authorities to deal forcefully with the problem was not, however, the only unsatisfactory outcome of this whole episode. Equally distasteful was the opportunistic bandwagon-jumping and point-scoring which ensued. Thus hardly had the dust settled on the Bernabeu stadium than organisers of London’ 2012 Olympic bid were not only condemning the racist incident, but also were calling for it to be brought to the attention of the International Olympic Committee (IOC) members.²⁹³ It is only to be hoped that the relevant IOC members treated this clear attempt to gain an advantage over one of the front-runners in the race for the 2012 Games with the contempt it richly deserved.

Some Spanish sources were also somewhat intemperate in the way they reacted to the manner in which the Bernabeu incident was received by the British media. One such commentator was Spanish journalist Guillem Balague, who attempted to point out what he saw as the beam in the eye of English football by pointing out that

“there is only one prominent black football writer, one black FA director, hardly any Asian players throughout English football. If you want to be defender of the moral high ground (...) you must first clean up your own act.”²⁹⁴

Exactly where the moral equivalence lies between dehumanising black players with monkey chants and the fact that the ethnic communities are not represented as proportionately as they might be in English football’s structures is a secret presumably known only to Spanish journalists. And exactly how many black football writers daily grace the pages of La Marca, or how many directors rule the roost among the hierarchy of the Spanish FA?

Racist incidents continue in Spanish football

There could have been a silver lining to the cloud of bigotry which marred the Spain v. England internationals if it had shocked the Spanish footballing community sufficiently into abandoning these distasteful practices once and for all. Unfortunately, incidents of a racist kind continued to occur well after the shameful events at Bernabeu in mid-November.

Barely one week after the matches referred to, the racists were at it again in Real Madrid’s stadium for the European Champions League encounter with German side Bayern Leverkusen. The object of their racism on this occasion was the visiting side’s black defenders, Juan and Roque Junior. Even more embarrassingly, this took place in the presence of the UEFA President, Lennart Johansson, who afterwards left without commenting.²⁹⁵ Once again, the trouble seemed to emanate from the Ultras Sur. Several members of the Bernabeu crowd were also seen to offer Nazi salutes.²⁹⁶ For this, UEFA inflicted the penalty of £6,760 on Real Madrid. Once again, many commentators condemned what they regarded as an unduly lenient penalty.²⁹⁷

However, Real was not the only Madrid club whose followers were found to be wanting in this respect. In early January of the new year, similar scenes were noted during the Madrid derby played at Atletico Madrid’s ground, the Vicente Calderon stadium. What should have been a resounding triumph for the away team, who eventually emerged victorious 0-3, was soured to a large extent by the incessant abuse directed by the Atletico fans towards Real’s Roberto Carlos, especially during the second half.²⁹⁸ The chanting became so bad at one stage that the referee, Alfonso Perez Berrull, went over to the touchline to consult the fourth official. A message was then passed to the home club’s officials, who broadcast a message over the loudspeaker system requesting a stop to the abuse. Unfortunately, the Atletico fans decided to ignore this request.²⁹⁹

Here again, the Spanish FA came in for heavy criticism

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by deciding to impose the lenient penalty of a £430 fine. A spokesman for the Spanish controlling body explained that, in the view of the Association, the club had done all it could to prevent the abuse by broadcasting the messages referred to above, which implored them to stop.³⁰⁰ This was in spite of a strong statement which they had issued, in conjunction with the Spanish professional league, to act with the “greatest of rigour” in order to eradicate racism from the domestic football scene.³⁰¹

Nor does the cancer of racism appear to be confined to the Spanish capital. This was highlighted particularly by an incident which occurred during a fixture between Real Zaragoza and Barcelona, who were leading the Primera Liga at the time. When the visiting striker Samuel Eto'o scored his 17th goal of the season, he went into a seemingly unbalanced dancing routine by way of celebration. Later, the striker explained that this had been a reaction to the racist abuse he had received from a section of the home fans, who had not only engaged in monkey noises whenever he touched the ball, but had also pelted him with peanuts after he scored. Here again, the official response appeared to be fundamentally flawed, since the referee, Fernando Carmona Mendez, failed to mention this in his official report; indeed, he described the crowd's behaviour as “normal”.³⁰² Nevertheless, Spain's Anti-violence Commission opened an investigation into the disturbance as a result of reports made by security officials in attendance at the fixture.³⁰³

Indeed, this appeared to have been an experience which was far from unusual for the Cameroon international striker, who confirmed the widely-held view that racism had become an endemic problem in Spanish football. In fact, he went so far as to maintain that the relevant authorities could never appoint a black referee because the fans would “kill him”. The reception he had received at Real Zaragoza was far from unusual, and it was also revealed that, during Barcelona's away match against Albacete, he had also been on the receiving end of racist abuse.³⁰⁴

All the above suggests strong evidence that – to adapt that over-used cliché – there is something rotten in the state of Spanish football, and that this does not the product of over-heated reporting by the media who are eager as ever for a story to sell. Both the international and domestic authorities overseeing the game – and perhaps even the country – ignore or play down the problem at their long-term peril.

Dutch football supporters involved in racist incidents

Unfortunately, the evil of racism is not confined to Spain, as a number of incidents elsewhere have borne out in the course of the current season. Thus there have been outbreaks of racism during a number of matches

involving Dutch teams. One such fixture took place in mid-October 2004, when the referee stopped a fixture between ADO Den Haag and PSV Eindhoven who both play in the Dutch Premier Division, after members of the home crowd started making racist chants. The match official in question, René Termink, halted the match in the 80th minute following anti-semitic chants from the ADO “supporters”. It was the first occasion on which a match was cancelled since the introduction of new legislation in the Netherlands aimed at combating racist chants.³⁰⁵

However, PSV themselves seem to be attract a regular following that includes some of the less desirable spectators, as was revealed by French international and Arsenal defender Patrick Vieira. Faced with the prospect of meeting the Dutch team in the preliminary stages of the 2004-5 European Champions' League, he spoke of his fears of racist abuse on the basis that both he and other black members of the Arsenal team had to endure such indignities when the two sides met in the same competition three years previously.³⁰⁶ The referee officiating at this year's fixture, Herbert Fandel, appeared to be fully aware of the problem, and announced that he too would be prepared to call a halt to the game if any racial abuse was forthcoming.³⁰⁷

Apart from the legislation referred to above, there are other encouraging signs that Dutch football is recognising and attempting to remedy the problem. In mid-January, it was learned that the Netherlands

National team would spearhead the anti-racism campaign launched by sportswear company Nike by wearing black-and-white shirts for the friendly international with England, which was held the following month.³⁰⁸

Racial issues continue to cause problems in South African sport

Countless previous issues of this Journal have related the extent to which the legacy of the apartheid regime, which until the 1990s kept the ethnic groups separated in South Africa and the latter ostracised from the international community, has continued to cause divisions and ill-feeling in various sporting circles. The period under review has, unfortunately, continued this sorry trend. Broadly speaking, these problems fall into two categories: (a) the attitudes displayed by some white sporting figures who seem unable to grasp that times have changed, and (b) the extent to which political pressures and quotas (whether official or unofficial) dictate team selection, and are sometimes alleged to cause results on the field of play to suffer.

An example of the first type of problem was very much on display during the Athens Olympics, when Hestrie Cloete, who won the silver medal for her country in the high jump event, became the centre of a race imbroglio after her friends and family allegedly

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booed and made insulting observations about a black official who presented her with the medal. Sam Ramsamy, the president of the South African Olympic Committee, was allegedly called a “coolie” and “kaffir” by Ms. Cloete’s brother-in-law, Stephanus Cloete, whilst he watched the medal ceremony. (Earlier, Mr. Ramsamy had provoked a serious debate in the country by claiming that the country’s Olympic team continued to be dominated by white competitors.)³⁰⁹

Ms. Cloete’s husband, Andries, then seemed to compound the outrage by informing the South African Sunday Times that he would not allow a black journalist into the family home because of his colour. It is perhaps instructive to note that the family’s home is in Coligny, 35 miles from Ventersdorp. This town is in the hometown of rabbleroising white supremacist politician Eugene Terr’Blanche, who has a very considerable following in that area.³¹⁰

Another unfortunate blast from the past in this respect came in the not insubstantial shape of Geo Cronje, the rugby lock forward international. The reader may recall from a previous issue³¹¹ that, during the South African team’s preparations for the 2003 World Cup in Australia, Mr. Cronje was reported to have refused to share a room with a black team-mate, Quinton Davids. Although the player denied the allegation and maintained that he was not racist – he was later cleared in an independent inquiry – he was sent home and then left out of the party which went to Australia for the World Cup. When Harlequins, an English Premiership side, expressed an interest in, and finally secured the transfer of, Mr. Cronje to their ranks,³¹² there was some controversy over this choice (and not only because of Mr. Cronje’s past, since he was still on contract to the South African club Blue Bulls until the end of the then current season). However, in the end it was not Mr. Cronje’s past, but a persistent knee injury, which discontinued his career at The Stoop.³¹³

The second issue – i.e. the question whether ethnic background should be a factor decide team selection, also affected South African rugby during the period under review. The thorny issue of what can only be described as racial quotas once again raised its controversial head when the national team selectors were compelled to deny any political interference in the side selected to play England at Twickenham in mid-November 2004. Although there is no official quota system which needs to be observed in the national team selection process, there was, under the South African Union’s president, Brian van Rooyen and the national coach, Jake White, an understanding that the side would contain two black players for every fixture.³¹⁴

With a few days to go before the match, the Springboks had intended to face England with one black

player only. However, they then restored the wing Breyton Palse to the team, thus denying Jaque Fourie a sixth international cap. Fourie had initially been selected because the selectors considered him better able to cope with the hanging cross-field kicks which they expected from England fly-half Charlie Hodgson.³¹⁵ The choice of the experienced but relatively diminutive Palse seemed to have been dictated by government pressures issued from home. Although the South African management publicly denied any interference, the reaction of coach Jake White to press questions suggested a different version of events:

“South African rugby is a unique environment and I bought into all the parameters (sic) when I signed up. It’s when you get injuries that it all gets difficult. Every single person in my squad is sensitive to our very different background and each individual’s needs.”³¹⁶

White has already come in for criticism from conservative elements in South Africa for paying excessive heed to transformation policies when he included 11 black and coloured players in his squad for the winter tour of Europe.³¹⁷ On the other hand, the success which Mr. White has enjoyed in transforming his side from the poor relations of the Southern hemisphere to the latter’s champions suggest that he would not take excessive liberties with the team’s chances of success.

Cricket is also a sport which has always enjoyed a high profile in South Africa, and here too, racial politics have sometimes caused ructions. In one particular case, this aspect of team selection has actually led one of their most promising players in years to leave the country of his birth and seek selection for England. Kevin Pietersen, a native of Natal, has now found favour with the England selectors – at least at the one-day level – after a few years spent playing for Nottinghamshire, and makes no secret of the reason why he has forsaken the land of his fathers. He claims that white resentment is as high as ever in South Africa over race quotas, and that a British passport (for which he qualified thanks to his English mother) was worth a fortune to a white youngster seeking an escape from this system. By way of example, he added:

“I went on a tour of Western Australia with my state side at the end of 1999 and did really well, but in the first game of the next season I was told that I wasn’t playing because they needed to fill up the quota with three players of colour. A week before that I had been asked whether I had a British passport. You can sell a British passport for millions to a white kid in South Africa.”³¹⁸

Ironically, however, his South African origins seemed to have thwarted him in his immediate quest for a Test place, since he was omitted from the England party to tour his native land during the winter of 2004-5. Mr.

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Pietersen claimed that this was because they did not want him as a politically explosive presence among the Test hosts – with another equally controversial series to come after that, i.e. to Zimbabwe (see above!). The England selectors, however, denied that this aspect had been a factor in Pietersen's omission.³¹⁹

Meanwhile, back in South Africa the selection process for the said Test series in England was itself once again in thrall to the ethnic origin problem. Particularly the position of wicket-keeper seemed to be a source of contention among the selectors. National coach Ray Jennings wanted the ebullient former vice-captain, Mark Boucher, recalled in place of Thami Tsolekile, who has acted as wicketkeeper for two Tests against India. Mr. Jennings had made his view publicly known during the weeks which followed the return of the South African team after their defeat in the Indian Test series. For this, he was severely reprimanded by the United Cricket Board (UCB) Chief Executive, Gerald Majola.

However, when the selection panel met for the first Test against England they did not even discuss the wicket keeper position.³²⁰ It was widely reported that UCB President Ray Mali had used his power of veto to retain Mr. Tsolekile, using the terms of the Board's constitution which is pledged to assist the transformation of the game from a white-dominated and elitist sport to a game for the people. The panel convener, Haroon Lorgat, tried to sooth the ill feeling created by Mr. Mali's intervention, although he fuelled rather than dispelled suspicions of politically-motivated interference when he stated that it was not "entirely" true that he (Mali) overruled or changed the team. Although he used cricketing merit as the basis for Tsolekile's retention, he made no apology for the fundamental principle that black players should receive special treatment from selectors, and be given more and earlier opportunities than their white colleagues – to a certain degree.

Officially, quotas have been abolished in South African cricket – at least at the provincial level. Offensive to senior players such as fast bowler Makhaya Ntini, and utterly disliked by young black cricketers who are inevitably "labelled", quotas have officially been replaced by "targets", although Mr. Lorgat admitted that they amounted to much the same thing.³²¹

The Morrison/Frei affair

In their final game during the qualifying stages for the football European Championships for 2004 Switzerland beat Ireland 2-0, thus ensuring that the Irish would have to wait another four years to have another opportunity to make it to the finals. The match itself was played in a tempestuous atmosphere, and, after Switzerland's volatile striker Christian Frei had scored his side's second

goal, he was seen taunting the Irish bench, which caused Ireland player Mark Kinsella to throw a water bottle at him in retaliation. However, it was also alleged by Clinton Morrison, Ireland's striker that remarks had been made to him by Frei which amounted to racial abuse. Mr. Morrison made this statement when he learned that Frei was to miss another encounter between the two countries, in early September, and expressed regret that this would mean a lost opportunity to "have it out" with Mr. Frei.³²² The Swiss player, for his part, denied ever having made any racist remark to Mr. Morrison, whom he accused of "trying to grab the headlines".³²³

In the event, nothing further came of this affair, although it still remains to be seen whether Mr. Morrison will be asked to account for the final part of his statement, in which he seemed to look on a return fixture with the Swiss as a way of exacting revenge.

Aussie cricketer "pommie" insult is racist, says disciplinary body

In mid-February 2005, it was learned that an Australian cricketer who described an opponent as a "pommie git" was found guilty of racism, Peter Gardiner, a bowler for the Joondalup side, had exchanged words with an opposing batsman over a disputed lbw decision. He was reported to have said "what are you looking at, you pommie git"? The batsman concerned, Kyle Coetzer, pointed out that he was in fact Irish, and there the matter would have rested had the umpire not overheard the remark and reported it to the Western Australian Cricket Association (WACA). The latter decided that the bowler was guilty of racism. The president of the Joondalup club protested at this verdict, complaining that the decision indicated that cricket was being "sanitised".³²⁴

Human rights issues

[None]

Gender issues

Mexican club bid to sign woman as professional dismissed by FIFA

Women's football has gone from strength to strength these past few years, but remains firmly segregated from the male game at all levels. However, it seemed as though a major break with this situation had occurred when it was learned, in mid-December 2004, that a Mexican male professional club had signed a woman player. The latter, Maribel Dominguez, had already scored 42 goals in 43 games for the national women's team, and was signed by the Celaya side.³²⁵ Both player and club

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insisted that there was nothing in the rules which prohibited such a move, and for a while it looked as though footballing history was going to be rewritten.³²⁶

However, the move had to be endorsed by FIFA, and the latter refused to ratify it at a meeting of its executive committee in Zurich, Switzerland, held two days later. In a written statement, the Committee emphasised that:

“there must be a clear separation between men’s and women’s football. This is laid down in league football and in international matches by the existence of gender-specific competitions, and the laws of the game and FIFA’s regulations do not provide for any exceptions.”³²⁷

This seemed to indicate that FIFA will not change its rules on the subject in the near future.

Other cases (all months quoted refer to 2004, unless stated otherwise)

Trinidad. In late October, it was learned that women became eligible for the first time for membership of the Queens Club, which is the West Indies’ cricket team international venue in Port of Spain. The voting result was welcomed by Willie Rodriguez, the club president.³²⁸

Dhaka. Earlier that same month, around 500 Bangladeshi Muslims demonstrated in Dhaka against the creation of the country’s first female football league. The leaders of the rally stated that they would besiege the national sports council if the “satanic women’s football league” was not abandoned immediately.³²⁹

Other issues

Fury at Di Canio fascist salute

South Africa is far from being the only country whose political past can return to haunt the sporting field. In Italy, many citizens continue to be traumatised by the collective memory of the fascism which ruled the country from 1923 to 1945, and have been quick to condemn those who have sought to reopen those wounds gratuitously. This appeared to have been the case with Paolo Di Canio, who, after spending several years in the English football leagues, returned to his native land to join the ranks of Lazio Rome. Mr. Di Canio chose the local derby, against deadly rivals AS Rome, to celebrate his side’s victory with a fascist-style stiff-arm salute addressed towards the Lazio fans at the Stadio Olimpico.³³⁰

Condemnation was quick to follow from most shades of political opinion, with centre-left politician Enzo Foschi claiming that Mr. Di Canio had given

legitimacy to a murderous and tyrannical ideology. However, Alessandra Mussolini, the dictator’s granddaughter and herself a far-right politician, welcomed his “Roman salute”. Mr Di Canio himself has always confessed to a fascination with Mussolini, whom he described in his autobiography as “deeply misunderstood”.³³¹

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General, scientific and technological developments

Scientists discover new designer steroid

There are times when the valiant efforts of the world's anti-doping bodies seem to resemble the "pursuit of the uncatchable" and, as such, doomed to long-term failure. However, thanks to the dedication and expertise of a number of scientists, they are able to stay abreast of the attempts made by the purveyors of unlawful drugs to peddle their wares to often unwary and inexperienced sporting performers. Thus in early February 2005, it was learned that scientists had discovered a second steroid especially designed to evade drug testers. The World Anti-Doping Agency (WADA) admitted that there were other designer drugs in circulation, but this one, called desoxymethyltestosterone (DMT), was discovered by Canadian customs officials in a shipment of bottles which entered their territory from the US. A mystery whistleblower subsequently tipped off WADA that the drug had been found. The information was received by WADA through emails, and investigations have yet to establish the identity of the source.³³²

The discovery and identification of the steroid owes much to the publicity surrounding the THG (tetrahydrogestrinone), the designer drug which is at the heart of the BALCO scandal (of which more later – see below, p. 000). Oliver Rabin, the science director at WADA, commented:

"This is the second designer drug that we have discovered and we believe it was created purely for doping in sport. Without referring to an epidemic situation, this proves that THG was not a one-off. This new substance has been discovered so quickly because we learned some lessons from the THG story."³³³

Mr. Rabin added that tests of thousands of stored urine samples from a variety of sports had yielded no results, suggesting that DMT has not yet been used by athletes in competition. In that case, he concluded WADA was probably ahead of the dopers.³³⁴

As is reported elsewhere in this Journal (below, p. 000), the first case involving DMT has already reached the courts. Naturally this column pledges to keep its readership as closely informed as possible on any further developments in this field.

Doping issues and measures - international bodies

EAA official reveals that Athens tests may be flawed

Despite ominous warnings and predictions, the Athens Olympics were not quite as riddled with drugs cheating as had been feared. However, only weeks after the closing ceremony at the Athens Games, an official from the European Athletics Association (EAA) claimed that many athletes may have got away with doping because of flaws in the relevant testing procedures. In a communication addressed to EAA President Hansjörg Wirz, Georg Facius, a Danish member of the EAA anti-doping council, expressed a number of fears that "lack of education among doping stewards" may have allowed athletes to elude detection. Mr. Facius considered that inadequate supervision of urine samples was at the root of the problem. He stated that the devices used in Athens, which contained "foreign" urine, could not have been put in place had the athletes been kept under supervision from the time of notification to the time at which they produce their sample. This slip in procedure meant, according to the EAA official, that some may have got away with a doping offence. He also pointed out that of the 10 doping cases in the athletics discipline at Athens, nine were from the EAA – yet nothing had been done about them.³³⁵

IAAF may reduce no-shows in drugs testing

In late September 2004, it was learned that the International Association of Athletics Federations (IAAF) may reduce from three to two the number of times an athlete may fail to report for a drugs test during an 18-month period prior to triggering off an automatic ban. A final decision on this issue will be taken in August 2005, on the occasion of the next IAAF Congress.³³⁶

Rogge urges immediate disqualification for those missing dope tests

Reviewing the old year 2004 in terms of the success earned by the various bodies involved in combating doping in sport, Jacques Rogge, the president of the International Olympic Committee (IOC) concluded that the World Anti-doping Agency (WADA) had made great strides in their fight against doping during that year, but that athletes who miss doping tests should be immediately disqualified in future. He commented that 2004 represented a breakthrough in the battle against doping, adding that there had occurred a sea change in the attitude towards drugs cheats.³³⁷

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Doping issues and measures – individual countries

The Balco scandal – an update

Background

The reader will recall from a previous issue³³⁸ that one of the recent drugs to be devised in order to enhance sporting performance unlawfully is THG, which had been produced in such a way as to evade existing testing procedures. One of the main locations from which this substance originated was found to be the Bay Area Laboratory Co-operative (BALCO), a laboratory in California which was raided after a tip-off from someone who claimed to be a well-known athletics coach. This naturally attracted the attentions of the US prosecuting authorities, and Grand Jury hearings into the affair commenced in October 2003.

As the investigation proceeded, a number of names of sporting figures alleged to have been customers of BALCO came to the fore. Prominent amongst these was Marion Jones, the Olympic medal-winning sprinter, whose bank account had shown a sizeable amount paid to the laboratory's founder, Victor Conte. Although she steadfastly denied any involvement with the laboratory, the clouds of suspicion failed to lift, and in the event Ms. Jones withdrew from the 100 and 200 metre events at the Athens Olympics. Allegations of Ms. Jones's drug-taking had also emerged from her former husband, top US athlete C J Hunter, who insisted that he had injected his former wife with the prohibited substance.³³⁹

Since then there have occurred a number of further developments which have brought the matter to greater public attention and implicated other names in US sport – even beyond the world of athletics. However, the road to litigation in this matter has been far from straightforward, as will be revealed below. Various individual cases related to the BALCO affair which might have appeared under other headings are dealt with here for the sake of convenience.

Conte "reveals all" on television

Naturally, the media continued to take an interest in the affair, and various investigative features were devoted to it, particularly on television. In early December 2004, the US ABC News programme 20/20 focused on the founder of BALCO, Victor Conte, who confirmed that he had assisted the former Olympic and world champion to administer the human growth hormone via a syringe in a California hotel room on the eve of her first competition in 2001. Asked specifically whether Ms. Jones was a drugs cheat, Conte replied "Without a doubt". He also claimed he had started a drugs programme, which included THG, for Jones six weeks

before she won five medals at the 2000 Olympics in Sydney³⁴⁰. He also told ESPN The Magazine that he had been asked to help the sprinter and long jumper before the 2000 Olympics began by her former husband, C J Hunter, who, as was mentioned earlier, has made his own allegations about seeing Ms. Jones injecting steroids.³⁴¹ It later emerged that, in indulging in these forays into the visual and printed media, Conte had acted contrary to his lawyer's advice.³⁴²

Ms. Jones once again forcefully denied all these claims. Her lawyer, Richard Nichols, invited the general public to decide between Conte, facing 42 charges on federal indictment, and his client, one of the country's most decorated athletes. It has also been pointed out that, in the course of her entire career, Ms. Jones never failed one drugs test out of the many she was required to take. Mr. Conte countered this by claiming that no accurate tests existed at the time for the substances which he gave her.

Mr. Conte alleged that drug-taking was rife at the highest level of all sports, and that it was thanks to a good deal of corruption that this was hidden from the world. This was confirmed by US athlete Kelli White, for whom Conte devised a drugs programme, on the same ABC News programme. As the reader may recall,³⁴³ Ms. White was stripped of the 100 and 200 metres titles at the 2003 World Championships after admitting the use of anabolic steroids. The regime which Conte devised for Ms. White included taking the THG designer steroid, applied through a syringe without a needle under her tongue, the endurance-boosting drug EPO through what she called "very painful" injections in the stomach, and a testosterone/epitestosterone which was spread on the insides of the arms and elbows. Ms. White justified her taking part in this exercise by invoking the age-old excuse that "there so many other people doing it" ...³⁴⁴

Another US athlete accused of involvement in the BALCO scandal by Mr. Conte on the same television programme was Tim Montgomery, whom he claimed set the 100 metre record in 2002 after using a doping plan devised by him. Mr. Montgomery himself is facing a life ban for alleged steroid abuse after having been charged by the US Anti-doping Agency (USADA), which believes it has sufficient evidence to that effect even though Montgomery had also at no time failed a drugs test.³⁴⁵ (In the meantime, Mr. Montgomery had also been charged with doping infringements by USADA and the case is pending before the Court of Arbitration for Sport (CAS). In mid-November, the CAS agreed to a seven-month delay in the case brought against Mr. Montgomery, which will now start in June 2005.³⁴⁶ This column will naturally follow up this case with interest.)

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Jones case gathers momentum

Naturally these renewed allegations concerning Marion Jones aroused the interest of the various authorities, both sporting and public, involved. The day after the ABC programme referred to, Dick Pound, the head of the World Anti-Doping Agency (WADA), said he would urge the International Olympic Committee (IOC) to strip the athlete of her five-medal haul, including the golds which she won at Sydney. He also indicated that is what should have happened more in the past, admitting that the various bodies concerned were not perhaps as vigorous as they might have been in this respect in the case of the East Germans. Whether or not the Jones medals could be revoked could depend on the way in which the IOC's rules on limitations in time is interpreted, since in principle, decisions can only be challenged within three years of the closing ceremony of the Games. Mr. Pound, however, claims that this rule may not apply to actual results³⁴⁷. Within the next few days, it was also learned that the IOC President, Jacques Rogge, had set up a disciplinary commission to investigate the allegations made against Ms. Jones, which would present a report to the IOC after its investigation³⁴⁸.

The Conte revelations also caused speculation as to whether Ms. Jones had become vulnerable to a perjury threat if it could be proved that she lied during her testimony to the Grand Jury investigating the BALCO affair. During the relevant hearings, which were held behind closed doors, she had reportedly denied under oath that she had ever used steroids, which was precisely the contention which was being challenged by both Conte and former husband C J Hunter.³⁴⁹ The District Attorney's office, which prosecuted the case in North Carolina, has a reputation for taking a hard line on alleged cases of perjury. The maximum penalty for such a misdemeanour would be up to five years' imprisonment and a maximum fine of \$250,000, as well as three years of supervised release. It has become common practice for Federal Government in the US to pursue perjury or obstruction charges if it discovers evidence of false statements. Leading sporting figures have experienced the hard line taken by the US public authorities at their cost: two years ago, the Sacramento Kings' Chris Webber was issued with 300 hours' community service by a Detroit court for having lied to a Grand Jury.³⁵⁰

Ms. Jones herself, however, also took the legal initiative, and two weeks after the ABC News allegations brought a defamation action against Mr. Conte, claiming \$25 million in compensation. In so doing, she challenged Mr. Conte to take a lie detector test in respect of his allegations. She did so from an apparent position of strength, having herself passed such a test regarding her alleged drug-taking. More particularly her lawyer, Richard Nichols, wanted Conte to answer the question whether he ever saw her take performance-enhancing drugs and if he had leaked any Grand Jury testimony.³⁵¹ She even offered to pay for the

organisation of such a test before a qualified polygrapher.³⁵²

Mr. Conte's reaction was not slow in being forthcoming. To defend himself against the defamation charge, he employed the services of a lawyer, James Wagstaffe, who ominously stated that his client's defence in the action could include the publication of details from her personal life which she may wish to keep private. He was also reported to have had a secret meeting with USADA officials, which could lead to renewed allegation of drug-taking against her. Certainly Travis Tygart, the USADA spokesman, indicated that they had sought further meetings with Conte in order to discover the truth about the entire imbroglio.³⁵³

Meanwhile, back in Frisco...

Whilst these events were being played out in the media spotlight, the federal investigation into the BALCO affair was reaching the trial stage in San Francisco. At its preliminary stages, Mr. Conte attempted to persuade the court to dismiss the charges against him because of what he described as "outrageous government conduct", as well as other infringements. The judge dismissed this request, although Conte did score a minor victory when the court ordered a hearing into the question whether the Government had acted properly in the course of the investigation.³⁵⁴ Legal experts also claimed that US prosecutors should have little trouble in having the ABC News broadcast referred to above admitted as evidence for the trial, which was scheduled to commence in March 2005. The video in question would undermine Conte's claim of innocence, but certainly also pose a similar problem to his co-defendants.³⁵⁵

The defendants also raised other preliminary objections, one of which could still prevent the matter from coming to a full trial. Three out of the four defendants, i.e. Conte, Jim Valente (the BALCO vice-president) and Greg Anderson (personal trainer to US baseball player Barry Bonds, also implicated in the affair) alleged that they were questioned about the affair without being given their due legal rights. The question on which these claims turn is whether these men were in custody when they were initially interrogated by investigators.³⁵⁶ The questioning took place during the September 2003 raids at BALCO premises and at Mr. Anderson's home, which gave rise to the investigation. If the men were under arrest during the raids, as the defendants claim, the defence will argue that their statements are inadmissible because their clients were denied the right to consult their legal advisers. The prosecutors, however, claim that the men were free to leave during questioning.³⁵⁷ The chief investigator in the case, Jeff Novitzky, was to take the stand on this issue in mid-March, and the next issue of this Journal will duly report on the outcome of this matter. In any case,

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there could be a further delay in the trial because, just as this issue was about to go to press, Mr. Conte employed the services of new defence lawyers.³⁵⁸

Other sporting figures implicated in BALCO affair

Michelle Collins. In mid-December 2004, USADA banned the sprinter for eight years, even though she had never tested positive, in a case which seemed to have ominous overtones for Marion Jones. The Court of Arbitration for Sport (CAS) ruled that:

“USADA has proved, beyond a reasonable doubt, that Collins took EPO, the testosterone/epitestosterone cream and THG, and that Collins used those substances to enhance her performance and elude the drug-testing that was available at the time.”³⁵⁹

The Collins verdict was the first non-analytical positive case to be decided by CAS involving athletes implicated in the BALCO affair. She was one of three sprinters charged with a “non-analytical positive” – the others being Tim Montgomery (see above) and Chryste Gaines, whose cases were still proceeding at the time of writing. Ms. Collins will now forfeit all competitive results and winnings since 1/2/2002.³⁶⁰

Alvin Harrison. In October 2004, the US 400-metre runner was banned by USADA for four years after having admitted using a plethora of drugs. A statement issued by USADA revealed the extent of Ms. Harrison’s involvement with BALCO. He too will be required to forfeit all his competitive results and winnings (since 1/2/2001). He could also lose the relay gold medal which he won at the Sydney Olympics in 2000 because of the Jerome Young affair (see below).³⁶¹

Gary Sheffield. In early October, it was announced that the New York Yankees baseball star would not be penalised following his admission that he unknowingly used a cream two years previously which contained illegal steroids. The cream in question had been supplied by BALCO, but before the affair was investigated.³⁶²

Barry Bonds and Jason Giambi. The two baseball stars appeared before Grand Jury hearing which, although held behind closed doors, was obtained by a Californian newspaper. Mr. Bonds admitted that he used two unlawful products from the BALCO laboratory which were supplied to him by his personal trainer, Greg Anderson. He defended himself, however, by claiming that he thought the one to be an anti-arthritis product, the other flaxseed oil. In a separate testimony, Mr. Giambi said that he had taken the two products, knowing that they contained supposedly undetectable steroids.³⁶³

Doping issues – individual sports

Athletics

The Kenteris/Thanou affair – the saga continues...

The early stages of the saga of the two Greek athletes, Ekaterini Thanou and Costas Kenteris, who spoiled the party for the city of Athens on the opening day of the 2004 Olympics by failing to attend a random drugs test has been extensively documented in the previous issue of this Journal.³⁶⁴ As the Olympics drew to a close, the affair became the subject-matter of three enquiries: one by the Greek prosecutors, which could lead to criminal charges, and three sporting ones, by the disciplinary committees of the International Olympic Committee (IOC), the International Association of Athletic Federations (IAAF) and the Hellenic Athletics Association. The two spent four days in hospital as a result of an alleged motoring accident, before withdrawing from the Olympics. Each of the investigations has experienced a number of strange twists, and all three proceedings remained undecided as to its outcome at the time of writing.

The criminal prosecution took on a very strange turn barely two weeks after the Games finished, when the Greek public prosecutor involved announced that he was postponing plans to question Mr. Kenteris’s former coach Christos Tsekos after his lawyer, George Mavros, was killed in a helicopter crash in Northern Greece.³⁶⁵ However, this only delayed the actual criminal proceedings by a few weeks, and in mid-November the two were formally charged with missing a drugs test and faking a motorcycle accident, the prosecutors involved claimed that Thanou and Kenteris had repeatedly obstructed doping officials after they failed to attend the doping test in Chicago and Tel Aviv shortly before the Games, and then again at the 2000 Olympic Games on the opening day.³⁶⁶ The outcome of the case was not yet known at the time of writing.

The proceedings before the International Association of Athletics Federations (IAAF) also experienced some unusual turns. At first there was a good deal of hesitancy on this subject on the part of the IAAF, presumably because they remained haunted by the Katrin Krabbe affair, in which the former East German medal-winning athlete challenged a doping ban issued by the IAAF and won a1 million by way of compensation. After spending five months on the case, they still were loath to come to a decision whether or not to charge the two sprinters.³⁶⁷ However, this hesitancy was abandoned in early December 2004, when they, as well as coach Tzekos, were formally charged.³⁶⁸ Two weeks later, the world governing body announced that the pair were to be provisionally

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suspended pending the full resolution of their case. In a statement, the Federation made it clear that it found their explanations for missing the three tests in question were unacceptable.³⁶⁹ The full investigation was still proceeding at the time of writing.

As to the proceedings before the Hellenic Association of Athletics, this commenced after the IAAF provision suspension referred to above. The hearing was held in late January 2005, and although Mr. Kenteris admitted having missed the Tel Aviv drugs test, he and Ms. Thanou still emerged from the hearing hoping that they would be cleared of the allegations.³⁷⁰ A verdict was expected by early March.³⁷¹ However, the case was hit by a two-week delay because new evidence had come to light, the nature of which was as yet unknown.³⁷² Here again, the present writer has to refer the reader to the next edition to be able to report on the full outcome of these proceedings.

Dueck case shows extent of drugs culture in athletics

It has already been reported in this Journal (see above, p. 000) that a new designer steroid, called DMT, has been discovered as a result of a customs seizure at the US/Canada border in December 2003. The first proceedings brought against an athlete for the use of this drug has already been held, and involves the Canadian sprinter Derek Dueck, who in February 2005 was fined C\$3,000 by a provincial court in Alberta. He had pleaded guilty to two charges – one of making a false or deceptive statement on the value of goods, and another of attempting to smuggle controlled or regulated substances into Canada.³⁷³

What struck commentators as not only strange, but also highly alarming, about this case is that Mr. Dueck is little more than the equivalent of a club athlete, having never represented his country at any event. This seems to show the frightening extent to which the drugs culture had established itself in this noblest of sports. Nor was this the case of a first offence, since Mr. Dueck was banned for four years after having tested positive at the Canada Games for androstenedione, an anabolic steroid described as the precursor to the steroid testosterone.³⁷⁴

Other cases (all months quoted refer to 2004, unless stated otherwise)

Mickey Grimes. The US sprinter was banned for two years in January 2005 after testing positive for the steroid Norandrosterone in an out of competition test. It was the second doping infringement for Mr. Grimes, who forfeited a 2003 Pan American games gold medal after testing positive for the stimulant ephedrine.³⁷⁵

Calvin Harrison. The 400-metre sprinter was suspended for two years in August for a second doping infringement involving the stimulant modafinil.³⁷⁶ (The penalty imposed on his twin brother Alvin has already been dealt with above, see p. 000).

Sureyya Ayhan. The Turkish runner was banned for two years in February 2005 for having infringed anti-doping procedures on the occasion of a test held before the 2004 Olympics. She announced that she would appeal.³⁷⁷

Robert Fazekas and Adrian Annus. It will be recalled from the last issue of this Journal³⁷⁸ that these two Hungarian athletes, discus and hammer thrower respectively, had been stripped of their gold medals gained at the Athens Olympics for drugs offences. They were later suspended for two years each, and appealed the verdict. As a result of the appeal, held in November, Mr. Fazekas had his sentence reduced to one year, whilst the charges against Mr. Annus were dismissed.³⁷⁹

Jerome Young. Also in November, Mr. Young, the world 400 metre champion, was banned for life by the United States Anti-Doping Agency (USADA). He had tested positive for EPO at the Golden League meeting in Paris in July. An earlier failed test by him seemed set to cost the US relay 4x400 metre team, including Michael Johnson and Alvin Harrison (see above) their gold medal gained at the Sydney Olympics in 2000.³⁸⁰

Equestrianism

The Waterford Crystal affair

When Irish rider Cian O'Connor, mounting Waterford Crystal, won a gold medal at the Athens Olympics in the show jumping event, the entire nation rejoiced and Mr. O'Connor was given a hero's welcome when he returned to Dublin from the Games. Yet this euphoria was to be short-lived, as in early October it was learned that four horses, including Waterford Crystal and Goldfever, a member of the German winning team, had returned positive drugs tests for these events.³⁸¹

Officially, the various identities were not known, as the International Equestrian Federation (FEI) normally does not name the horse and riders until such time as the investigation and full legal process is complete. However, the names of the horses had become an open secret, to the extent that the FEI spokesman did not even attempt to pretend otherwise.³⁸² Although the test results had been based on the A sample, it was unusual for the second test to be different from the first. Mr. O'Connor described himself as "devastated", and said

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that the sedative for which the horse had been found positive had been prescribed by his vet, James Sheeran, who had said that it would disperse within 10-14 days.³⁸³

This affair, although highly regrettable, seemed to amount to little more than a routine case of doping infringement, when it was hit by a strange twist a few weeks after the first devastating news had reached the parties concerned. In early November, the FEI announced that the B sample had been stolen. The sample in question was to have been tested at the Horseracing Forensic Laboratory in Newmarket, but, according to a statement by the FEI, a portion of the B sample was illegally taken at Cambridge, the sample having been shipped by a third-party courier from Paris³⁸⁴. This meant that, if the sample could not be retrieved, Mr. O'Connor would be allowed to retain his medal. The Cambridgeshire police were naturally involved, and requested information from the public.³⁸⁵

As if this saga had not yet assumed sufficiently bizarre overtones, it was announced the very next day that there had occurred a break-in at the offices of the Equestrian Federation of Ireland in Dublin. Later, an anonymous fax was received by Irish national broadcaster RTE which purported to know the names of the prohibited substances alleged to have been found in Waterford Crystal.³⁸⁶ The object of the break-in had been a batch of documents, and Irish police immediately attempted to establish whether this was at all linked to the disappearance of the B sample.³⁸⁷

However, a few days later it transpired that the stolen B sample involved only the urine portion, and that tests would proceed on the horse's blood sample. This was to be tested at the US drug-testing laboratory in New York.³⁸⁸ That test confirmed the original result, as was announced by Mr. O'Connor's lawyers later. This would almost certainly mean Mr. O'Connor forfeiting his medal, although at the time of writing the relevant FEI hearing had yet to be held.

Equally strange events were to surround the fate of the two other horses involved in the affair, i.e. Goldfever and Ringwood Cockatoo, both mounted by German riders. As regards the former, the second sample confirmed the original sample and tested positive.³⁸⁹ Its rider, Ludger Beerbaum, was summoned to by the FEI judicial committee, and because of the strict liability rule which applies in such cases, and was disqualified from the competition as well as incurring a hefty fine³⁹⁰. However, a different outcome applied in the case of Ringwood Cockatoo and its rider, Bettina Hoy. Here too, the B sample had confirmed the original result.³⁹¹ At the hearing, the German equestrian federation, which supported her case, pleaded that the drug had entered the horse's system via a cream applied to its back for the treatment of lumps. The crux of her defence was

that approval had been granted by the man which she and the German federation mistook for an official FEI vet, which he subsequently appeared not to have been. However, neither Ms. Hoy nor the German federation seemed able to put a name to the individual concerned. Nevertheless, this defence was sufficient to convince the FEI committee that both the horse and Ms. Hoy should be exonerated.³⁹²

Not unnaturally, this decision caused a good deal of controversy in equestrian circles, particularly as it seemed to take considerable liberties with the Federation's own rules, which clearly state that automatic disqualification should follow the discovery of any prohibited substance in a horse. Another rule equally plainly lays down that written permission must be obtained from an official FEI delegate before treatment or medication is administered to the horse. No such written authorisation was sought or obtained.³⁹³

Few seem to have gained any credit from this whole affair, least of all the FEI, who seem to be in dire need of overhauling their rules and procedures.

Tennis

The Svetlana Kuznetsova affair

Previous issues of this Journal have already indicated that there currently prevails a certain malaise in the world of tennis on the subject of doping. Such unease was not alleviated when, in mid-January 2005, the Belgian sports minister, Claude Eerdeken, seemed to cast suspicion on three players, Svetlana Kuznetsova, Elena Dementieva and Nathalie Dechy, when he said that a player had failed a drugs test at an exhibition tournament held in Charleroi the previous month. Only four players had taken part in the event, and Mr. Eerdeken had said that one of them, Justine Henin, had been cleared.³⁹⁴ The next day, the minister revealed that one of the players, Ms. Kuznetsova, had tested positive for ephedrine.³⁹⁵ This was in defiance of protocols which guarantee anonymity until a case goes before a tribunal, but Mr. Eerdeken was unrepentant, claiming that international tennis should be grateful for the efforts undertaken to ensure that tennis was a clean sport.³⁹⁶

Ultimately, Ms. Kuznetsova eluded any penalty because ephedrine is not regarded as a banned substance under the Women's Tennis Association's anti-doping programme. She pronounced herself offended by the allegation made by the Belgian minister, although she admitted that she took a cold remedy which could have caused the positive test. The International Tennis Federation indicated that it would report the entire matter to the World Anti-Doping Agency (WADA).³⁹⁷ It was not yet known at the time of writing whether the latter would follow this up by any disciplinary action.

15. Drugs legislation and related issues

Cycling

Hamilton may retain medal after B sample proves defective – but could still be suspended

Yet another competitor in the Athens Olympic Games who appeared to have fallen foul of anti-doping procedures was Tyler Hamilton, the US rider who won the time trial gold medal, who tested positive for blood doping on two occasions – once at the Games itself, the other after the Olympics had closed, i.e. following a stage in the Tour of Spain.³⁹⁸ He was immediately stripped of his medal.³⁹⁹

However, confirmation of this result should have been obtained from the B-samples. In the case of the Athens test, the specimen proved to be defective because the relevant laboratory had made a mistake by deep freezing the blood sample rather than merely refrigerating it. As a result, the specimen deteriorated and the B sample could not be analysed. As a result, the International Olympic Committee (IOC) announced that it would not be seeking to impose any penalties in the matter, and Mr. Hamilton was allowed to retain his medal.⁴⁰⁰ However, the other positive test was confirmed by the B sample. This will probably result in a suspension, although no news to that effect was available at the time of writing.⁴⁰¹

16. Family Law

Pre-nuptial settlement saves Blatter in divorce

It has been known for some time that the marriage of Sepp Blatter, the President of football's world governing body, was undergoing serious difficulties and that a divorce was pending. In late November 2004, it emerged that Mr. Blatter has escaped a substantial divorce settlement because of a pre-nuptial agreement concluded with his (now former) wife, Graziella.⁴⁰²

17. Issues specific to individual sports

Football

FIFA Microchip ball experiment to be held at Under-17 championships

On various occasions during football matches at the top level, doubts have been allowed to arise as to whether the ball crossed the goal-line or not, the most famous to date being the third goal scored by England in the World Cup final of 1966. Because of the multiplicity of such incidents, FIFA decided to launch an experiment at the Under-17 World Championships, to be held in Peru held in September 2005 which is aimed at introducing greater certainty in this matter. This experiment revolves around a microchip, developed by the Adidas sportswear firm and German company Cairros AG, which involves all four officials wearing a wrist-band which buzzes when the ball has crossed the line. If the experiment proves successful, it seems almost certain to be adopted for the World Cup, to be held in Germany in 2006.⁴⁰³

Governing bodies consider various rule changes

The off-side rule could be changed after Europe's most senior football coaches won the support of European controlling body UEFA for an alteration. The difficulties experienced with the current rule concerns the interpretation of the term "not interfering with play". Under the current interpretation, a player may remain in an offside position virtually until he kicks the ball into the net, a fact which has caused some controversy at the top level of football in various countries.⁴⁰⁴

Measures are currently also being mooted in order to safeguard the probity of the penalty kick. In February 2005, it was learned that FIFA, the world governing body, was considering plans to eliminate encroachment by attacking players at penalties by penalising offenders with the award of an indirect free kick to the opposition. If this plan is approved, a player will no longer be able to retake the kick should his team score after a teammate has encroached onto the penalty area.⁴⁰⁵ Earlier, it emerged that UEFA, the European governing body, is to use videotape evidence to punish players who dive in order to deceive referees.⁴⁰⁶

Various disciplinary cases (all months quoted refer to 2004, unless stated otherwise)

Fabien Barthez. In February 2005, the controversial Marseille goalkeeper was given an undisclosed punishment by his club after a referee reported that Mr. Barthez spat at him during a friendly fixture with

Moroccan side Wydad Casablanca.⁴⁰⁷

Sodovnik FC, Russia. In September, this second division team were penalised for fielding an ineligible player by having a record 57 points deducted from their total. They were issued with a 3-0 defeat in 23 consecutive matches for fielding the Georgian full back Zviad Dzheladze, who was found to have an invalid Russian passport.⁴⁰⁸

Philippe Mexès. In September, FIFA suspended the Roma player for six weeks for having left his former club Auxerre without their authorisation. The France defender was found guilty of "unilateral breach of contract" after moving to the Italian club.⁴⁰⁹

Miguel Angel Angulo. In December, UEFA banned the Valencia midfielder for seven matches after having been sent off in a game with Werder Bremen.⁴¹⁰

Robert Pires. In November, the Arsenal and France midfielder was fined by the French football federation for appearing with the national team wearing the logo of a different sports company from the team's official sponsor.⁴¹¹

Cricket

ICC move to Dubai

In the previous issue⁴¹² it was reported that a move to Dubai from Lords', in London, by the International Cricket Conference (ICC) was imminent. The British minister of sport, Richard Caborn, made desperate efforts to prevent this move, inviting ICC president Ehsan Mani and Chief Executive Malcolm Speed to discuss the issue at the Department of Culture, Media and Sport in late September 2004. He offered several financial incentives to remain in London, including the provision of larger accommodation.⁴¹³ However, at its meeting held in January 2005, the ICC voted 11-1, with one abstention, to effect the move. David Morgan, the chairman of the England and Wales Cricket Board (ECB), voted for the Dubai move, along with the other Test-playing countries.⁴¹⁴ Mr. Morgan defended his vote by reference to the refusal of the Chancellor of the Exchequer, Gordon Brown, to offer tax concessions (see above, p. 000).⁴¹⁵

ICC considers two-tier system

There are currently 10 Test-playing countries in the

17. Issues specific to individual sports

world, but there are growing doubts as to whether they can all continue to justify their position in the top league of cricket. Particularly the position of Zimbabwe and Bangladesh has come under close scrutiny over the past two years. It is for this reason that a two-tier system is currently under active consideration by the world governing body, the ICC. The proposal is that Bangladesh and Zimbabwe should play fewer tests and mostly at home. At present, all 10 test-playing nations are supposed to play each other once at home and once away within a five-year period, a cycle which must be repeated the following five years. Each series must consist of at least two tests and three one-day internationals. The abysmal performances by the two countries under review have exposed the problems of the system, and have made it ripe for review.⁴¹⁶

The new plan is for the eight major countries will play each other twice, once at home and once away, every four years. Bangladesh and Zimbabwe will have a longer time-span, as much as six years, in which to play the other countries. What is more, the two countries in question will play most Test matches at home. Home advantage may bring better results, and countries hosting their tours will be more likely to avoid embarrassing financial losses.⁴¹⁷

Muralitharan obtains clearance for “doosra”

Muttiah Muralitharan is perhaps the most successful cricketer which Sri Lanka has ever produced. However, a cloud of controversy has always surrounded his performances, because of suggestions that his bowling action might be illegal because of the straightening of the arm which has been a feature of his play. However, it has become increasingly apparent that the Sri Lankan is far from being the only bowler to have come under such criticism, which is why the ICC has recently voted for a change in the rules. The existing system allows some straightening of the arm, up to five degrees for spin bowlers and ten degrees for fast bowlers. However, an ICC survey has revealed that even Glenn McGrath (Australia) and Sean Pollock (South Africa), who are fast bowlers with model actions, bend their arms as much as 12 degrees.⁴¹⁸

Accordingly, the ICC committee considering the matter has proposed that the upper limit should be raised to 15 degrees for all bowlers, which would render virtually all current bowlers' actions legal – including that of Mr. Muralitharan, more particularly the doosrah, which has earned him so many wickets in the course of his distinguished Test career. The rule change is expected to enter into effect before the 2005 cricket season commences.⁴¹⁹

Footnotes

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18 *The Daily Telegraph* of 29/9/2004, p.S8.
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27 *The Mail on Sunday* of 24/10/2004, p.112.
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43 *Ibid.*
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45 *The Guardian* of 4/12/2004, p.S32.
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53 *The Daily Telegraph* of 7/1/2005, p.S5.
54 *The Daily Telegraph* of 8/1/2005, p.S1.
55 *The Times* of 30/12/2004, p.71.
56 *The Daily Telegraph* of 3/2/2005, p.S7.
57 *The Daily Telegraph* of 4/2/2005, p.S8.
58 *The Guardian* of 5/1/2005, p.23.
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The law reports in the Sport and the Law Journal are compiled by barristers at 11 Stone Buildings, Lincoln’s Inn, under the editorship of Alan Gourgey QC. The individual reporters (indicated by their initials after the date of the judgment) are Tim Penny, Nick Parfitt, Jamie Riley, Iain Pester, Damian Murphy, Martin Ouwehand and Reuben Comiskey. The Reports are published in chronological order and should be cited by their “SLJR” number.

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(2005) SLJR 1**New Zealand – cycling race – death of rider – prosecution of organiser – criminal nuisance – conviction – appeal – whether the mens rea for the offence required negligence or recklessness**

THE QUEEN v ASTRID CHRISTINE ANDERSEN

Court of Appeal of New Zealand, Glazebrook J., William Young J. and O'Regan J.
 22nd September 2004 (Reporter: DM)

Facts

1. The appellant (Andersen) organised through a company an annual cycling event known as "Le Race", which took place on 31 March 2001. Prior to Le Race, the appellant issued an information sheet which included the statement that "we have an official road closure on the Summit Road". The victim over-took another cyclist as she was approaching a blind corner on the Summit Road. She crossed the centre line of the road and collided with an oncoming car and was killed.

2. The appellant was charged with criminal nuisance under section 145 of the Crimes Act 1961. The Crown's case was that she had an obligation to take reasonable precautions against, and use reasonable care to avoid, danger to human life. She omitted to take such precautions in that she failed to take adequate steps to warn participants of the risks posed by oncoming traffic and of the consequent necessity to keep to the left. She knew her omission would endanger lives.

3. On behalf of the appellant it had been contended at trial that the Crown could not secure establish the mens rea for the offence without proving recklessness. This argument was rejected by the trial judge who directed the jury that all the Crown was required to establish was negligence.

4. The grounds of appeal were wide-ranging but did not include a ground that the judge had misdirected the jury on the mens rea test. After some prompting from the Bench, the appellant re-argued the mens rea question before the Court of Appeal.

Held

5. The appeal was allowed and defendant acquitted. Criminal nuisance was a crime of recklessness not negligence.

6. The evidence showed that the appellant had specifically turned her mind to safety problems which might result from participants being given incorrect information. In the information sheet, she had given unequivocal instructions to comply with the Road Code and not cross the centre-line. On the ordinary meaning of the information sheet, the appellant had not asserted the Summit Road would be closed to on-coming traffic.

7. The Crown's case was at its strongest in its contention the appellant did not do enough to dispel the natural tendency of cyclists to use the entire road. In that special context what otherwise might be regarded as clear instructions might be misinterpreted. Nonetheless, the Crown had not and could not establish that the appellant had actual knowledge that any omission (if there had been one) to take precautions would endanger the lives or safety of the public or any individual.

Commentary

8. Criminal nuisance requires proof that the omission relied upon by the Crown was one which the appellant "knew would endanger life".

9. The question was whether "knew" should be construed so as to permit conviction of a negligent defendant (i.e. a defendant who was aware that were he or she to breach the relevant duty in some way, that would or might be dangerous) or a reckless defendant (i.e. one who was actually aware of the danger but decided to proceed in any event). The key difference between the two mental states is that to convict a reckless defendant will require prove of the defendant's state of mind whereas a negligent defendant can be convicted on an objective review of what a hypothetical person should have thought faced with the same information.

10. The trial judge was in good company in treating criminal nuisance as a crime of negligence rather than recklessness. A leading textbook said as much. Parliament itself (when it had revisited the Crimes Act 1961 in relation to a possible amendment in 1995) had proceeded on the basis that criminal nuisance was a crime of negligence. In a previous case, a lower Court had described the test as being "must they have known that such failure, if they had turned their minds to it, would endanger the public" (i.e. a negligence test).

11. On this matter there was no safety in numbers. The trial judge was wrong. It was generally inappropriate in the context of a criminal statute to allow conviction of a defendant whose actual knowledge had not been proved. It was inconsistent with the plain language of the section which provided for conviction where the defendant "knew" his actions "would endanger life". It was inconsistent with the relevant legislative and Parliamentary history of the section (which pre-dated Parliament's most recent and erroneous visit to the section). It would be an unwelcome inconsistency if the law developed such that, under section 145, a person who commits an unlawful act can only be convicted provided he "knew" that this act would be dangerous whereas a person who omits to do something could be convicted without proof of actual knowledge.

12. This is another example of a Court of Appeal maintaining a high threshold test for criminal liability. Although in this case, as opposed to R v Barnes which is also reported in this issue, the fact that the alleged

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offence arose within a sporting context, this does not appear to have made any difference.

(2005) SLJR 2

Financial regulation – communal betting scheme – collective investment

FINANCIAL SERVICES AUTHORITY v (1) SEAN FRADLEY (T/A TOP BET PLACEMENT SERVICES) (2) GARY WOODWARD

High Court of Justice, Chancery Division, John Martin Q.C. (sitting as a deputy judge of the High Court) 21 October 2004 (Reporter: JR)

Facts

1. The defendants, F and W, were connected with a betting scheme which was operated from August 2002 by a company called 147 Racing Ltd. ("147") which was wound up in January 2004. W was a director and the company secretary of 147 until October 2002. F traded under the name of Top Bet Placement Services ("TBPS") which featured in the scheme.

2. The scheme involved the use of unsolicited mailshots sent to the public by 147 and taking the form of an invitation from well-known snooker players to participate in a scheme to make money on horse race betting by using information not widely available to the public. The scheme was described as "investing in horse racing". Investors in the scheme would provide a minimum of £500, referred to as a "betting bank" and were told that they stood a realistic chance of a tenfold increase in their betting bank each year. Membership of the scheme cost £97 a month for the first year increasing to £477 a month. The mailshot included an application form for membership of 147 which contained a standing order mandate in favour of 147 and a form appointing TBPS as the member's agent for the placing of bets. The appointment of TBPS was not initially a condition of the receipt of the confidential information but members were encouraged to appoint TBPS to place bets. On being accepted to the scheme, members were sent TBPS' terms and conditions which provided that the member's betting bank would be held in TBPS' client account out of which payments could only be made for the purpose of paying bookmakers, repaying members or payment of TBPS' management fee and placement levy. It was also a term that members' accounts would be updated daily and computerised statements issued monthly.

3. W resigned as director and company secretary of 147 on 8 October 2002 although he nevertheless remained involved in the scheme. From October 2002 the scheme documentation was revised so that it became compulsory to appoint TBPS to place bets.

4. By February 2003, the claimant, the FSA, became concerned about the scheme and sought undertakings that 147 and TBPS would cease trading. The FSA entered into discussions with the solicitors for the scheme's operators in an attempt to define a way in which the scheme could operate without being a collective investment scheme as defined in s.235 of the Financial Services and Markets Act 2000 ("FSMA").

5. From 9 March 2003 onwards further revised documentation was issued in relation to the scheme. The mailshots remained in substance the same but the documents sent out to new members were amended. A letter of acceptance from 147 explained that members were to have the option to place their own bets if they wished. TBPS' terms changed significantly. They now provided that all bets would be placed strictly in accordance with the member's instructions and in accordance with the mandate given by the member and stated that the member could appoint an intermediary to instruct TBPS to place bets in accordance with a formula. The terms also provided that the member's money would be received and held on trust.

6. On 4 April 2003 F moved to Dublin but the scheme continued to operate until 21 August when the FSA obtained an injunction restraining 147 and F from trading further.

7. Over the life of the scheme £1.415 million had been invested of which £425,000 had been lost on bets. 147 had received membership fees in excess of £293,000 and TBPS received management fees and placement levies totalling more than £145,000. The remaining funds were insufficient to repay the members' betting banks.

8. The FSA contended that the scheme amounted to a collective investment scheme and that F had been carrying out a regulated activity without authorisation or exemption in contravention of s.19 of FSMA. It also contended that F had been communicating an invitation or inducement to engage in investment activity in contravention of s.21 FSMA and that W knowingly co-operated with F in his contravention of FSMA. On a summary judgment application the FSA sought declarations, restitution and an account of profits in relation to past contraventions and injunctive relief to restrain future contraventions.

Held (granting the application)

9. Money contributions by members of the public were “property” for the purposes of s.235(1) of FSMA. There was no reason why betting winnings could not be categorised as profits and similarly no reason why the placing of bets out of money contributions could not be categorised as management of those contributions. Accordingly s.235 FSMA applied notwithstanding the fact that members of the scheme could opt out to place bets themselves or through their own agent rather than using the scheme’s recommended betting service.

10. The scheme did not fall within any of the common accounts excepted categories under the Financial Services and Markets Act 2000 (collective Investment Schemes) Order 2001 Sch. 1 para. 6(b). Therefore the scheme was a collective investment scheme.

11. Although F’s publicity material amounted to an invitation to acquire units in a collective investment scheme, it was not an invitation to exercise a right conferred by a unit in a collective investment scheme. The absence of the power to exercise a right meant that the promotion of the scheme did not contravene s.21 of FSMA.

12. W was involved in the operation of the scheme and knew how the scheme operated long after he resigned as director and company secretary of 147. F had carried on an investment business in the United Kingdom without authorisation and so had contravened s.19 FSMA. Therefore W was knowingly concerned in the carrying on by F and 147 of such a business.

Commentary

13. This decision has important consequences for the business of betting in that it confirms that betting may also be subject to the provisions of the FSMA. One argument against this is that betting is already a heavily regulated activity which is not really part of the world of financial services. Furthermore, it could be argued that the decision renders lottery and other betting syndicates as being in contravention of the FSMA. The justification for the decision lies in the fact that the scheme involved an approach to the public for funds to be applied on a communal basis. This would appear to be outside the scope of betting regulation but very much a matter of concern for the FSA. Further, those participating in workplace betting syndicates can for the most part rest easy as the scheme in this case was operated as a business to make profit. It is the operation of schemes as a business which the FSMA seeks to control and it is unlikely that informal betting syndicates would therefore be caught by its provisions. Even if the person designated to administer the syndicate is rewarded for his services, it

does not necessarily follow that the FSMA will bite provided that the syndicate is not operated as a business.

(2005) SLJR 3**Football – manager and club – employment – director’s fiduciary duties – contract – transfer negotiations****FULHAM FOOTBALL CLUB (1987) LIMITED v JEAN TIGANA***[2004] EWHC 2585 (QB)**High Court of Justice, Queen’s Bench Division, the Honourable Mr Justice Elias**12 November 2004 (Reporter:NP)***Facts**

1. Jean Tigana was the manager of Fulham between the Summer 2000 and the end of June 2003. In this action Fulham sued Tigana in respect of alleged breaches of duties arising under his employment contract and by reason of his position as a director of the club. Tigana counterclaimed in respect of share options and it was common ground that the counterclaim should succeed unless it could be shown by Fulham that the breaches were repudiatory.

2. The alleged breaches were based on the following circumstances:

- a) On 31 July 2001 Fulham agreed a fee of £7m with Juventus for Edwin van der Sar. Fulham alleged that Tigana knew but did not disclose to Fulham prior to the purchase that van der Sar’s proper value was £6m.
- b) On 28 August 2001 Fulham agreed a fee of FF120m with Lyon for Steve Marlet and to pay Marlet 800,000FF a month. Fulham alleged that Tigana conducted these negotiation without any regard for the interests of Fulham and agreed fees and wages that were too high and also failed to disclose that Marlet had a clause in his contract with Lyon entitling him to a portion of the fee but that Lyon were requiring Marlet to forego that right.
- c) On 4 January 2002 Fulham signed John Carew from Valencia subject to medical examination. Carew failed the medical and Fulham’s chairman, Mr Al Fayed rejected the player, but Tigana sought and obtained a second opinion and sought to persuade Mr Al Fayed to change his mind.
- d) Finally, Fulham alleged that Tigana gave misleading answers to questions put to him on behalf of Fulham about his knowledge of the provision in Marlet’s Lyon contract allowing the player a share of the transfer fee.

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Held (dismissing the action against Tigana and allowing Tigana's counterclaim)

3. The judge examined the circumstances at the time of the van der Sar negotiations. There were negotiations in respect of the terms to be agreed between the two clubs as well as between van der Sar and Fulham. The negotiations took place at Harrods. The judge found that the final price was agreed by Mr Al Fayed who could, if he had wished, had asked Tigana as to his views on the price. Fulham's claim related to the van der Sar fee, failed.

4. The judge heard evidence on and made findings as to the history of the Marlet negotiations. The Boisseau brothers on behalf of a company called BMB participated in these discussions. BMB received agent's fees as a result of the transfer. Prior to the Tigana trial, Fulham had settled proceedings against BMB and such settlement had included a provision that those concerned in BMB, namely the Boisseau brothers, would provide witness statements in the Tigana litigation. On two points where the Boisseau recollection differed from Tigana's, the judge preferred Tigana's. The judge held that a Fulham executive agreed the fee of FF120 million with Lyon and then sought and obtained Mr Al Fayed's approval. Although the judge found that Tigana was pressing hard for the player to be signed, he did not make the final recommendation to Mr Al Fayed. The judge said that although with hindsight the purchase was not a success at the time the hope was that this young player would in time justify the fee paid.

5. The judge found that Tigana did not agree the salary figure of FF800,000 a month without negotiations. There was evidence that Marlet was seeking FF1 million a month and in any event the judge accepted Tigana's evidence that he did not have and could not have given any commitment as to what salary Fulham would in fact agree. Such agreement would have been the result of consideration and decision by appropriate executives and Mr Al Fayed.

6. On the issue of whether Tigana did not tell Fulham about Marlet's right to share in the transfer fee and Lyon's requirement that Marlet forgo that right, the judge found that Tigana did tell the Fulham executive about the position.

7. There was little disputed fact in respect of the Carew issue. Following an initial medical the club's doctor raised concern about the player's knee. Mr Al Fayed instructed a consultant surgeon who advised there was a small but significant risk that a career threatening injury could occur. Mr Al Fayed decided not to purchase the player. Tigana heard about the decision but not directly from Mr

Al Fayed and took the player to see a consultant in France for a second opinion. That opinion was more favourable and Tigana raised the issue with Mr Al Fayed. Mr Al Fayed told Tigana to discuss the matter with the consultant surgeon. Discussion took place and the original consultant maintained his view. The judge found however that Mr Al Fayed would not have changed his mind in any event. The judge found nothing that amounted to breach of duty in Tigana's conduct.

8. As to the allegation that Tigana had given misleading answers the judge examined the three separate occasions on which different sets of lawyers had sought responses from Tigana on Fulham's behalf and one conversation between Tigana and a Fulham executive. The judge found that there was no deliberate concealment by Tigana and that in any event the one particular item of information (which was when Tigana became aware that Marlet had an entitlement to a share in his transfer price which he had been required to forego) was not significant enough to amount to a repudiatory breach even if it had been deliberately withheld.

9. For these reasons, the allegations of breach were not made out on the facts and, even if some of them had been, the loss would have been assessed as follows:

- a) Van der Sar's existing club would not have accepted less than £7m and therefore there was no loss to Fulham.
- b) Although there was a 50% chance that Lyon might have accepted a fee FF10 million less but that was highly artificial the fact that on the evidence the price would not have fallen below FF110 million itself demonstrated that FF120 million was not an artificially high or unrealistic price.
- c) There was no basis whatsoever for suggesting that Tigana having obtained a second opinion in the Carew transfer caused Fulham any loss.
- d) There was no loss on the allegations of non-disclosure since the judge thought that the proceedings against BMB would have been taken whether or not Tigana had provided the alleged non-disclosure.

Commentary

10. At paragraphs 7 to 15 of the judgment there is a brief discussion about the duties on a manager when involved in transfer negotiations. Although these are plainly dependent on the wording of the particular contract concerned, the following duties would appear to arise as a result of the well established duties of good faith and loyalty implied into every contract of employment:

- a) If a manager does negotiate on behalf of a club, he must seek to advance the interests of the club rather than his own interest or those of the player being acquired. This arises not just because of the obligation

- of good faith but is also a separate fiduciary duty.
- b) A manager would be required because of the duty of loyalty and good faith to pass on to the club any information which comes into his possession and which he believes may be material to any proposed sale.
 - c) A manager would be obliged to give an honest and bona fide opinion, if asked, about the value of a particular player or the terms on which such player should be engaged. The judge did not accept however that the manager would be obliged to volunteer an opinion.

11. The case is also interesting for the comments made by the judge about certain expert evidence that was put before him. The evidence was from a professor of football finance. The professor had identified, as a result of statistical analysis of many transfers, numerous factors which were likely to combine to create a player's value. Although the judge saw the usefulness of this work so far as placing a value on a squad of players was concerned, he found it of limited assistance when determining what value a particular player might have fetched on a particular occasion in a particular market situation. Moreover the professor declined to reveal in his evidence how he determined the weight that he attributed to the various factors. He said his methodology had commercial value that he was not prepared to jeopardise. As the judge commented, this decision "would have seriously undermined the strength and reliability of his evidence even if I had found it pertinent to the case".

(2005) SLJR 4

Australia – Olympic Games – Sydney 2000 – the marketing of Olympic products using Olympic images and indicia – unlawful interference with contractual relations by the statutory organising committee- use of police – attempt to rely on the defence of justification being the protection of the Olympic brand and Olympic Charter

ZHU v THE TREASURER OF THE STATE OF NEW SOUTH WALES

[2004] HCA (17 November 2004)

The High Court of Australia

(Reporter: MO)

Facts

1. TOC Management Services Pty Ltd ("TOC") had been authorized by the Sydney Organising Committee for the Olympic Games ("SOCOG"), a statutory body, in relation to the promotion of products and services relating to the Sydney Olympics. One of the functions of SOCOG was to establish a marketing programme of goods and services

relating to the Games so long as it took into account the requirements of the Olympic Charter and the Host City Contract for the protection of the Olympic brand.

2. In March 1999 the Plaintiff was appointed by TOC under an Agency Agreement to sell international memberships in a product known as the "Olympic Club" to the Mainland Chinese as part of an accommodation and travel package for the Games. The Plaintiff was supplied with Olympic Club letterhead, satchels and other merchandising material bearing the Olympic Club logo. During the period of his agency, the Plaintiff sold a significant number of memberships and earned income for TOC which TOC relied upon heavily to stay afloat financially.

3. SOCOG took over TOC's business when it appeared that it was about to become insolvent and terminated the Plaintiff's agency. They also procured the Police to arrest the Plaintiff and seize material from his home. The Plaintiff was charged but the charges were withdrawn a few months later. The Plaintiff sued TOC and also SOCOG for interference with contractual relations. SOCOG attempted to rely on the Defence of Justification in relation to its responsibilities under Australian legislation, the Host City Contract and the Olympic Charter to enforce the regime for approval of the exploitation of Olympic intellectual property. They attempted to argue that the Plaintiff had failed to obtain the various consents necessary under the documents governing his agency. The Plaintiff was successful at trial but the Defendant was successful before the Court of Appeal on the issue of Justification. The Plaintiff then appealed to the Australian High Court.

Held (allowing the Appeal)

4. SOCOG had no rights against the Plaintiff in relation to his conduct in Australia. In respect of his conduct in China, the Plaintiff's only failure was that he did not obtain consent in writing from the Chinese Olympic Committee to use Olympic images and indicia in China, as required under the Olympic Charter. The Chinese Olympic Committee had given its oral consent and is likely to have waived the requirement for writing which was imposed for their benefit given the territorial system of regulation put in place by the IOC.

5. However, SOCOG could not show it had any legal rights in respect of the Plaintiff's activities after TOC entered the Agency Agreement. It needed to establish such rights to justify its interference with the Agreement. It had no statutory right of action, could show no loss and could not have obtained an injunction.

6. In any event, a duty requiring it to act against the Plaintiff did not arise under the Host City Contract given

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the waiver of written consent by the Chinese Committee and given that SOCOG had not shown that the Plaintiff's activities resulted in a breach that would have led to the removal of the Games from Sydney by the IOC.

Commentary

7. In the words of the High Court of Australia : "It is a truth almost universally acknowledged – a truth unpatriotic to question – that the period from 15 September 2000 to October 2000, when the Olympic Games were held in Sydney, was one of the happiest in the history of that city. The evidence in this case, however, reveals that the preparations for that event had a darker side."

8. In accordance with the Agency Agreement the Plaintiff entered into a Deed Poll with SOCOG requiring the Plaintiff to obtain the prior written permission of SOCOG before promoting or marketing any products related to the Sydney Olympic Games or using the Olympic words, images or symbols.

9. Unbeknown to the Plaintiff, by July 1999 TOC encountered serious financial difficulties with the prospect that the Olympic Club business would need to be put into administration causing serious embarrassment to the public perception of the Games. It was therefore agreed between TOC, SOCOG and the Australian Olympic Committee that SOCOG would take over responsibility for the running of the Olympic Club. SOCOG took the unfounded view that the Plaintiff was a "loose cannon" whose activities in China might expose SOCOG. SOCOG therefore instructed TOC "to rein the Plaintiff in" and had the Police investigate him. Yet in August 1999, the Chinese Cultural Consul sought and received assurances from SOCOG officers in Sydney that the Club being marketed by the Plaintiff was genuine.

10. In November 1999 SOCOG purported to terminate the agency relationship with the Plaintiff. The Plaintiff rightly took issue with the grounds for termination and maintained that the Agency Agreement was still on foot. In December 1999 SOCOG arranged for the Police to arrest the Plaintiff, seize his passport and take documents relating to the agency from his house. The Plaintiff was charged with obtaining money by deception in April 2000 on the basis of SOCOG's allegation that he was unlawfully holding himself out to be connected with the Olympic Club in return for membership fees. These charges were withdrawn by the Director of Public Prosecutions in October 2000.

11. In December 1999 the Plaintiff commenced proceedings against SOCOG for interference with contractual relations. TOC went into liquidation but the

trial judge entered Judgment against SOCOG in the sum of \$4.2m including \$95,000 in aggravated damages for injury to the Plaintiff's feelings as a result of the arrest and \$200,000 in exemplary damages for SOCOG's "high-handed and reprehensible" behaviour. The Treasurer of New South Wales was substituted for SOCOG in the proceedings prior to the Judgment being appealed.

12. The trial judge found that SOCOG committed an interference in three respects:

- a) SOCOG had sufficient notice of TOC's contractual obligations under the Agency Agreement and was aware that entry into the Deed of Release and Termination in September 1999, as part of the taking over of the Olympic Club business from TOC, would leave TOC unable to perform its obligations to the Plaintiff.
- b) SOCOG's direction to TOC to terminate the agreement in November 1999 was on insufficient grounds.
- c) SOCOG led Police to believe that the Plaintiff had been representing himself as a person who was entitled to sell Club memberships in China without having authority do so. However SOCOG had failed to inform the Police of:
 - i) the purported termination of the agency and the Plaintiff's challenging of it;
 - ii) SOCOG's assurance to the Chinese Consul in August 1999 that the Club was genuine;
 - iii) that SOCOG had delivered blank membership certificates to the Plaintiff which he was entitled to issue;
 - iv) the income earned for TOC by the Plaintiff.

13. The only issue before the High Court was whether SOCOG could establish that its actions were a justifiable attempt to protect an "equal or superior right" arising out of the statutory rights and statutory responsibilities it held in respect of the Sydney 2000 Games. SOCOG relied on the Plaintiff's failure to obtain written consent from SOCOG or the Chinese Olympic Committee to use the Olympic indicia and images.

The Plaintiff's need for consent to use Olympic indicia and images

14. In the High Court's words, "in SOCOG's view of the world, the whole human scheme was acrawl with requirements for its prior written consent, without which not a sparrow could fall". The Court held that if the Plaintiff acted in accordance with the Agency Agreement then he would not be in breach of the Deed Poll he had entered into with SOCOG. The SOCOG Licence Agreement included a provision allowing TOC to empower its employees and agents to use the Club

logo and so the Court held that this obviated the need for prior written consent under the Agency Agreement and amounted to a licence under the legislation protecting the use of the Olympic indicia and images. The Court found that, in any event, the burden was on SOCOG to prove that it did not grant consent. The burden could not be discharged given the consent inferred by SOCOG allowing TOC to hand the Olympic Club material to the Plaintiff.

15. These matters, however, did not assist the Plaintiff insofar as the Plaintiff's activities in China were concerned because the Licence Agreement granted to TOC did not concern China. SOCOG argued that the Plaintiff was still required to obtain consent from SOCOG under the legislation protecting the Olympic images and indicia. However the Court found that this legislation gave Australian Courts no jurisdiction to interfere with the Chinese Olympic Committee's rights in China. Therefore SOCOG could have no interest in the enforcement of the statute in respect of the Plaintiff's activities in China.

16. The Court found that the Plaintiff's use of the Olympic indicia and images was unlawful in one respect; that is, there was no written consent from the Chinese Olympic Committee as required under the Olympic Charter. The Plaintiff had met with the Chinese Olympic Committee in March 1999 who had offered to help him solve any problems. In July 1999 other senior Chinese officials told the Plaintiff they supported his plan to sell memberships and that he only needed their oral support. There was no evidence of any complaint by the Chinese Olympic Committee about the Plaintiff's activities. Whilst this had satisfied the requirements of the Agency Agreement it had not satisfied the Olympic Charter.

The approach to the Defence of Justification

17. SOCOG argued that under the Host City Contract, the IOC Executive Board could have withdrawn the Games from Sydney unless SOCOG fulfilled its duty to ensure compliance with the Olympic Charter. The Court found that even if SOCOG had such a duty, SOCOG would still have to show that it had legal rights against the Plaintiff.

18. The Court found that the Act constituting SOCOG did not grant any statutory right of action to SOCOG and even if it could show breaches of the Deed Poll the Plaintiff entered, it could not prove any loss. The Court said that SOCOG would also have grave difficulties obtaining injunctive relief given that it was a volunteer under the Deed Poll, it was not a party to the Agency Agreement and it had failed to communicate its refusal of consent when the Plaintiff requested it in August 1999.

19. In any event SOCOG could not be shown to be in breach of the Olympic Charter by not enforcing the requirement of written consent from China because:

- a) the requirement existed for the benefit of the Chinese Olympic Committee and the Committee was entitled to waive it given the IOC's territorial structure to protect intellectual property;
- b) the Host City Contract required service of a notice to remedy a breach of the Charter and no notice was given;
- c) it was "wholly unrealistic to imagine" that, even if there was a breach of SOCOG's duty, the IOC Executive Board would have withdrawn the Games on the grounds of the Plaintiff's "rather modest activities."

20. The Court noted that SOCOG had considerable control over TOC and so it bore a responsibility for the Agency Agreement between TOC and the Plaintiff which was not compatible with its reliance on a Justification Defence in respect of its actions against the Plaintiff.

21. The Plaintiff's appeal was upheld. Ultimately, "SOCOG had no legal rights and corresponding duties of the kind alleged, but nevertheless attempted to vindicate the interests of itself and the related entities that it wanted to protect by the most direct means, independently of any concern for legality."

22. The prospect of a successful London bid for the Olympics brings with it the prospect of controversy similar to that involving the parties in this case. The right to host the Olympics brings with it more than a few weeks of sporting events; it brings with it a whole commercial and regulatory environment revolving around the exploitation of Olympic goodwill. In order to realise the important financial benefits that are derived from marketing the Games, the host city is faced with having to encourage the successful promotion of Olympic products without devaluing the Olympic brand to the detriment of its own Games or the Games of successive host cities. In this case, the sensitivity over the Olympic brand and the centralization of power in one statutory body led to a dramatic disregard of an individual's rights and, ultimately the very kind of publicity the host city was anxious to avoid.

23. The individual in this case agreed to work within the marketing regime set up by the organizers but made the mistake of being too effective in his business and his diplomacy; he was the TOC's most successful marketing venture, the Chinese Olympic Committee's support was such that they brushed aside the need for

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written consent and he was able to maintain a profile in China which seemed to threaten the organizers. What is particularly disturbing is that had this been an ordinary marketing venture, rather than one involving the politics and sensitivities surrounding the lead up to an Olympic Games, then it is unlikely that the weight of the Police and the criminal justice system could have been employed to terminate the Plaintiff's business in the way that it did.

(2005) SLJR 5

Formula One – Shareholders Agreement – Constitution of Board of Directors

SPEED INVESTMENTS LIMITED & ANR – V – FORMULA ONE HOLDINGS LIMITED & ORS

[2004] EWHC 3215 (Ch); [2004] All ER (D) 78 (Dec)
Chancery Division (Park J)
 6 December 2004 (Reporter: RC)

Facts

1. This case concerned the ownership and management of the companies controlling Formula One racing. It arose out of the failure of the Kirch Group, which led to a consortium of banks (Bayerische LB, JP Morgan Chase and Lehman Brothers) having control over one of the parents of the Formula One companies.

2. The management of Formula One is conducted through two English companies: Formula One Administration Limited and Formula One Management Limited. Both of these companies are (directly or indirectly) wholly owned subsidiaries of a third English company, Formula One Holdings Limited ("FOH"). In turn FOH is 100% owned by a Jersey Company, SLEC Holdings Limited ("SLEC"), the second claimant in the action.

3. At the end of 1998 SLEC was 100% beneficially owned by another Jersey Company, Bambino Holdings Limited ("Bambino"). The ownership of Bambino did not form part of the issues to be decided, and nothing was said about it. On 17 December 1999, Bambino sold 25% of the shares in SLEC to a third Jersey Company, Speed Investments Limited ("Speed"), the first claimant in the action. Speed was at that time owned by EM.TV, a German media company and part of the Kirch Group.

4. On 12 May 2000 Bambino sold to Speed a further 25% of the shares in SLEC. In addition it granted a call option over a further 25% of the shareholding. This call option was exercised in March 2001, and from 30

March 2001 SLEC has been 25% owned by Bambino and 75% owned by Speed.

5. In addition to the transfer of shares, on 12 May 2000 Bambino and Speed entered into a Shareholders Agreement. This regulated their relationship both on the basis of an equal shareholding in SLEC, and also in the event that Speed exercised its option. One aspect of the relationship it regulated was the appointment of directors to the boards of SLEC and FOH. It was the constitution of FOH's board of directors which gave rise to the proceedings.

6. In September 1998, there were only four directors of FOH: Mr Mullens, Mr Piccinini, Mr Werner, and Bernie Ecclestone. A further appointment was made by West LB in 1999, presumably as a condition of advancing funding. On 11 May 2000 (the day before the Shareholders Agreement was entered into), three further directors were appointed, Thomas Haffa, Florian Haffa, and Dr Becker. These three were officers or employees of EM.TV, then the owner of Speed.

7. The next day the Shareholders Agreement came into effect. Under the terms of this agreement, the maximum number of directors in both SLEC and FOH was fixed at 8. In addition provision was made for the appointment of 'A' Directors and 'B' Directors. 'A' Directors were those appointed by Speed, while 'B' Directors were those appointed by Bambino. The possibility of ordinary directors (i.e. those who were neither 'A' nor 'B' Directors) was not excluded.

8. Under the terms of the Shareholders Agreement, both Speed was entitled to appoint 4 'A' Directors, and Bambino was entitled to appoint 4 'B' Directors, of both SLEC and FOH. These directors were listed in the Schedule to the agreement, and in the case of FOH the 'A' Directors were listed as the three EM.TV appointees together with the West LB appointee, while the 'B' Directors were listed as the four original directors dating back to the time when FOH was wholly owned by Bambino.

9. The Shareholders Agreement went on to deal with the situation where Speed exercised its option. In this event it required Bambino to procure the removal of two 'B' Directors of SLEC and FOH. It did not give Speed the power to appoint two more 'A' Directors, but, as the judge pointed out, Speed would by virtue of its shareholding be able to secure the appointment of two additional directors.

10. By the end of June 2001 Mr Piccinini and Mr Werner, both original directors of FOH prior to Speed's interest in

it and named in the Shareholders Agreement as 'B' Directors, resigned. On 9 October 2002 Bambino sought to appoint two 'B' Directors, M and Mme Argand. The Company Secretary accepted the appointment.

11. Bambino claimed that it was entitled to make this appointment because there were no 'B' Directors at all. Its position was that neither of the remaining original directors, Mr Mullens and Bernie Ecclestone, had been appointed 'B' Directors in accordance with the provisions of the Articles. Therefore, it said, they had at all times been and remained ordinary directors.

12. Speed disputed this appointment, claiming that Mr Mullens and Mr Ecclestone were both appointed 'B' Directors by virtue of the Shareholders Agreement regardless of the formalities set out in the Articles. It claimed for a declaration that the appointment of the Argands was invalid, and applied for summary judgment on its claim

HELD (allowing the application and granting summary judgment to the Claimants)

13. Speed relied upon the Duomatic Principle (from *Re Duomatic Limited* [1969] 2 Ch 365) to the effect that where it is clear that all the persons whose approval for some step is required under a company's constitution can be taken to have assented to the step, then the step will not fail by reason merely of the non-observance of a procedural formality. Bambino, on the other hand, denied that Mr Ecclestone in particular would ever have consented to becoming a 'B' director.

14. The judge noted that under the articles, board meetings were inquorate unless there was at least one 'A' and one 'B' Director present. He held that on the proper construction of the Shareholders Agreement, that document was effective to appoint as 'A' and 'B' Directors those individuals listed in the schedule, without the need for compliance with the formalities required by the Articles. He also indicated that had he needed to, he would have held that the situation fell within the Duomatic principle.

15. In addition Bambino advanced the possibility of a claim for rectification of the Shareholders Agreement as a reason not to grant summary judgment. However the judge held that this also was doomed to fail.

Commentary

16. The interest of this case does not stem from the legal issues raised in it. These are limited to the construction of the Shareholders Agreement and the application of the well known Duomatic principle. Rather

it stems from the rare insight it gives to the management of Formula One racing, and the effect on that management which the judgment might give rise to. It is too early to tell at this stage what that effect might be – though paradoxically some recent developments seem to suggest that one effect might be to delay or prevent the threatened break away movement and thereby lengthen Mr Ecclestone's control of the sport.

(2005) SLJR 6

National Greyhound Racing Club – Stewards Inquiry – disciplinary decision – review of decision – apparent bias – outsider present during Stewards' deliberations

FLAHERTY v NATIONAL GREYHOUND RACING CLUB LIMITED

[2004] EWHC 2838 (Ch)

*High Court (Chancery Division), Evans Lombe J
8 December 2004 (Reporter: TP)*

Facts

1. The Claimant was the owner of a greyhound which raced at Wimbledon Greyhound Stadium ("WGS") in a heat of the greyhound derby during May 2002. The Claimant brought the animal from Scotland to WGS on the day in question and, following a veterinary inspection, the animal was kenneled around 6.15pm. It was due to race at 9.15pm. Immediately prior to the race, it was selected for a random urine sample, which was sent off to a laboratory for testing pursuant to the Defendant's standard procedure. The animal had been a favourite for the race, but it finished last of 5 runners.

2. The sample was found to have contained a product called hexamine, which is a substance found in some urinary antiseptic medicines. The Claimant was charged under the Rules of Racing of the Defendant with administering for an improper use a substance which by its nature could affect the performance or prejudice the well-being of a greyhound.

3. Upon being notified of the presence of hexamine in the sample, the Claimant informed the Defendant that, when he removed the animal from the kennel for the sample to be taken just before the race, the animal had appeared tight, that when the animal was placed in the trap it appeared somewhat distressed and that it had urinated on its bedding in the kennel, which was very unusual. The Claimant denied administering hexamine and alleged that the presence of hexamine in the sample must have been

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as a consequence of some third party administering the substance through the wire mesh of the kennel door between 6.15pm and 9pm on the evening in question, and he questioned the security arrangements in place at WGS on the evening in question. Alternatively, the Claimant alleged that the presence of the substance could have been explained by contamination of the animal, for example from a feeding bowl.

4. The Claimant asked the Defendant to produce the sample so that he could have it tested. This was not possible, since the Defendant's policy was not to split the sample into A and B samples. In any event, there was insufficient urine left in the single sample to allow for any meaningful testing to take place.

5. The charges against the Claimant were heard and determined at a Stewards Inquiry. The Stewards of the Defendant are responsible for making decisions on alleged breaches of the Rules of Racing.

6. The veterinary Steward at the Stewards Inquiry had worked as a vet for WGS over a period of 30 years until about a year before the Stewards Inquiry. His veterinary practice had been retained by WGS during this period, and WGS had been the practice's most loyal client. The veterinary Steward had had a working acquaintance with the Racing Manager at WGS, who was the Defendant's main witness at the Stewards Inquiry on the issue of stadium security on the evening in question. The veterinary Steward's duties whilst attending at WGS involved spending considerable time in the kenneling area. The veterinary Steward held firm views on the adequacy of the security arrangements at WGS, namely, that security was adequate. At the time of the Inquiry, the Claimant was aware that the veterinary Steward used to work at WGS but was not aware of the details nor was he aware that the veterinary Steward had had a working relationship with the Racing Manager of WGS.

7. The Stewards Inquiry heard the evidence of the Racing Manager of WGS and also heard the Claimant's submissions. After the open session, the Stewards convened in private to deliberate. During those deliberations, the Chief Executive of the Defendant – who was not a Steward – was also present, although the Claimant was not aware of this at the time and this only emerged at the end of the High Court trial. After considering the issues, the Stewards found the Claimant in breach of the Rules of Racing and imposed a fine on the Claimant.

8. The Claimant issued proceedings in the High Court making the following claims:

8.1. that the decision was perverse as no reasonable tribunal could have reached the decision on the evidence before it;

8.2. that there was a breach of the rules of natural justice in the failure of the Defendant to carry out a split sampling procedure;

8.3. that the veterinary Steward had been so hostile to him during the hearing that the Steward had been affected by actual bias;

8.4. that the veterinary Steward was affected by apparent bias;

8.5. that the proceedings were procedurally unfair for a number of other reasons, including the failure to put to the Claimant the reasoning behind the decision of the Stewards.

9. At a late stage in the High Court trial, the Claimant discovered that the Chief Executive of the Defendant had been present during the deliberations, so the Claimant amended his claim so as to add this as a head of procedural unfairness. The Defendant filed evidence from the Stewards who claimed that the Chief Executive had not played any part in reaching their determination and had not influenced them in any way.

10. The Claimant claimed declaratory relief to the effect that the decision of the Stewards was of no effect against him.

Held (allowing the Claimant's case in part)

11. The learned Judge rejected the Claimant's case on (i) perversity, (ii) the absence of a split sampling procedure, (iii) actual bias, and (iv) the Stewards' failure to communicate their reasoning during the hearing.

12. However, the learned Judge found in the Claimant's favour on (i) the issue of apparent bias and (ii) the issue relating to the presence of a non-party during the Stewards' deliberations.

(i) Actual bias and waiver

13. The learned Judge held that the correct approach is that set out in *Porter v Magill* [2002] 2 AC 357, applying *Re Medicaments* [2001] 1 WLR 700, namely (i) the Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased, then (ii) it must ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased.

14. Adopting this approach, the Court held that all the circumstances regarding the connection between the veterinary Steward and WGS, including his professional work for WGS over a 30 year period, his professional acquaintance with the Racing Manager of WGS, his firm expression of views as to the adequacy of the security arrangements at WGS and his knowledge of security arrangements at WGS would lead such a fair-minded observer to conclude that there was a real possibility that the Steward would be biased.

15. The learned Judge rejected the Defendant's defence that any apparent bias was waived by the Claimant's failure to object at the hearing, because (i) applying *R v Bow Street Magistrate ex parte Pinochet (no 2)* [2000] 1 AC 137, the Claimant was not aware of all the relevant circumstances surrounding the connection between the veterinary Steward and WGS, and (ii) applying *R v Essex Justices ex parte Perkins* [1927] 2 KB 475, the Court was not satisfied that the Claimant (who appeared in person at the disciplinary hearing) knew of his right to object.

(ii) presence of a non-member during the deliberations

16. The learned Judge held that the rule against non-members being present during deliberations (being *Cooper v Wilson* [1937] 2 KB 309 and *R v Leicestershire Fire Authority ex parte Thompson* (1978) 77 LGR 373) flowed from a different principle from the authorities considered in the cases on apparent bias, and the appearance of injustice alone is sufficient to undermine the decision, provided the appearance of injustice is sufficiently stark. The learned Judge also held that evidence from the tribunal members that no injustice had occurred was irrelevant.

17. For these reasons, the learned Judge held in favour of the Claimant and declared that the decision of the Stewards Inquiry was ineffective.

Commentary

18. The decision on apparent bias is an important one, since it applies standard principles to the decision of a sporting disciplinary body and shows that members of such tribunals must be careful to declare their personal interests prior to or during the hearing, if they are to avoid a later challenge.

19. The case is under appeal, and is due to be heard by the Court of Appeal in July 2005.

(2005) SLJR 7

Amateur football – bad tackle – conviction on one count of unlawfully and maliciously inflicting grievous bodily harm – appeal – the point at which sporting conduct leading to injury reaches the required threshold to be criminal.

REGINA v MARK BARNES

Court of Appeal (Criminal Appeals Division), Lord Chief Justice of England and Wales, Cresswell J. and Simon J.
21st December 2004 (Reporter: DM)

Facts

1. On 7 December 2002, in the final minutes of a Saturday league football match between Minster Football Club and the Punch & Judy, Minster led by two goals. As the victim (Bygraves) of Minster Football Club was in the act of scoring his side's third goal, he was tackled from behind by appellant (Barnes). The evidence of the referee was that the appellant had not made a "sliding tackle" but had gone in with two feet. The referee sent off the appellant. The victim suffered a serious injury to his right ankle and fibula.

2. At his trial before the Crown Court, the appellant was convicted on one count of unlawfully and maliciously inflicting grievous bodily harm contrary to section 20 of the Offences Against The Person Act 1861.

3. In his summing-up, the trial judge made clear the appellant could only be guilty if the prosecution proved what happened was "not done by way of legitimate sport". In response to a request from the jury after they had retired, the trial judge gave a further direction which reiterated that if the tackle was done in the course of legitimate sport then that would provide a defence. He required the jury to consider whether the appellant was reckless (as to the consequences) in his deliberate act of tackling the victim.

4. The appellant's grounds of appeal amounted to a contention that the trial judge failed, in his summing up and in response to a question asked by the jury after they had retired, adequately to explain to the jury the facts that needed to be established before the appellant could be convicted of the offence charged.

Held

5. The appeal was allowed. The summing-up was inadequate and as a result the conviction was unsafe.

6. Whether the sporting conduct which causes injury reaches the required threshold to be criminal depends

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on all the circumstances. The test is objective. The type of sport, the level at which it is played, the nature of the act, the degree of force used, the extent of the risk of injury, the state of mind of the defendant are all likely to be relevant in determining whether the defendant's actions go beyond the threshold.

7. However, there will be cases that fall within a "grey area" and the tribunal of fact will have to make its own determination as to which side of the line the case falls. In a case such as the instant case, the jury would need to ask themselves among other questions whether the contact was so obviously late and / or violent that it could not be regarded as an instinctive reaction, error or misjudgement in the heat of the game.

8. The concept of "legitimate sport" was not unhelpful but it needed the support of an explanation of how the jury should identify what is and what is not "legitimate" within the context of a football match. The jury could have been given examples of conduct which could be regarded as "legitimate sport" and those which were not legitimate. Specifically, the jury should have been told why it was so important to determine (a) where the ball was at the time the tackle took place and (b) whether the appellant had been going for man or ball.

Commentary

9. The Court considered in some detail the important issue about the boundary between civil and criminal liability for sporting injury. The Court's summary that the question of whether the conduct is criminal is to be answered objectively and depends on all the circumstances is hardly surprising. The punching and gouging in a rugby scrum would be out of place in a hockey match.

10. However, what makes the case of particular interest is that in coming to its conclusion, the Court offered significant guidance on the nature and extent of the defence (which is founded on public policy) that a participant can lawfully consent to having bodily harm inflicted upon him in the course of contact sports such as football.

11. In general the Court accepted the view of the Law Commission in "Consent and offences against the person: Law Commission Consultation Paper No. 134" that:

- the intentional infliction of injury enjoys no immunity;
- a decision as to whether the reckless infliction of injury is criminal is likely to be strongly influenced by whether the injury occurred in actual play, or in a moment of temper or over-excitement when play has ceased, or "off the ball";
- although there is little authority on the point, the

principle demands that even during play injury that results from risk-taking by a player that is unreasonable, in the light of the conduct necessary to play the game properly, should also be criminal.

12. The Court added that conduct outside of the rules can be expected to occur in the heat of the moment and even if such conduct resulted in a sending-off it may still not reach the level required to be criminal.

13. Sunday league footballers in general may take heart from this decision. The Court emphasised that criminal proceedings arising from sporting injuries should remain rare, not just because of the high threshold it went onto to confirm but also because civil alternatives (a sport's own disciplinary procedures or actions in negligence or assault) offer a more appropriate mechanism.

(2005) SLJR 8

Licence – refusal to grant – review of decision – due process rights

ARCYCLING AG v UNION CYCLISTE INTERNATIONALE

Court of Arbitration for Sport

2004/A/777

31 January 2005 (Reporter: IP)

Facts

1. This was an appeal before the Court of Arbitration for Sport ("CAS") against a decision to refuse to grant a UCI ProTour cycling licence. ARcycling AG ("the Appellant") is a Swiss limited company which operates professional cycling teams, including the team "Phonak". UCI ("the Respondent") is a non-governmental association of national cycling federations, and is recognised by the Olympic movement as the international federation governing the sport of cycling.

2. The Respondent granted the Appellant a provisional licence in accordance with the UCI cycling regulations ("the Regulations") on 30 June 2004. The letter informing the Appellant that this had been done stated that provided the conditions laid down by the Respondent had been met then on 23 November 2004 a four-year UCI ProTour licence would be granted to the Appellant's team.

3. In July 2004, one of the Appellant's riders failed a blood test and was found positive for EPO. This rider admitted his guilt and his contract with the Appellant was terminated. In August 2004, at the Olympic Games, a second rider for the Appellant's team

underwent an anti-doping control and after an initial negative finding he was found to have undergone a blood transfusion. This second rider protested his innocence and asked for a counter-analysis. Finally, in October 2004, a third rider from the Appellant's team was found to have taken a blood transfusion.

4. At the same time over the course of autumn 2004, the Respondent revised its Regulations to provide that teams subject to its jurisdiction could, in addition to an employment contract with its riders, include an image contract with riders, but that remuneration payable under the image contracts could not exceed 15% of the total remuneration paid to the cyclists. The Appellant was apparently told by the Respondent's advisor on financial matters that this new provision would not apply to existing contracts "due to the legal principle prohibiting retroactivity". The Appellant renewed five contracts during autumn 2004 with riders without including the new provision on image rights.

5. By a letter dated 13 November 2004, the Respondent informed the Appellant that its Licence Commission had issued a negative preliminary opinion on the definitive grant of a UCI ProTour licence. There then followed a hearing between representatives of the Appellant and of the Respondent. In its final decision on 22 November 2004, the Respondent rejected the Appellant's application for a UCI ProTour licence, citing the existence of "several cases" of doping or suspected doping of the Appellant's riders, and the failure to respect the Respondent's rules regarding riders' contracts in respect of image rights. In addition, the Respondent relied as a ground for rejecting the application for a licence on the Appellant's questioning the validity of the tests which revealed the suspect doping, even more than the doping cases themselves.

6. The Appellant appealed to the CAS on, among others, the following grounds:

- (1) the accusation of doping could not be linked to any proven organisational misbehaviour on the part of the Appellant or its team;
- (2) the final decision to reject the application was taken all of a sudden and without any warning;
- (3) all mistakes allegedly made had been corrected;
- (4) it was legitimate and not unethical to question the reliability of a new doping test;
- (5) the provisional decision of June 2004 had created trust that a UCI ProTour licence would be granted, and the Appellant had entered into several contracts with the firm belief of taking part in the UCI ProTour;
- (6) the Appellant had been treated differently from other teams, in that the Appellant was not given an opportunity to amend its application to meet the

expectations of the Licence Commission, as other teams had been allowed to do;

- (7) the effect of the refusal by a monopoly holding like the Respondent was an economic restriction on the free economic growth of the Appellant and an exclusion from the market which violated Swiss competition law.

7. In its answer, the Respondent sought to argue that:

- (1) the Appellant could not be sure of getting a licence; it had to take into account the possibility of not getting a licence;
- (2) by contesting the validity of the testing method, the Appellant had engaged in "unethical behaviour", contrary to the Regulations;
- (3) the fact that the Respondent itself did not take any measures against the riders did not suggest that it had doubts about the testing method;
- (4) the Appellant had not demonstrated that it had structured itself in such a way as to combat doping effectively;
- (5) the letter of July 2004 was not a provisional decision creating trust that the Appellant would be granted a licence in November 2004, as the wording of the letter made it very clear as to the provisional nature of the licence being granted;
- (6) it was not the role of the Respondent to warn the applicants for a licence of problems which might be relevant to the application;
- (7) the Appellant had been treated equally with those applicants which were in the same situation as the Appellant.

8. Prior to the final hearing, the Appellant applied for disclosure of all files of the Licence Commission concerning all other applicants for a UCI ProTour licence, on the ground that such documents were relevant to demonstrate that the Respondent had informed other applicants of problems with their applications, giving those others a chance to do something about it. The application was refused, but solely because the CAS held that the evidence already put forward by the Appellant sufficiently demonstrated that the Respondent had indeed advised other applicants of the inadequacy or incompleteness of their applications.

Held (allowing the appeal and granting the Appellant a two year UCI ProTour licence)

9. CAS stressed that it was undertaking a review of the decision of the Respondent. CAS would review the decision if:

- (1) the decision adopted was taken without proper regard for the applicable sections of the Regulations [at 59];
- (2) while CAS would defer to the discretionary

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- appreciation of the Licence Commission, the decision appealed from would be reviewed if it was “materially unfounded” or “evidentially unjustified”, and this would include cases where there was any breach of the applicant’s fundamental rights [at 60];
- (3) a fortiori, CAS would intervene if the decision was arbitrary. A decision was arbitrary if it harms in an inadmissible way the sense of justice or of fairness or if it is based on improper considerations or lacks a plausible explanation of the connection between the facts found and the decision issued [at 60];
- (4) but, according to the constant jurisprudence of CAS, a procedural violation was not enough in and of itself to set aside an appealed decision. It had to be ascertained that the procedural violation had had a bearing on the outcome of the case [at 104].

10. CAS noted that when the Respondent’s Licence Commission adopted its preliminary negative opinion on 12 November 2004, the Appellant could not know all the allegations made by the Respondent’s representatives and the Respondent’s appointed consultants. Therefore, the Appellant could not examine beforehand the evidence and could not refute it by providing some counter evidence in support or correction of its application. True it was that there had been a subsequent oral hearing after the preliminary negative opinion had been issued. But in light of the stringent restrictions on the Appellant’s ability to submit fresh evidence at the oral hearing, in front of the same body which had already issued a negative decision, CAS held that the Appellant’s “fundamental due process rights” had been breached [at 74].

11. Turning to the three main grounds for refusing the Appellant’s application, CAS held:

- (1) Anomalies or positive results of anti-doping tests concerning some of the Appellant’s riders: CAS expressed its sympathy with the Respondent’s anti-doping stance. But, unless there was evidence of intentional or negligent “implication” of the team’s management, the team as such could not be held liable for the individual actions of its riders [at 80].
- (2) Ethical attitude of the Appellant: CAS noted that the testing method used, the homologous blood transfusion testing method, was “absolutely new”. Until a decision was rendered by CAS or another independent court, CAS was of the view that it was clearly not unethical to voice doubt about the reliability of the testing method [at 88].
- (3) Failure to comply with the Regulations relating to riders’ image contracts: CAS pointed out that there was apparently contradictory information given to the Appellant [at 102].

12. On each of the three grounds, CAS held that the conclusion of the Respondent was “materially ungrounded and unjustified”. Summing up, CAS held that:

“the procedural defects of the licensing procedure had a critical bearing on the outcome of the same procedure ... As a consequence, the Panel holds that the violations of the Appellant’s fundamental procedural rights, in addition to the other questionable aspects of the Appealed decision ... have yielded a ruling that, as a whole, is materially ungrounded and evidentially unjustified.” [at 105]

13. CAS did not express a view on the other grounds of appeal, namely competition law and the principle of proportionality.

14. According to the Regulations, the Panel “would deliver a new decision replacing the challenged decision” in order to definitively decide the dispute. CAS went on to hold that, given that the Applicant “might not have been irreproachable in its internal organisation during the 2004 season” is was proportionate to grant a two year licence.

Commentary

15. The decision to allow the appeal, and the process by which that decision was reached, is not surprising. CAS was following the ratio of earlier decisions which held that a procedural violation is not enough by itself to set aside an appealed decision; the procedural violation must have affected the outcome (see CAS 2001/A/345, *M v Swiss Cycling*, in *Digest of CAS Awards*, III, 240 and references therein). Nevertheless it is a useful illustration of the process.

16. However, the one aspect of the decision which is not clearly reasoned is why CAS in the instant case decided to issue the Appellant with a two year licence. The normal period for a UCI ProTour licence is apparently four years. Pursuant to the Regulations, the Respondent can withdraw a licence at any moment should the team no longer comply with the conditions set out therein. Despite holding the grounds on which a licence was refused to have been evidentially unjustified, CAS felt able to grant the Appellant what might be seen as only a partial victory. This seems, in the absence of further explanations, wrong.

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Reviews

James Nafziger (2004), *International Sports Law, Ardsley NY: Transnational* (p.376)

In the first edition to this text published in 1988, the author comments 'the elements of international sports law, perhaps as in any new field of inquiry, are a bit like chips in a kaleidoscope. The law looks a little different each time' (xiii). It is perhaps a reflection of the slow burning fuse of international sports law that it has taken 16 years for a second edition to appear. Nevertheless, times have indeed changed and international sports law continues to develop 'under its own steam' (p.4). Doping, the rights of athletes, dispute resolution, corruption, broadcasting and intellectual property law are now the 'critical issues' in sport (xiii). Many of these issues have been brought into sharper focus by the increasingly commercialised world of sport, the changing role of the governing bodies and the growth in calls for greater external regulation of sport. Changed also are the sources of law influencing sport on a global level. A growing disregard for the impartiality and integrity of sports own internal hearings combined with the growing economic significance of sport has breathed new life into the field of international sports law. The Olympic Charter has been substantially amended, national legislation has been recodified, national courts have been increasingly engaged, the Court of Arbitration for Sport (CAS) has matured, the World Anti-Doping Agency (WADA) has been created, the European Union (EU) has emerged as a growing regulatory influence in sport and international human rights law has assumed a heightened prominence. Very welcome it is that Professor Nafziger has therefore revisited this issue.

The book is essentially structured in three parts. The first part (chapters 1-5) examines the process of international sports law and its institutions for avoiding and resolving disputes. Chapter 1 (the introduction) presents some initial thoughts on the process, importance and future of international sports law. Here the author claims that the term 'international sports law refers to a process that comprises a more or less distinctive body of rules, principles, institutions and procedures to govern important consequences of transnational sports activity' (p.1). Further, 'the process of international sports law thus includes provisions of international agreements; international custom, as evidence of a general practice accepted as law; general principles (including equity and general principles articulated in the resolutions of international organisations); and, as subsidiary sources, judicial decisions (including those of both international and national tribunals) and scholarly writings' (p.1-2). For Nafziger, the normative underpinning of international

sports law lies with the Olympic Charter and the constitutions of the governing bodies. Nevertheless, as the book goes on to explain, disputes involving sport are all too frequently settled outside the 'sporting family' via the route of litigation. The author points to the commercialisation of sport as an important reason behind the growth of sports litigation. Life bans with the associated loss of earnings and reputation act as an incentive to litigate particularly if the justice dispensed by sport is not seen to be fair, transparent and impartial. For Nafziger, litigation can act as a type of Graysonian safeguard in sports governance – ensuring fair play and the maintenance of the public interest. However, it could also act to impede the construction and coherence of international sports law itself.

Chapter 2 defines the institutional legal framework of international sports competition, with the Olympic movement, non Olympic organisations, the European and American models of organisation and issues of corruption receiving particular attention. The brief discussion on the role of the EU was, I thought, insufficient although I am quite prepared to accept that the world does not revolve around Europe. I also smiled at the commendable commentary on cricket scandals given the author had briefly expressed his bewilderment at the game. Chapters 3 and 4 are pivotal. Chapter 3 defines the general institutional structure of dispute resolution focussing particularly on the Court of Arbitration for Sport (CAS) and its emerging *lex sportiva*. Chapter 4 further develops this theme by examining the balance between arbitration and litigation in sport. The fifth chapter discusses how disputes during the sporting contest may be resolved. His discussion on the use of technology to resolve disputes (such as line calls) is fascinating. Throughout this commentary the author masterly untangles the complex pattern of sports regulation globally and brings it into sharper focus. He explains that in order to confront the problem of judicial encroachment into their jurisdiction and to consolidate the disparate authority into more coherent processes for resolving disputes, the international sports governing bodies have established and acceded to new forms of regulatory control such as that provided by the CAS. The CAS, it is suggested is a major source the incipient international *lex sportiva*. The more this develops and is allowed to develop, the more likely it will guide national courts, the EU and indeed sports own procedures in how to deal with sporting disputes. It could therefore act as a vehicle through which national courts, and by association the EU, play a less prominent role in sport. Yet the connection between the CAS and its founder (the Olympic movement) continues to raise questions

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about the impartiality of CAS awards. A decoupling of its relationship from the Olympic movement in 1994 following Gundel has partly addressed such concerns although Nafziger discusses the dangers of formalising the procedures of CAS.

In places I wondered whether the author was perhaps overly optimistic about the force of international sports law and too romantic in his conception of sport as a movement rather than a business. After all, international sports law is a concept full of holes and it is a body of law which at best can be described as 'ripening'. Nafziger recognises that the *lex sportiva* is more of a *lex ferenda* than a *lex specialis* (p.49). He also underplays the claim that the *lex sportiva* is analogous with the commercial concept of the so called *lex mercatoria*. He stresses that 'the association of the two terms may be somewhat strained' (p.48-49). Nor does he appear overly concerned with the incompleteness of international sports law. It may be a slow burner, but burning it is and as it develops it will guide future sports related awards thus providing efficiency within the legal process, stabilizing the expectations of what arbitration can offer and making arbitration more predictable – a function performed in national jurisdictions by the doctrine of *stare decisis*. It will also add clarity to the principles and rules of international sports law (such as the Olympic Charter) in a manner equivalent to that performed by statutory interpretation in national jurisdictions. In such circumstances, judicial rules can become increasingly harmonised and applied equally, transparently and without political bias within the sports world. A lack of these principles has called into question the integrity of disciplinary procedures in sport. The author cites the Ottey and Sotomajor cases as instances of world class athletes being cleared of drug offences by the International Amateur Athletics Federation (IAAF) despite the existence of evidence to the contrary (p.51). In such cases the independence and neutrality of such panels can be seriously questioned making the case for the existence of such bodies as the CAS overwhelming. Yet is the maturation of international sports law as embodied in the CAS free from danger? For predictability in international sports law read formality and as Nafziger recognises 'what would arguably be lost by formalizing the CAS process ...are several other advantages of arbitration: confidentiality; relatively low cost; simplified procedures; speed; meditative quality; capacity to help restore; preserve and maintain relationships between disputing parties; flexibility and customization to particular circumstances and the wishes of the parties; and international enforceability' (p.52).

Chapters 6 and 7 form the next distinct section of the book. These chapters further develop the *lex sportiva* debate by examining the substantive issues in

sports disputes, namely issues of the human rights and duties of athletes, their eligibility, doping, violence and issues of commercialisation in sport. Again, throughout these chapters the enviable and persuasive analysis strengthens the author's arguments on the growing strength of international sports law. For example, the author cites the CAS' involvement in doping appeals as establishing the basis for uniform standards for testing, applying the rules and sanctions and review of them. Again however, the coverage of the EU's regulatory approach to sport was lacking. EU policy papers on sport are heavy with the language of the Olympic movement. They have also proved influential in shaping the EU's perception of what sport is, how it should be regulated and what standing it should have in the EU's constitutional architecture. The normative underpinning of international sports law has therefore affected the judicial and constitutional choices made by the EU in a manner consistent with Nafziger's arguments.

The final section of the book is contained in chapters 8-12. Here the book moves away from the focus on how disputes within the sporting movement are avoided and resolved to an examination of the normative underpinning of international sports law and the influence on the emerging body of international sports law on the conduct of nation states. International sports law is not just accepted, respected and applied by nation states through judicial or statutory means, it is also a process comprising a distinct body of institutions, rules and principles capable of influencing transnational sporting activity including the behaviour of nation states. In this connection the Olympic Games acts as the contextual setting for considering the interrelationships among politics, policy and law in the international sports arena. Chapter 8 presents an historical journey from the Ancient Games to the infamous 1936 Games as a means of contextualising the political issues to have surrounded the Games. Chapter 9 examines the involvement of national sports policies (particularly of the US) in the politicisation of international sports. This theme is continued in chapter 10 which further examines the political uses of sport by nation states. Chapter 11 focuses on the use of boycotts and chapter 12 examines the general characteristics and shared goals of sports competition and its management. This final chapter raises interesting analytical questions concerning the dynamics sustaining international (sports) co-operation. Two appendices complete the book by describing the legislation of the US and China.

Nafziger's book is a masterful account of an emerging body of law. It is not, as I initially thought, too optimistic and too romantic about the development and force of the *lex sportiva*. All too often the term international sports law is used not to mean a process

through which coherence and stability can be brought to the pattern of sports regulation at all levels but rather as a means of promoting the notion of an autonomous international legal order immune from the reach of law courts. Nafziger's analysis does not amount to this. He paints a picture of an emerging body of law akin to public international law which directs national courts, national legislators, state behaviour and the sports world itself. He describes it as a process which does not seek to strip away the role of national courts but to blend national and international processes into a single process of justice. Its development establishes a constitutional equilibrium between courts and sporting federations through the definition of a territory of sporting autonomy vested in arbitral awards and a territory of judicial intervention in which litigants are active. Courts are not written out of the equation as the law remains watchful that procedures are fair and the public interest upheld. He merely puts forward a balanced position that litigation should be used sparingly. In doing so the book teases out many intriguing analytical questions the most interesting of which concerns the emerging *lex sportiva*. The question of what sustains this process is fascinating. Nafziger's all too brief footnote discussion (p.282) on the dynamics of international co-operation (see reference to Mitrany and Haas) hints at further theoretical investigation. It also implies some common ground with the emerging literature on sports regulation and European integration. This issue may be explored in a future edition. Let's hope we don't have to wait a further 16 years for it. My guess is that 16 years from now international sports law will be an established and theorised academic discipline and scholars will point to this book as its genesis.

Dr. Richard Parrish, Edge Hill College

**John Beech & Simon Chadwick (eds.) (2004)
The Business of Sport Management Harlow:
Pearson (p. 496).**

As the discipline of the area of sports law is expanding a pace, it cuts across almost the whole spectrum of other legal subjects. However it is clear that not only does the sports law practitioner need to be familiar with a wide range of legal knowledge, a good understanding of the dynamics of sport business is required. This book provides a very useful insight to many issues which provide the context within which sports law operates. The two editors, John Beech, from a sports management background and Simon Chadwick, from a sports marketing background have compiled a group of contributors both from the UK and internationally to provide a range of perspectives on the business of sport.

Section One focuses on the 'Context of Sport', highlighting issues of governance and ethics in sport and the role of the State. The development of effective governance is perhaps the most pressing issue facing sporting bodies. As they become increasingly complex and having to manage significant commercial interests, it is useful to understand some of the theoretical models of governance. This not only allows the appreciation of the complexity of these bodies, for example in the context of sports' numerous stakeholders, but helps understand the implications that this has on the development of policy. The requirement of sports bodies to act ethically is also highlighted.

Section Two focuses on business function in sport including the topics of human resource management, sports marketing, sports finance, measuring performance in sports organisations and managing small and not-for-profit sports bodies. It needs to be remembered that the vast majority of sports clubs are small and have limited funds. Their financial health is vital as is their ability to eligible for state funding through mechanisms like the National Lottery. Chapter 7 focussing on Sports Finance is of particular interest. The author, Bill Gerrard defines the subject as 'the study of effective management of cash flows by sports organisations in pursuit of their organisational objectives'. He features a case study of the financial plight of Leeds United over the last few years, presumably to show how sports bodies can get his previously stated goal so wrong.

The chapter on Strategy and Environmental Analysis examines the environmental factors influencing sport that is the different drivers and trends that determine the environment or context that sport operates within. Chris Parker identifies six factors; political drivers based on government initiatives, economic drivers being those aspects of the economy that determine consumer

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behaviour; social trends and attitudes; technological drivers, highlighting the very close commercial relationship between sport and new technologies; environmental issues in the sense of the wider environment sports operates within; and lastly legal and regulatory factors, which are 'perhaps the easiest drivers for sports organisations to monitor as they are usually enforced'.

Section Three focuses on Sports Management issues. The first chapter written by Karen Bill examines Sports and the Law issues and provides a useful overview of some of the main issues with a particular focus on participant liability and case study of the role of player agents. There are also chapters on Sport Event and facility management and Risk Management, emphasising the very practical issues facing those whom organise sports events, particularly in limiting potential financial and legal liability. Finally there are useful chapters on management of the commercial issues facing sport; sponsorship; broadcasting, e-commerce and the betting industry.

This text is targeted at both undergraduate and post-graduate sports management students and professionals who operate within the sports industry. There is variability in the level of analysis between chapters with some providing fairly basic information. John Beech & Simon Chadwick however should be congratulated in bringing this edited collection to the market. It does however provide many useful insights to and explanations of the wider context of the sports industry and will help the sports law practitioners gain a wider understanding.

Simon Gardiner

Future reviews

Sports Image Rights in Europe (2005) Ian S. Blackshaw (Editor), Robert C.R. Siekmann (Editor), Asser Press

Cricket and the Law: The Man in White Is Always Right (2004) David Fraser, Frank Cass

Sports Business: Law, Practice, Precedents (2005) R. Verow, et al, Jordans

Sports Law and Policy in the European Union (2004) Richard Parrish, Manchester University Press

European Union and Sport: Legal and Policy Documents (2005) Robert C. R. Siekmann (Editor), Janwillem Soek (Editor), Asser Press

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