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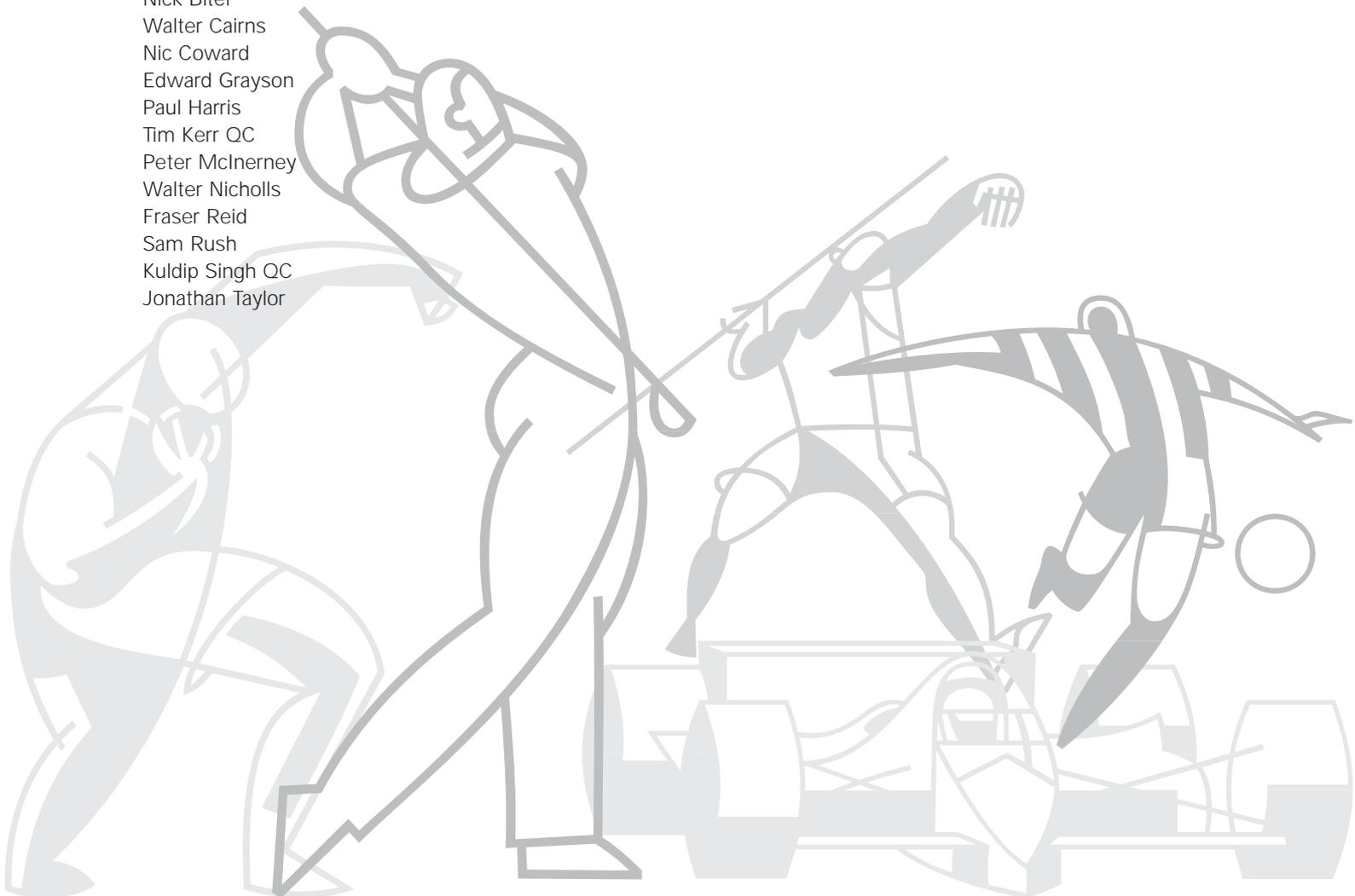
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Contents

Editorial	2	Survey and Reports	
		Sports Law International Survey	41
		Walter Cairns	
Opinion and Practice		Sport and the Law Journal Reports	101
Settling sports domain name disputes	6		
Ian Blackshaw			
Image rights: Where next?	10	Reviews	
Stephen Bate		Book Reviews	109
Is there a case for more criminal justice system involvement in sporting incidents?	13	<i>Ian Blackshaw and Robert Siekmann, Sports Image Rights in Europe (2005).</i>	
Steven Barker		Mark Buckley	
Footballers and fixed term contracts	16	<i>Lars Halgreen, (2004) European Sports Law: a Comparative Analysis of the European and American Models of Sport.</i>	
Graham Shear and Alison Green		<i>Richard Parrish, (2003) Sports law and Policy in the European Union.</i>	
Analysis		<i>Robert Siekmann and Janwillem Soek (eds), (2005) The European Union and Sport: Legal and Policy Documents.</i>	
The Death of the Constitutional Treaty: Implications for Sport	20	Professor Stephen Weatherill	
Richard Parrish			
Is there an EU 'sporting exception'?	25		
Juliet Mash			
The Bosman/Kolpak effect: Has sport got it wrong?	33		
Simon Boyes			
Current case briefing – G14 versus FIFA	36		
Ruth Byrne			

Editorial

By Simon Gardiner, Editor

This is the first issue of the Sport and the Law Journal in electronic format. This development is part of the on-going evolution of the Journal. One advantage of this electronic form is that the contents are searchable with the use of key words. Over a period of time the archive of the Journal will also be available on the website.

This issue has a specific focus on the increasing role that the European Union has in regulating sport. The relevant articles will be discussed below. Firstly however, the Opinion and Practice section has a number of articles focusing on other issues. Two of these examine some of the legal measures protecting IP rights in sport. Ian Blackshaw's article, 'Settling Sports Domain Name Disputes' provides analysis of recent developments in protecting sporting Internet sites. Secondly, Stephen Bate's article 'Image Rights: Where Next? – the Bedford Case', discusses the alternative remedy pursued by David Bedford in his action to OFCOM against the '118 118' advertising campaign.

Two further articles focus on topical issues. Firstly, Graham Shear & Alison Green's article, 'Footballers and fixed term contracts', examines how different the contractual position is of footballers to other employees on fixed-term contracts. Secondly, Steven Barker considers 'Is there a case for more criminal justice system involvement in sporting incidents?' In early June, the Crown Prosecution Service held a conference on Crime and Sport focussing on the criminal liability of a range of issues including corruption and match fixing, football hooliganism and on-field violence and abuse including that of a racial nature. It was the regulation of on-field violence that raised most media interest with the CPS indicating that it is reviewing its policy concerning when and where prosecutions are brought, particularly in team contact sports. It is interesting to debate why this initiative to clarify the CPS policy on sports field 'violence' is occurring presently. It cannot be that sports related violence is on the increase. In Britain, in football and both codes of rugby, the game is relatively sanitised in comparison to 20 or 30 years ago with rule changes, the introduction of formal codes of conduct and more rigorous officiating leading to safer and less violent play. Statistics that indicate increases in levels of injury are misleading. Higher levels of fitness and physical endeavour in professional sport contribute

to more frequent but less serious injuries than in the past. There is no indication that amateur sport is any different. Might it be that the contested view that violence in society is on the increase and the desire to engage with anti-social behaviour has seeped onto the sports field? Steven Barker who has acted in many sports-related criminal cases suggests an appropriate role for the criminal law.

The Analysis section focuses on European Union policy in sport. It is clear that the EU has recognised that professional sport is subject to regulation as a business. In addition the social-cultural dimension of sport is clearly recognised as being powerful and will continue to be actively promoted. What has emerged in terms of an EU sports law is little 'hard law' that has legally binding force, but significant amounts of 'soft law', that is 'rules of conduct which in principle have no legally binding force but which nevertheless may have a significant effect on policy and legal developments'. Richard Parrish's, 'The Death of the Constitutional Treaty: Implications for Sport', examines the latest indication of the present position of EU sports policy.

There is recognition that although sport is an economic activity it is a 'special' case. Sport will however have to ensure that it complies with the provisions of EU law in areas such in competition law. The dialogue between the European Commission and the football federations concerning the changes to the transfer system is a good illustration of what seems to be a 'new realism'. It is highly unlikely that there will be a 'sporting exemption' from the provisions of EU law. Juliet Mash's article 'Is there an EU 'sporting exception'?' examines the evidence for and against its existence. Two more practical issues are examined with firstly, Simon Boyes' article, 'The Bosman/Kolpak Effect: Has Sport Got it Wrong?' analysing how sport has responded to the impact of these two ECJ cases. Secondly, Ruth Byrne's 'Current Case Study- G14 v FIFA' considers the legal issues involved in the club versus country debate.

Editorial

The extent of the involvement of the EU in sport is highlighted in a Review Article by Stephen Weatherill focussing on three recent book publications. In addition Mark Buckley reviews a recent publication on the protection of Image Rights in Europe.

Lastly the usual features of the Sports Law International Survey and Sport and the Law Journal Reports are included.

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 refer to information on BASL web site and contact the Editor with any suggested offerings. The longer Analysis section articles are peer reviewed by external referees. To help facilitate this process, a small Editorial board is in place consisting of myself, Dr Richard Parrish, Dr Hazel Hartley, Murray Rosen Q.C. and Jonathan Taylor.



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Opinion and practice

Settling sports domain name disputes

By Ian Blackshaw

With sport now being big business, disputes over the registration and use of domain names relating to sporting personalities, leading teams, sports organisations and major sports events are on the increase. This article looks at the settlement of such disputes under the Uniform Domain Name Dispute Resolution Policy administered by the Arbitration and Mediation Center of the World Intellectual Property Organization, a specialized UN Agency based in Geneva, Switzerland, with examples taken from some of the recent leading cases.

It has often been said by commentators that the Internet is a modern example of the 'wild west' of celluloid fame, in that it is a 'new frontier' and difficult to police and regulate. This is mainly because of its global nature and reach – not being confined by State borders. However, in one respect, at least, to use the jargon, 'cybersquatting' – the abusive registration of 'domain names' – that is, internet addresses, many of which are sporting ones, such as 'fifa.com' – is regulated internationally, thanks to the ICANN (Internet Corporation for Assigned Names and Numbers) Uniform Domain Name Dispute Resolution Policy (UDRP) (the Policy), which was approved on October 24, 1999. To access the Policy, log onto 'www.icann.org/udrp/udrp-policy-24oct99.htm'.

The Policy is administered and enforced through a specific adjudication process conducted by among others the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations, based in Geneva, Switzerland. For more information, especially concerning the services provided by the Arbitration and Mediation Center, log onto 'arbitrator.wipo.int/domains'. Since introducing this process more than five years ago, the Center has handled more than 7,700 cases from 122 countries. Incidentally, the 5,000th case was a sporting one involving the leading English Football Club, Tottenham Hotspur, and the use of the domain name 'tottenhamhotspur.com'. The decision can be found at '<http://arbitrator.wipo.int/domains/decisions/html/2003/d2003-0363.html>'.

The disputes handled by the Center have involved more than 14,500 domain names, mostly in the .com, .net and .org domains; but more recently, the Center has dealt with disputes in the new domains of: .aero, .biz, .coop, .info, .museum, .name and .pro. The Policy has also been adopted by certain registration authorities of national domains.

The cases are decided by WIPO appointed IP and electronic commerce experts, of which there are presently about 400 drawn from more than 50 countries. These experts, before being appointed in any particular case, are required to sign a Declaration of Independence, thereby assuring the parties in dispute of an impartial and independent decision. The experts form single or up to three member panels, depending on the wishes of the parties.

It should be noted, however, that, under the terms of the Policy, parties in dispute have the right, if they wish to exercise it, to submit their domain name disputes to Court either before or after commencing the UDRP proceedings (Paragraph 4(k) of the Policy). To date, very few of the WIPO domain name cases have proceeded to national courts.

Before looking at some leading sports domain name cases handled by WIPO, involving sports persons, teams, bodies and events, we need to define the activity of 'cybersquatting' within the meaning of and for the purposes of the Policy.

Cybersquatting

Under the Policy, cybersquatting involves the abusive registration of a domain name and the complainant, in order to obtain its transfer or cancellation, must establish that the disputed domain name is:

- identical or confusingly similar to a trademark of another;
- registered by a party who has no rights or legitimate interest in that domain name; and
- registered and used in bad faith (Paragraph 4(a) of the Policy).

For the complainant to succeed, all three of these conditions must be met.

Settling sports domain name disputes

But, what, one may ask, is meant by the expression 'bad faith'? The Policy provides the following examples of acts, which *prima facie* may constitute evidence of bad faith:

- an intention to sell the domain name to the trademark owner or its competitor;
- an attempt to attract for financial gain internet users by creating confusion with the trademark of another;
- an intention to prevent the trademark owner from reflecting his trademark in a corresponding domain name; and
- an intention to disrupt the business of a competitor (Paragraph 4(b) of the Policy).

It should be noted that the above list is not exhaustive, but merely illustrative of the kinds of situations that may fall within the concept of bad faith.

In practice, many of the disputes are not defended by the respondent to the complaint, and this fact, along with a failure to respond to any 'cease and desist' letter from the complainant issued before the proceedings were commenced, may constitute further indication of bad faith on the part of the respondent. Likewise, the respondent may have been previously involved in registering disputed domain names that have been the subject of previous UDRP cases, in which those names have been found to be without legal justification and ordered to be transferred to the complainants. Again, this would constitute evidence of bad faith. As could registering a fanciful domain, with a bizarre explanation of why the respondent chose that particular domain name, as happened in the so-called Pepsi case (*PepsiCo, Inc. v PEPSI, SRL (a/k/a P.E.P.S.I.) and EMS COMPUTER INDUSTRY (a/k/a EMS)*, WIPO Case No. D2003-0696). In that case, an Italian Company, with the name of "Partite Emozionanti Per Sportivi Italiani", which, in translation, stands for "Leave the Histrionics for Italian Sports Fans", and known for short as "P.E.P.S.I.", registered 70 domain names incorporating the famous soft drink trademark PEPSI in relation to an extensive range of sports, including 'pepsicricket.com', 'pepsigolf.com', 'pepsisoccer.com', 'pepsirugby.net', 'pepsisuperbike.net' and 'pepsivolleyball.net'. The sole panelist in this case held that there was "opportunistic bad faith" because the domain names were so obviously connected with such a well-known product with which the respondent had no connection. See also *Veuve Cliquot Ponsardin, Maison Fondée en 1772 v The Polygenix Group Co.*, WIPO Case No. D2000-0163.

In the event that the complaint does go undefended, how is the case to be handled? In previous cases, in which the respondent failed to file a response, the panel's decisions have been based on the complainant's assertions and evidence, as well as inferences drawn from the respondent's failure to reply. See *The Vanguard Group, Inc. v. Lorna Kang*, WIPO Case No. D2002-1064; and also *Köstritzer Schwarzbierbrauerei v. Macros-Telekom Corp*, WIPO Case No. D2001-0936.

Nevertheless, the panel must not decide in the complainant's favor solely based on the respondent's default. See *Cortefiel S.A. v. Miguel García Quintas*, WIPO Case No. D2000-0140. The panel must decide whether the complainant has introduced elements of proof, which allow the panel to conclude that its allegations are true.

Some Sports Domain Name Cases

Using the WIPO adjudication process, many sports domain name disputes of various kinds have been settled quickly. Absent any exceptional circumstances, decisions should be rendered within 14 days of the appointment of the Panel to handle the dispute being notified to the parties, pursuant to paragraph 15 of the Rules for Uniform Domain Name Dispute Resolution Policy, which are available by logging onto 'www.icann.org/udrp/udrp-rules-24oct99.htm'.

And also settled effectively. All decisions are reported to the Registrar, who registered the disputed domain name in the first place, together, in successful cases, with a direction to cancel or transfer the registration to the rightful party. The Registrar is obliged to do so pursuant to the provisions of Paragraph 4 (k) of the Policy. Indeed, on average, four out five complaints brought are upheld. The process is also relatively cheap involving a fee of US\$1,500 being paid by the complainant. In addition to providing a model form of complaint (this can be accessed at '<http://arbitrator.wipo.int/domains/filing/udrp/>'), the Center publishes on its website a full index of all WIPO domain name decisions (this can be accessed at '<http://arbitrator.wipo.int/domains/filing/udrp/>'); and also a WIPO Overview of WIPO Panel Views on Selected UDRP Questions (this Overview can be accessed at '<http://arbitrator.wipo.int/domains/search/overview/>'). These value adding resources are not only invaluable, but they also provide a high degree of legal certainty/predictability for the benefit of the parties in dispute.

Settling sports domain name disputes

As Francis Gurry, Deputy Director General at WIPO, has pointed out:

“Reflecting the increasing commercial importance of sport, the number of sports-related WIPO UDRP complaints has been rising. In football, for example, WIPO complainants have included famous players, such as Ronaldinho and Totti, eminent managers, like Sir Alex Ferguson, and major clubs, like Real Madrid and Liverpool. In sport, as in other fields, there is need for continued vigilance by rights owners. The UDRP has proven to be a very effective instrument in combating predatory practices aimed at siphoning off the goodwill attached to major players and participants.”

An example of such unfair practices occurred in the recent case involving the US Major Soccer League's most expensive player, Freddy Adu. In that case (see WIPO Case No. D2004-0682 involving the domain name 'freddyadu.com'), the respondent registered the domain name 'freddyadu.com' and contacted Adu's representative, offering to create the official Freddy Adu fan site, in exchange for such benefits as a stake in advertising negotiations, access to the player and his sponsors and match tickets. The WIPO panelist found that the respondent had held Adu to ransom for the domain name by inappropriately seeking a long-term commercial relationship with him.

Sports domain name disputes to date have involved a wide range of sports and constituents. These have included such individual sports personalities as the tennis players, Venus and Serena Williams (see WIPO Case No. D2000-1673 involving the domain name 'venusandserenawilliams.com'); the former Formula One champion, Damon Hill (see WIPO Case No. D2001-1362 involving the domain name 'damonhill.com'); and the famous footballer Ronaldinho (see WIPO Case No. D2001-1362 involving the domain name 'damonhill.com').

They have also involved well-known football teams, including Real Madrid (see WIPO Case No. D2000-1805 involving the domain name 'realmadrid.org') and Bayern Munich (See WIPO Case No. D2003-0464 involving the domain name 'bayernmunchen.net'). And also well-known Formula One racing teams, including Jordan (See WIPO Case No. D2000-0233 involving the domain name 'jordanf1.com') and Ferrari (see WIPO Case No. D2003-0050 involving the domain names 'clubferrari.com' and 'clubferrari.net').

The Jordan case is particularly interesting, because in an earlier WIPO decision (See WIPO Case No. D2000-0193 involving the domain name 'f1.com'), a complaint made by a group of companies involved in the organization of the Formula One Grand Prix Motor Racing Championships, concerning the registration and use of the domain name 'f1.com', was disallowed. The Panel held that, because the trademark F1 consists of merely a single letter and a numeral, it was not sufficiently distinctive to justify the transfer of the domain name (see later concerning the use of the abbreviation for the FIFA World Cup of the letters 'wc'). In other words, the mark was generic and there was no evidence of considerable and widespread use of the mark for it to acquire a 'secondary meaning' – in other words a commercial association with the activities of Formula One – and thereby distinctiveness. Whereas, in the Jordan case, the Panel held that, because the name Jordan is so well-known as being associated with Formula One, there was a real danger of confusion in this case. Furthermore, there was also other evidence of bad faith, in that the respondent had offered to sell the disputed domain name to Jordan.

The WIPO adjudication process has also been invoked in relation to the protection of sports event names. For example, the world governing body of football, FIFA, successfully challenged the use of its trade mark WORLD CUP in 13 domain names by another party, who had used some of the domain names in the address of his website, which not only related to the FIFA event, but also included copyrighted content from the official website of FIFA (see WIPO Case No. D2000-0034). There was also evidence of bad faith, in that, prior to the WIPO proceedings, the other party offered to sell some of the domain names concerned to FIFA. However, in the same case, the Panel refused to order the transfer of two of the disputed domain names consisting of the letters 'wc', because they were not sufficiently distinctive to be unequivocally regarded by the public as being an abbreviation of the name 'world cup' designating the flagship event of FIFA.

The WIPO domain name dispute resolution process has also been used successfully to protect famous sporting leagues, including the UEFA Champions League (see WIPO Case No. D2000-0153 involving the domain name 'uefachampionsleague.com') and the English FA Premier League, a case in which the writer was the sole panelist (See WIPO Case D2005-0014 involving the domain name 'fapremierleague.com').

Settling sports domain name disputes

Additional Information

The WIPO Arbitration and Mediation Center may be contacted at World Intellectual Property Organization, 34, chemin des Colombettes, P.O. Box 18, 1211 Geneva 20, Switzerland. Telephone: (41-22) 338 8247 or 0800 888 549; Telefax: (41-22) 740 3700 or 0800 888 550. General queries: 'arbiter.mail@wipo.int'.

The Center publishes two useful Booklets entitled 'Dispute Resolution for the 21st Century' and 'Guide to WIPO Domain Name Dispute Resolution' which are available free of charge.

A new Book entitled 'Domain Name Law and Practice' edited by Torsten Bettinger and comprising 1300 pages has been published in March 2005 by the Oxford University Press (ISBN 0-19-927825-3) in hardback at the price of £165.00.

Conclusion

As this article has demonstrated, disputes concerning well-known sporting domain names, whether of individual sports persons, teams, bodies, events or leagues, which incorporate famous and valuable trademarks, can be quickly and effectively resolved using the WIPO adjudication process under the terms of the ICANN Uniform Domain Name Dispute Resolution Policy.

A further advantage of this process is that decisions to transfer or cancel disputed domain names must be enforced by the Registrar that originally registered them.

Again, the cost of using the WIPO process, which, as noted above, is user friendly, is relatively inexpensive.

It is surprising that, after five years, questionable domain names are still being registered, but, one thing can be said with certainty, that those registering and using them contrary to the terms of the Policy will not get away with them when challenged in the corresponding WIPO proceedings by those with a rightful and legitimate claim to them. BASL

Ian Blackshaw is an International Sports Lawyer and a member of the Court of Arbitration for Sport in Lausanne, Switzerland. He is a Domain Name and a WIPO Arbitration and Mediation Center Panelist. And he is also the author of 'Mediating Sports Disputes – National and International Perspectives' published in 2002 by the TMC Asser Press, The Hague, The Netherlands (ISBN 90-6704-146-7). He may be contacted on 'cblackshawg@aol.com'.

Image rights: Where next?

By Stephen Bate

Disputes over image and like rights arise in many contexts and make the news with increasing frequency. The Times, 3 June 2005 edition carried the story of complaints made by the legendary long-jumper Bob Beamon over use of his photograph in the literature promoting the London 2012 Olympic bid.

The same edition carried a story of a truly novel claim made by the former astronaut Neil Armstrong, threatening proceedings under a statute of the state of Ohio against a barber who collected the astronaut's hair clippings from his monthly hair cuts and sold them last year. Apparently, the ultimate purchaser owns the largest collection of hair from historical figures, including Marilyn Monroe and Napoleon.

It is well-known that English law relating to so-called image rights is not as developed as that in the USA. However, it is developing rapidly. The recent decisions of the Court of Appeal in *Douglas v Hello! Ltd* [2005] EWCA Civ 595 and of the European Court of Human Rights in *Von Hannover v Germany* [2005] EMLR 21 have confirmed the rapid development in the law in this area. English law recognizes no concept as a 'image right' and the term conveys no clear meaning. However, it is well-known that English law does give sportspeople and other celebrities the right to protect and control the exploitation of their name, likeness and other aspects of their personality and their private life through a variety of means, including contract, passing off, trade marks, copyright, the law of confidentiality or privacy, and various regulatory codes. These developments are also being lent force by the Human Rights Act 1998 ("HRA").

The circumstances in which the law grants protection in this area derives from the particular contexts it has recognized the right of an individual either to exploit their image commercially (e.g. the law of trade marks), or a right to be left alone (privacy-based laws and regulations). In *Douglas*, the Court of Appeal regarded the right of the Douglases to control photographic images of how they looked on their wedding day as giving rise both to a privacy right in unapproved images (based on the tort of 'misuse of private information' derived from the law of confidence) and also a right protected as a trade secret under the law of confidence attaching to the commercial exploitation of approved images. The latter right was expressed in the following terms (at [118] of the judgment of the court):

Where an individual ... has at his disposal information which he has created or which is private or personal and to which he can properly deny access to third parties, and he reasonably intends to profit commercially by using or publishing that information, then a third party who is, or who ought to be, aware of these matters and who has knowingly obtained the information without authority, will be in breach of duty if he uses or publishes the information to the detriment of the owner.

The court acknowledged that this formulation recognised the right of a celebrity to make money out of private information and that this broke new legal ground.

The decision in *Von Hannover* apparently extends yet further the circumstances in which a sportsperson will be able to use art. 8 of the European Convention on Human Rights either to seek a remedy for the publication of unauthorised photographs, or to use the right as a basis for entering into commercial arrangements. On one view, the decision extends significantly the range of circumstances in which a person may be said to enjoy a 'reasonable expectation of privacy', the touchstone of a claim for misuse of private information – see *Campbell v Mirror Group Newspapers* [2004] EMLR 15. Those circumstances extend to photography in many public places. One possible response of the courts to a wider approach to the circumstances in which article 8 rights are engaged in the light of *Von Hannover* may be to look more closely at the circumstances in which a person can be said to have waived or consented to publicity in the past.

The law may prescribe limits to which 'image rights' can be traded. For example, in the *Douglas* case, it was held that the purchaser of the rights (OK magazine) acquired no property right, which it could enforce against third parties. In other situations, an 'image right' may be capable of being traded.

Image rights: Where next?

The extent of a sports person's legal right to control their image is informed by the nature of the right at play. It may also depend on the precise context in which the image is to be exploited, i.e. in which media. These conclusions are well illustrated by David Bedford's dispute with the Number (UK) Ltd over the 118 118 television advertising campaign, which led to a hearing before the OFCOM Content Board last year. The decision is reported at [2004] I.S.L.R 18.

David Bedford complained of a breach of rule 6.5 of the ITC Advertising Standards Code, which provided:

6.5 Protection of privacy and exploitation of the individual

With limited exceptions [none of which applied], living people must not be portrayed, caricatured or referred to in advertisements without their permission."

The background to the complaint is well-known. The Number carried on a distinctive television advertising campaign featuring twin runners whose look and appearance were that of 1970's athletes. Mr Bedford said they were a caricature of him and he had not given his permission to the caricature. It was not alleged that David Bedford had given his consent, but it was denied that the Number had intended to or had in fact caricatured him. The Board found that whatever the intentions of The Number, it had used photographs and videos of David Bedford (and other runners from the era) and that the twins were not generic athletes of the time but caricatures of David Bedford. The test applied by the Board to determine caricature was little different to that used in the law of copyright to decide whether or not copying has taken place. Thus, a breach of r 6.5 was established.

As a "public authority", OFCOM was required (by s 6 HRA) to act compatibly with the Convention rights in play, including (but not limited to) articles 8 and 10. Although it had power to do so, the Board decided not to prohibit the further broadcast of the adverts. Instead, it found that publication of its finding of infringement was adequate. There were three reasons why the Board decided not to prohibit further broadcasting of the adverts. First, a perceived delay of six months before the complaint was made during which The Number developed a brand image at considerable cost. Second, David Bedford had not "necessarily" suffered actual financial harm. Third, a prohibition would be a disproportionate response to the harm done to the complainant's feelings or reputation, which would be

adequately protected by publication of the decision of the Board that Mr Bedford had not endorsed the Number's service.

The decision was certainly open to challenge by way of judicial review. In the event, no challenge was made. OFCOM's functions with respect to the control of advertising have since been devolved upon the Advertising Standards Authority, in particular the Broadcast Committee of Advertising Practice (BCAP). Rule 6.5 is now embodied in rule 6.5 of the BCAP Television Advertising Standards Code.

A prompt complaint under r 6.5 should usually result in a direction to license holders not to carry unauthorised adverts. Even if relevant, the absence of any financial harm to the complainant should rarely be sufficient to render disproportionate a ban imposed in response to a prompt complaint. A plea that a campaign has cost money will have considerably less weight if the complaint is made soon after the advert is televised. Were that not so, it would always be an answer to a complaint to say that expenditure has been incurred.

At its heart r. 6.5 is designed to protect privacy, rather than to give individuals commercial image rights. However, the restriction in that rule can be deployed for commercial purposes to secure a *de facto* right of commercial endorsement in relation to broadcast advertising. The fact that r 6.5 protects privacy should inform the proper approach to the consequences of its infringement, i.e. rendering the financial effects or non-effects of the infringement less important.

Perhaps most interestingly of all, the Bedford decision shows that the jurisdiction under r 6.5 does not depend on the existence of either goodwill or a misrepresentation of endorsement, unlike the present law of passing off. In *Irvine v Talksport* [2002] FSR 60, [2003] FSR 35, C.A. it was essential not only that there existed a goodwill associated with Eddie Irvine's professional activities but also that the defendant's public relations campaign falsely represented that he had endorsed the radio station. Had that not been so, the claim would have been unsuccessful. In numerous adverts there is no explicit or even implicit message that the celebrity has endorsed the product or service in question.

Image rights should be placed in a wider context, beyond the right to control commercial exploitation of appearance or likeness. Neil Armstrong's threat of

Image rights: Where next?

proceedings in the USA for sale of his hair strikes a wider resonance. The wider context embraces what in the USA would be described as rights of publicity and associated false light claims, including defamation. It is possible to discern developments in English law that will permit growth of these rights. As long ago as 1952 the Court of Appeal recognized the possibility of a person's voice being the subject of a claim in passing off, where an imitation of the voice of the actor Alastair Sim was used in an advert (*Sim v Heinz* [1959] 1 WLR 313). Thirty years later, the tort of malicious falsehood gave some protection to the actor Gordon Kaye in respect of an interview he had given to journalists who had obtained unauthorised access to his hotel room while he was barely conscious and obviously unable to give his informed consent to the interview. The court found that the actor had suffered loss because publication of the interview and accompanying photographs would lose him the valuable right to sell his story and the falsehood consisted of the message in the article that the actor had agreed to be interviewed. It is now generally recognized that the law of confidence, or at least now in its re-branded form, would have given Gordon Kaye a remedy for that invasion of his privacy. Looking further to the future, it is likely that the law will develop in a piecemeal manner to give increasing protection to sportspeople and to their ability to control the exploitation of their personality in a commercial context. 

Stephen Bate, Barrister at 5RB, who represented David Bedford before the OFCOM Content Board, instructed by Couchman Harrington, solicitors.

Is there a case for more criminal justice system involvement in sporting incidents?

By Steven Barker, Barker Gillette LLP

The above question was posed at a Crime and Sport Conference organised and hosted by the Crown Prosecution Service for England and Wales (CPS) in London on the 3rd June this year. The stated purpose of the conference was for the CPS to have dialogue with the sporting community regarding what their attitude and policies ought to be in relation to violence and abusive behaviour on the sporting pitch itself.

Such dialogue would then inform the CPS of any future policy that they might have in that regard. Just five days later and without any reference or regard to the conference the CPS for Northumberland decided to prosecute the Newcastle United Footballer Lee Bowyer for an offence under Section 4 of the Public Order Act 1986 (commonly referred to as threatening or insulting behaviour). This prosecution arose out of an altercation between Lee Bowyer and his fellow player Kieron Dyer during a professional football match between Newcastle and Aston Villa at St James' Park on the 2nd April this year. The decision to prosecute Mr Bowyer received much commentary and analysis in the sporting press some of which is referred to or highlighted below.

My answer to the posed question is an emphatic NO. The law as it presently stands is more than satisfactory and adequate. Firstly however it is important to try and identify what is a "sporting incident" and to distinguish such incidents from other potential criminal conduct that may take place in or near a sporting arena but is not in fact a sporting incident at all. An obvious example of such an incident would be Mr Eric Cantona's infamous kung fu style attack on a spectator after he had left the field of play in a professional football match between Manchester United and Crystal Palace. That was not a sporting incident at all and Mr Cantona was quite rightly prosecuted for that attack. It might appear an easy task to identify similar such incidents adopting the simple criteria that at the time of the incident the perpetrator of the conduct is not in fact involved in or on the field of play at the time. If a footballer or other professional sportsman were to assault a colleague or any one else after the game had concluded then again it would not and could not be classified as a sporting incident because the sporting event had concluded. The real difficulty however arises in relation to incidents where the perpetrator is engaged in play either directly

or indirectly or perhaps during an interruption in play but before the game has concluded e.g. for a booking of another player or for injury. How does one draw the line in relation to such incidents? If a footballer were to deliberately elbow a fellow player in the face whilst challenging him for the ball should one and could one draw a proper distinction between that behaviour and an elbow in the face away from the ball or off the ball or during an interruption in play? A principal objection to increasing criminal justice system involvement in sporting incidents is that dealing with such behaviour and deciding such issues is surely best left to those disciplinary bodies who know the sport in question and can judge that behaviour in accordance with the codes of conduct for that particular sport. Sport, in all its forms and varieties, professional and amateur, is a complex business and Prosecutors are not trained or equipped with the requisite knowledge and experience to make the judgment calls which are necessary when deciding whether such behaviour is merely a breach of the code of conduct of that particular sport or criminal conduct.

It is quite easy to demonstrate this difficulty by comparing the different codes of behaviour across different sports and an obvious comparison is that between professional football and professional rugby. At the aforementioned conference on the 3rd June Judge Jeff Blackett addressed the audience on types of assaults on the pitch and suitable cases to charge. During the course of his presentation to the conference he produced a video of seven incidents of violent conduct during professional Rugby Union matches including International matches. The almost unanimous consensus amongst the audience (which included many Prosecutors and Senior Police Officers) was that had such conduct occurred in the street then charges of ABH (Actual Bodily Harm - maximum sentence - 5 years in prison) or GBH (Grievous Bodily Harm - maximum

Is there a case for more criminal justice system involvement in sporting incidents?

sentence - life imprisonment) would have been brought. Judge Blackett noted however that not one of the seven incidents shown resulted in any criminal justice system involvement and some of them did not even receive on field disciplinary action by the referee or a subsequent citation. A professional footballer that appears before the FA Disciplinary Tribunal for lesser conduct cannot say to that Tribunal that more serious misconduct occurs in rugby and nothing is done about it. The professional footballer and his adviser knows full well that when they appear before the FA tribunal the tribunal is adopting and applying the code of conduct for that sport and nothing else. That same professional footballer however is entitled to say to a Police Officer or a Crown Prosecutor that his behaviour is far less serious and onerous than behaviour in other sports, which goes totally unpunished. The reason why he can and indeed should say this is because the criminal justice system and all of the Codes for Prosecutors and guidance issued there under has at its heart a concept of fairness. An essential element of fairness is consistency and equal treatment.

Another major objection is that any conduct in any sport which is adjudged by the referee or umpire of that sport to be out with the laws of that sport is thereafter capable of being scrutinised as criminal behaviour and it is no answer to say that although the incident in question is a breach of the rules that particular sport nonetheless permits or tolerates and forgives the behaviour in question. When one makes further comparisons between say football and rugby and other sports the dilemma faced by Police Officers and Crown Prosecutors becomes more acute. How would they deal with for example the following:

The Formula 1 driver who deliberately and recklessly causes a major accident driving in a manner that is subsequently ascertained to be a breach of his particular code, the professional boxer who deliberately head butts his opponent or delivers a deliberate blow below the belt, the tennis player who deliberately issues threatening and/or abusive language to an umpire in frustration for an overrule with which he or she disagrees, the jockey who deliberately unseats a fellow rider, the ice hockey player who deliberately engages in fisticuffs with an opponent knowing he is going to be sent to the sin bin but knowing equally that it will entertain the crowd.

Most of these examples and much of what has been said thus far relates to violent or threatening behaviour. The dilemma facing Investigators and Prosecutors becomes yet more acute when one looks at other

sporting incidents not involving violence or threatening behaviour. The Formula 1 driver or his constructor who deliberately and knowingly conceals a hidden fuel tank or uses fuel out with the agreed specification is surely obtaining a pecuniary advantage by deception: a criminal offence under the Theft Act. An athlete who knowingly takes a banned substance is surely likewise obtaining some advantage pecuniary or otherwise. A footballer who commits the obvious professional foul of tripping a centre forward from behind just as he is about to come one on one with the goalkeeper knows full well that he is going to be dismissed from the field of play but isn't he likewise obtaining some advantage for his team and many others who might have an interest in the outcome of the particular match. Is this fraud? The perpetrators of such incidents can expect to receive severe disciplinary action from their prospective professional disciplinary bodies but do we really want such behaviour to be brought within the criminal justice system? The criminal justice system is already overloaded and it is my view that the limited and hard fought for resources of Police authorities and the CPS are surely best left and directed towards keeping our schools, streets, transport, places of entertainment and homes safe from the very many threats visited upon them. I do not believe that the public would take too kindly to seeing yet another professional sportsman clogging up the Court system with all the publicity that such cases attract when that same member of the public or someone close to him might not be able to get an Officer to his home after, say, a minor burglary or criminal damage to his motorcar. I have heard it said that if, for example, footballers were not prosecuted for behaviour which should it occur in the street they would be then there is one rule for them and one rule for everyone else. The answer to that is that the codes of conduct and the rules and regulations applicable to most organised sport do have the rule of law attached to them. The procedures are quasi judicial, there are appellate procedures and decisions made are capable of judicial review in the High Court. The penalties meted out can be and often are more severe than might be delivered by the courts. An athlete who is found guilty of taking banned performance enhancing substances can these days expect to receive a very substantial if not lifetime ban from the International Olympic Committee and yet further bans from domestic and European competition. If the banned substance were a class c prohibited drug then the criminal justice system would likely deliver a warning or possibly a caution. Fines and suspensions are and can be quite severe. Take Mr Bowyer's case: he was instantly red

Is there a case for more criminal justice system involvement in sporting incidents?

carded resulting in an immediate 4-match suspension. Within days his club initiated disciplinary action fining him a sum in excess of £200,000 and within days after that he appeared before the FA disciplinary tribunal where he was fined a further £30,000 and suspended for a further 3 games. Not only is this severe but it is swift and could never be matched by the criminal justice system. The maximum fine for the offence which he now faces is £5000.00 There are other penalties available including imprisonment but we surely do not want to send our sportsmen and women to Jail for what might be nothing more than a moment of indiscipline born of frustration in the highly competitive and often hostile atmosphere of the sporting arena. It would be hypocritical of our Society to urge our sportsmen and women to excel and succeed, enjoy with them the success they bring to us all but then criminalize them for misbehaviour in the sporting arena even if such misbehaviour amounted to prima facie criminal conduct. To do so is surely not in the public interest and the CPS is obliged to act in the public interest. Paragraph 5.6 of The Code for Crown Prosecutors reads as follows: -

“In 1951, Lord Shawcross, who was Attorney General, made the classic statement on public interest, which has been supported by Attorney General ever since “It has never been the rule in our country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution.”

In the case of *R v Barnes* (2005) 1 WLR 901 Lord Woolf CJ sitting in the Court of Appeal held that:

“Most organised sport have their own disciplinary procedures for enforcing their particular rules and standards of conduct and therefore, in the majority of situations, there was no need for, and it would be undesirable that there should be, any criminal proceedings where a player injured another player in the course of a sporting event.”

Barnes was an amateur footballer who caused serious injury to an opponent when tackling him for the ball. In the Crown court it was alleged against him that the tackle was crushing, late, unnecessary, reckless and high. He was convicted of inflicting grievous bodily harm and appealed against conviction to the Court of Appeal. The appeal was allowed and the conviction declared unsafe. Lord Woolf CJ in handing down the judgement went on to say that:

“A criminal prosecution should be reserved for those situations where the conduct is sufficiently grave to be properly categorised as criminal conduct.”

Most people who work in the sports industry seem to agree and I would suggest that they do so because they understand the pressures placed upon our sportsmen and women. In the Times on Friday June 10th Matt Dickinson, Chief Football Correspondent for the Times wrote “tackling jobs on the pitch is a job for FA, not Police”. Paul Wilson in the Observer Sports Column page 12 asked of the CPS “haven’t they got better things to do”. He went on to say “there is no need to list here all the other things the CPS could be doing with their time such as looking at rather more serious assaults in Rugby Union and Horse Racing or heaven forbid tackling crime that isn’t covered on television from a dozen different camera angles”. Glenn Moore, Football Editor for the Independent writing on Thursday 9th June in that newspaper says “the Bowyer/Dyer fight while reprehensible was no worse than many scraps on the Street on a Saturday night, few of which end up in Court”.

The assault alleged against Mr Barnes occurred whilst he, his opponent and the ball were in play and some prosecutors will no doubt argue that it is therefore distinguishable from those incidents I referred to earlier where there is an interruption in play or the perpetrator is not directly engaged in play. Is this really a fair basis for selecting candidates for criminal prosecution? After all in Barnes the CPS alleged that the tackle was not only late, crushing and high but also “unnecessary”. An FA disciplinary tribunal composed of persons who have been engaged in the sport themselves for many years and who understand the pressures of the game is in a far better position to decide such issues than a magistrate or a jury. Such tribunals also act in the public interest and do so with speed and efficiency spending not one penny of taxpayer’s money. They do not operate, as I have heard it alleged, some form of “cosy club” where there is one law for sportsmen and one for the rest of us.

The CPS asked for dialogue with the sporting community and I now urge the sporting community to impress upon the CPS that there is no need for any increase in their involvement. BASL

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Footballers and fixed term contracts

By Graham Shear and Alison Green, Partners at TSSLAW

Footballers normally sign their first meaningful contract at the age of 18 or 19 for a term of three, four or five years. Once the player begins to establish himself the club is likely to offer to replace it with a four or five year term contract on better money. If renegotiated, the most likely reason was the club seeking to protect its “investment” so that it has a longer term commitment from the player, enabling the club to sell the player, if they want to, and receive a transfer fee.

So what is all the fuss about? The FAPL is an association of its member clubs primarily concerned with protecting their interests. Rule K3 of the FAPL rules prevents any club from approaching a player who is contracted to a Premiership club unless they have obtained the written consent of the players club. One would have thought that this restriction, together with the transfer windows and the footballers fixed term contracts would be sufficient to prevent “poaching” of players and any instability that could arise.

But that is not the limit of restrictions. The FAPL says that in addition to preventing clubs from approaching players, they also need Rule K5 which prevents all Premiership players from approaching another club prior to the third Saturday in May in the year in which that player’s contract ends, notwithstanding that such a discussion would be for a future contract with a prospective future employer. Player contracts all end on 30th June. Therefore the players are prevented from making any meaningful approaches, without the consent of their club, until the last five weeks of their contract which falls in a period after the end of the playing season and when most clubs to whom an approach could be made are either on tour or on holiday.

The domestic law is relevant. The principle in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Limited* (1894) AC535 sets out a doctrine of three parts:

1. Is there a restraint of trade?
2. If so, can the body seeking to rely upon that restraint (in this case the FAPL) prove that the restraint is reasonable and justified in the interests of the parties and, in doing so, is it a worthwhile, balanced and legitimate basis upon which such a restriction should be imposed and is it proportionate in all the circumstances?

3. If the FAPL can show that such a restraint is reasonable and justified in the interests of the parties, can the employee show that it is contrary to public interest?

There can be little dispute that K5 is a restraint of trade. The FAPL do not deny that it is. The question therefore is whether the restraint can be justified by the FAPL as being reasonable and in the interests of the parties. Only if they can overcome this hurdle does the third part of the test come into play. So what is the FAPL’s justification for the restraint imposed by rule K5? They say that is necessary for competitive integrity, contractual stability, team stability and competitive balance. But there are no equivalent provisions to K5 in Europe’s other main footballing nations; Italy, Spain, France and Germany. Apparently the FAPL’s European counterparts do not consider that allowing their footballers the freedoms enjoyed by employees in other walks of life would place the game in jeopardy. So why are English footballers different?

According to the FAPL, if a player were free to contact other clubs, then his performance might be affected. For example, he may be tempted to “throw a game” if he were to play against the club with which he was in discussion.

Common sense dictates footballers are likely to try hard on the pitch if they are seeking to attract the attention of another club. If a player purposefully fails to perform he will remain “on the bench” and out of the eye of prospective employers and possibly perceived as being unreliable and having little professional integrity and hence value to any team. A prospective club would be reluctant to take on a player who acted in such a way, for fear that he could do the same to them.

Should a Football Association Premier League (FAPL) footballer be treated differently from other employees on fixed term contracts?

The “capital” value of a player to their club begins to diminish as the end of the player’s contract approaches. This discounting effect begins from about 18 months to 2 years before the contract ends. It is therefore in the Club’s interest to maintain Long-term contracts, especially for younger players, in order to retain the prospect of obtaining a hefty transfer fee should they subsequently sell the player.

It is argued by the FAPL that Rule K5 is necessary for team stability. They say without the rule there would be more transfers and if squads were continuously changing, spectator interest would be lost. But it is simply a fact of the sport that squads fluctuate and players move between teams for any number of reasons. In general, however, supporters remain loyal to their teams regardless of the changing faces of individual players. It is noteworthy that the changes of Manager, promotion or relegation are the situations which ordinarily lead to wholesale changes to the first team squad. What about the Manager? There are few who would doubt that the loss of a good manager would have a far more detrimental effect on team morale than the loss of an individual player. However, there are no similar restrictions to rule K5 imposed on managers, who are free to approach other clubs during the term of their contract.

Two groups of players most affected by rule K5 are players at, or approaching, the peak of their careers whose clubs wish to retain at the lowest salary cost. The other group is footballers nearing the end of both their playing careers in the Premiership and their fixed term contracts with their then current clubs. In both cases it is in the clubs interest to use the rules to maintain its options. In the first case it will simply wish to maintain a strong negotiating tension and in the second it will simply not wish to be committed whilst it considers alternative, younger players. All players who remain in the premiership are likely to experience the situation recently faced by Shaka Hislop (37) of Portsmouth FC who was only told a couple of weeks before the end of the season that his contract would not be renewed. This late notice together with the effect of rule K5 has made it extremely difficult for the older players to maintain continuity of their careers.

In 1990 Jean-Marc Bosman challenged the system of transfer fees imposed by clubs on the cross-border transfer of players. Bosman’s club effectively prevented him from moving to a French club by imposing an excessive transfer fee for his services. Bosman sued the Belgian and European football authorities, claiming that the imposition of transfer fees stopped EU citizens from having the human right of freedom of movement in employment. In 1995, the European Court of Justice ruled in his favour, holding that the then existing football transfer rules contravened the European Union law on the free movement of workers.

The Bosman ruling resulted in players being able to move between clubs on the expiry of their contracts. This has provided footballers with the freedoms enjoyed by employees in other walks of life. There has not been “chaos” in the game as a result of this ruling and hysterical claims that any tinkering with rule K5 will result in chaos or the “end of football as we know it” are viewed by the writers with derision. Rationalization and change to the Premiership rules will bring English football into the modern employment era to which it will quickly adapt.

There should be two overriding concerns. Whilst many Premiership footballers are highly paid, they nevertheless have the right to a balanced and fair treatment so far as the protection by them of their future careers is concerned and the right to properly and appropriately seek future employment so as to maintain the continuity of what is ordinarily a short and intensive career. Secondly, where associations or governing bodies produce a system of rules whereby their members, as employers, restrict or govern the rights of their employees, they nevertheless have obligations not only to produce fair and balanced rules between employer and employee but also to ensure that the rules accord with the requirements of the broader domestic law. ^{BASL}

Analysis

The Death of the Constitutional Treaty: Implications for Sport

By Richard Parrish

On May 29th 2005 in a public referendum 55% of the French electorate rejected the EU's Constitutional Treaty. Days later the Dutch public did likewise and shortly afterwards the British Government declared its intention to halt its own ratification of the Constitution in the UK. It now looks extremely unlikely that the Constitutional Treaty can survive in its current state.

Introduction

The failure to ratify the Constitutional Treaty has implications for sport. Articles I-17 and III-282 of the Treaty proposed adopting sport as a new competence of the EU thus establishing a constitutional reference point for the EU's judicial bodies to consider when deciding sports related cases. This article assesses the implications of the failed Constitution for sport. It first recalls the current legal status of sport in the EU given that, in the absence of further constitutional change, this is the default state of play. The article argues that current case law demonstrates that there already exists sufficient flexibility in the existing Treaty for sport and the EU to comfortably co-exist. The death of the Constitution, whilst regrettable for other reasons, should not impact too harshly on sport.

The Current Legal Status of Sport in the EU

The Constitutional Treaty proposed changing the legal status of sport in the EU from one in which the EU had no direct competence in sport to one in which the EU could adopt 'supporting, co-ordinating or complimentary action'. The EU has in fact developed an 'indirect' sports policy as a consequence of sports proximity to EU policies with a legal base, such as those dealing with freedom of movement or competition policy (see Tokarski 2004: 61-113). It has however needed to act with caution when discussing sport in a direct sense. The UK's successful challenge to the Commission's sports spending programmes highlights this danger (see *UK v. Commission* [1996] ECR I-02729). Article III-282 would have resolved these questions and the failure to ratify the Constitutional Treaty will mean sport operates under the EU's current legal framework. This framework is generally well understood as consisting of Treaty provisions, case law and non-legal policy interventions. Broadly, Articles 3, 12, 39, 43 and 49 of the current Treaty relate to the ability of individuals to circulate freely within the territory of the EU and Articles 81, 82 and 87 concern the manner in which business undertakings conduct themselves within the single

market. Whilst these provisions would have remained unchanged by the Constitution, the manner in which they related to sport as a consequence of Article III-282 was the issue.

As has been well documented in this journal, Treaty provisions on free movement and competition law have been applied to sporting contexts by the European Court of Justice (ECJ) and the European Commission. Case law is becoming more settled. In *Walrave* [1974] and *Donà* [1976] the ECJ established that sport is subject to EU law in so far as it constitutes an economic activity within the meaning of Article 2 of the EEC Treaty. When the purpose of this economic activity is to gain employment or remunerated service, the provisions relating to freedom of movement become engaged – as was amply demonstrated in the 1995 *Bosman* ruling. In that case it was suggested that the absence of a sports article in the Treaty contributed to the ECJ's economic analysis of sport. In fact, in *Bosman* the court did acknowledge the peculiarities of sport and subsequent ECJ jurisprudence has reinforced the point made in para. 106 of the *Bosman* judgement (see below) by indicating that sport has characteristics which may justify treatment not afforded to other 'normal' industries. This line of reasoning was developed in *Deliège* [2000] and *Lehtonen* [2000] in which the Court examined the use of selection criteria in judo and transfer windows in basketball. In both of these rulings the Court suggested that some rules escape the reach of free movement law because they are inherent to sport. Nevertheless, the ECJ has been unwilling to allow such arguments to interfere with the fundamental principles of free movement. In *Kolpak* [2003] and *Simutenkov* [2005] the ECJ transposed some of the free movement principles of *Bosman* into Association Agreements concluded between the EU and third states which contain a non-discrimination clause. This means that certain non-EU workers (footballer's for instance) must not be discriminated against in terms of working conditions, remuneration or dismissal when they are legally employed in the territory of the member state.

The Death of the Constitutional Treaty: Implications for Sport

In addition to the provisions on freedom of movement, the competition law Articles of the Treaty have also been applied to sporting contexts. Article 81 prohibits restrictive practices in the single market, Article 82 seeks to prevent abuses of dominant market positions by undertakings and Article 87 places restrictions on the granting of state aids. Following *Bosman*, the Competition Policy Directorate General received over 50 sports related complaints. These complaints (and subsequent Commission investigations) covered a wide range of sporting rules including re-structured transfer systems, competition between sporting federations, rules preventing the multiple ownership of sporting clubs, rules preventing club re-location, the operation of Formula One motor-racing, ticketing arrangements for major sporting events and the sale and purchase of broadcasting rights and the transmission of sporting events. Again, the absence of a sports article in the Treaty which could have informed the Commission's judgements in the above cases gave rise to some concern amongst the sports governing bodies that the specificity of sport was not being fully acknowledged in the Commission's approach.

The adoption of a sports article in the EC Treaty has been widely discussed since *Bosman*. The 1994 '*Larive Report*' on the European Community and Sport, the 1997 '*Pack Report*' on the Role of the European Union in the Field of Sport and the 2000 '*Mennea Report*' added impetus to this agenda (European Parliament 1994, 1997, 2000). The Pack Report claimed that:

"although the European Union has taken an interest in professional sport as an activity, it has, to date, only taken account in a very marginal fashion of the cultural, educational and social dimension of sport, and whereas such neglect stems basically from the fact that there is no explicit reference to sport in the Treaty" (European Parliament 1997: para.1).

Pack suggested that the solution of how to find a balance between the economic and socio-cultural aspects of sport was for sport to be included in the Treaty. This would strengthen the position of sport in other EU policies, heighten awareness of the role of sport in European society and crucially, place a legal obligation on the EU's judicial bodies to refer to the Treaty Article when deciding sports related cases. Sports governing bodies welcomed this initiative as a potential vehicle through which sport could be exempt from EU law. Despite the growing strength of support, the Heads of State and Government meeting in

Amsterdam in June 1997 decided only to attach a non-binding Declaration on sport to the Amsterdam Treaty which read:

"The conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport" (Declaration 29, Treaty of Amsterdam 1997).

The member states added political impetus to the Amsterdam Declaration by releasing a further statement on sport as part of the December 1998 Vienna European Council Conclusions. The statement read, "Recalling the Declaration on Sport attached to the Treaty of Amsterdam and recognising the social role of sport, the European Council invites the Commission to submit a report to the Helsinki European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework" (Presidency Conclusions 1998).

Following the Amsterdam and Vienna Declarations the Commission began to piece together a sports related rolling agenda. In 1998, the Commission published a working paper, '*The Development and Prospects for Community Activity in the Field of Sport*' (Commission of the European Communities 1998a) which identified sport as performing an educational, public health, social, cultural and recreational function and that sport could be used as a vehicle through which policy objectives in these fields could be pursued. The paper also noted that sport plays a significant economic role in Europe and that no general exemption from EU law could be permitted. Shortly afterwards the Commission published the consultation document, '*The European Model of Sport*' (Commission of the European Communities 1998b) which acted the basis for the production of the Helsinki Report on safeguarding current sports structures and maintaining the social function of sport within the Community framework (Commission of the European Communities 1999b).

The aim of the Helsinki Report was to give 'pointers for reconciling the economic dimension of sport with its popular, educational, social and cultural dimensions' (Commission of the European Communities 1999b: 3). The report suggested that a new approach to sports regulation was needed which involves 'preserving the

The Death of the Constitutional Treaty: Implications for Sport

traditional values of sport, while at the same time assimilating a changing economic and legal environment' (Commission of the European Communities 1999b: 7). The Report expressed similar views to that developed in a previous Commission paper published in February 1999 on the application of competition rules to sport (Commission of the European Communities 1999a). In that paper, the Competition Policy DG made a distinction between purely sporting situations which escape EU law and wholly commercial situations to which Treaty provisions will apply.

The European Council responded to the Helsinki Report by including within its June 2000 Santa Maria da Feira Presidency Conclusions the following statement:

'... the European Council requests the Commission and the Council to take account of the specific characteristics of sport in Europe and its social function in managing common policies' (Presidency Conclusions 2000a).

This passage added to speculation that the member states were prepared to include a sports article within the legal passages of the forthcoming Nice Treaty. In the event, the member states once again chose not to adopt a sports competence in the Treaty. Instead another political Declaration on sport was released in the form of a Presidency conclusion (Presidency Conclusion 2000b: Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of which Account Should be Taken in Implementing Common Policies). Paragraph 1 of the Declaration adds an important statement on the specificity and autonomy of sport by stating:

"Sporting organisations and the Member States have a primary responsibility in the conduct of sporting affairs. Even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured".

This is developed in para. 7 which states:

"The European Council stresses its support for the independence of sports organisations and their right to organise themselves through appropriate associative structures. It recognises that, with due regard for national and Community legislation and on the basis of a democratic and transparent method of operation, it is the task of sporting organisations to organise and promote their particular sports, particularly as regards the specifically sporting rules applicable and the make-up of national teams, in the way which they think best reflects their objective."

The Constitutional Treaty and the Implications of the French 'No'

In May 2004 the EU enlarged to 25 member states with the accession of Estonia, Hungary, Latvia, Lithuania, Poland, Slovak Republic, Czech Republic, Slovenia, Cyprus and Malta. Such an expansion necessitated a review of the EU's institutional and constitutional structure. At the Laeken European Council meeting in December 2001, the member states agreed to conduct a *'deeper and wider debate about the future of the European Union'*. This was to involve a larger institutional and constitutional review of its activities. Throughout 2002/03 a specially convened Convention on the Future of Europe deliberated on these issues. The wide remit and participatory nature of the Convention's deliberations allowed relatively peripheral topics such as sport to receive an airing. Indeed, in its final Draft Constitutional Treaty, the Convention recommended that sport should be legally integrated into the Treaty. The final text which included sport was signed in Rome in October 2004. The holy grail was in sight.

Article III-282 of the Constitutional Treaty defines sport as an area for 'supporting, co-ordinating or complimentary action' within the context of education, youth, sport and vocational training policy. Article III-282: Education, Youth, Sport and Vocational Training reads:

282(1) 'The Union shall contribute to the promotion of European sporting issues, whilst taking account of its specific nature, its structures based on voluntary activity and its social and educational function'.

282(1) 'Union action shall be aimed at: (g) developing the European dimension in sport, by promoting fairness in competitions and co-operation between bodies responsible for sports and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen'.

282(2) 'The Union and its member states shall foster co-operation with third countries and the competent international organisations in the field of education and sport in particular the Council of Europe'.

282(3) 'In order to contribute to the achievement of the objectives referred to in this Article, (a) European laws or framework laws shall establish incentive actions, excluding any harmonisation of the laws and regulations of the Member States. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee (b) the Council of Ministers, on a proposal from the Commission, shall adopt recommendations'.

The Death of the Constitutional Treaty: Implications for Sport

On May 29th 2005 the Constitutional Treaty was rejected by the French electorate. Whilst some aspects of the Constitution may be salvaged ('cherry picked') by the member states, Article III-282 is most likely dead. This will disappoint many of the major governing bodies of sport who are searching for legal protection from the reach of EU law. Even though the wording of III-282 fell far short of the text UEFA / IOC submitted to the Convention, the inclusion of the phrases 'specific nature' and 'bodies responsible for sport' within the text was potentially significant. The text offered the potential for a more settled and clarified legal environment for sport to operate within although it does not offer sport a general exemption from EU law. Furthermore, the text does not contain a specific horizontal integration clause which would place an obligation on the EU institutions to take sport into account in defining and implementing other EU policies and activities (Mestre 2005: 83). Nevertheless, the Article would have established the legal base for the Commission and the ECJ to make expanded use of the so called 'sporting exception' in EU law. Here rules which are deemed inherent to sporting competition are not touched by law. This could be used to expand the previously diminishing territory of sporting autonomy. Whilst the concept of the sporting exception has been emerging in EU jurisprudence, it lacks a reference point in the Treaty which could guide the judicial actors. The death of the Constitution thus appears a significant blow to sport. Or does it?

The notion that that sport operates under different market conditions to other industries does not require constitutional entrenchment, it is a matter of common sense. This is borne out by a review of the case law which reveals that the judicial bodies have clearly been able to grasp this concept. The ECJ's judgements in *Deliège* [2000] and *Lehtonen* [2000] illustrate a willingness on the part of the Court to look beyond a simple economic analysis of sport in search of the conditions necessary to allow for the proper functioning of sport. The Commission has done likewise with the maintenance of collective selling arrangements for sports broadcasting and the maintenance of prima facie restrictive transfer rules reflecting greater sensitivity for the specificity of sport. Furthermore, in the field of regulating players' agents, the Commission and Court have granted remarkable authority to FIFA to regulate a profession that would not be subject to such restrictions in other sectors (see Case T-193/02, *Laurent Piau v Commission of the European Communities*, 26 January 2005). Indeed one may question the very assumption that the EU has been insensitive to sport at all. Commenting on *Bosman*, Weatherill points out, it

would be incorrect to argue that the ECJ was totally unsympathetic to sports claims for special treatment. He states:

"Contrary to much of the misconceived criticism levelled at the European Court, the Court did not treat football as an industry like any other... the Court did acknowledge that sport is different" (Weatherill 2000: 164).

In particular, the Court argued that:

"in view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate" (para. 106 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman* [1995]). ***Whilst Weatherill sees this passage as evidence that the Court was prepared to treat sport differently to other sectors, Foster argues that 'in retrospect this paragraph can be seen as the genesis of the Court's attempt to formulate a policy of non-intervention in sport' (Foster 2000: 47).***

The death of the Constitution may however be most acutely felt by those sports bodies hoping to use sports new legal status to attract EU funding for their activities. As explained above, in *UK v. Commission* [1996] the ECJ held that the EU's spending programmes needed to be limited to those areas in which the EU has a competence to act. This excluded sport and as such the Commission's sports spending programmes should be halted. Potentially, Article III-282 would have resolved this issue and thus acted as the basis for the renewal of the EU's sports programmes. Article III-282 falls within the category of 'supporting measures' which may take the form of financial support, administrative co-operation, pilot projects or guidelines. However, the level of funding attached to Article III-282 should not be overstated. The cost of enlargement combined with the EU's current budgetary dispute over the British rebate suggests that budgetary caution will be exercised in the future.

Conclusions

Will sport be negatively affected by the death of the Constitutional Treaty? Potentially Article III-282 could have resolved the budgetary status of sport, promoted the more widespread use of a direct sports policy, established a more formal rolling political agenda on the subject and ensured that EU policies in the field of free movement and competition policy paid greater attention to the 'specific' characteristics of sport. Furthermore, rather than opening a new front in sports policy, a

The Death of the Constitutional Treaty: Implications for Sport

limited Treaty Article located in 'supporting measures' would have placed limits on EU interventions in sport. This would have been welcomed by those sports governing bodies who desire less EU involvement in sport. In this connection, Treaty status for sport may promote a more settled and clarified legal environment for sport to operate in without necessarily extending further EU involvement in this area.

On the other hand, the impact of the failure of the Constitutional Treaty on sport should not be overstated. Given the scope of European integration, it is hardly surprising that EU law affects a growing range of activities such as sport. Not every deleterious consequence of these new relationships can be addressed through the classic Community method – namely legislative action. To continue with this tradition risks breaching the principle of subsidiarity by moving the EU towards an omni-competent authority and as the French and Dutch referendums have demonstrated, care should be exercised when expanding the authority of the EU. It also contradicts the EU's new style of integration launched at the Lisbon Summit in 2000 (the open method of co-ordination) in which the EU exerts a softer regulatory influence on emerging sectors. This does not preclude the EU exercising a positive, albeit soft, influence in sport despite the collapse of the Treaty. The political process on the specificity of sport born at Amsterdam in 1997 is a flexible and non-intrusive means of exerting influence in the field of sports regulation.

The Amsterdam Declaration has also contributed to the developing concept of the sporting exception in EU law which already has a legal basis in ECJ jurisprudence and in Commission competition law reasoning, particularly when linked to the exemption criteria contained in Article 81(3). The EC Treaty also contains provisions on social dialogue (Articles 137-139) which can act as the basis for a collective bargaining agreement between sporting employer and employee organisations in Europe. This offers sport the opportunity to proactively shape the legal environment in which they operate before disputes are settled by litigation. Consequently, there is already sufficient flexibility within the existing Treaty for sport and the EU to comfortably co-exist. Is the death of the Constitution a disaster? Yes, but not for sport. 

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Is there an EU 'sporting exception'?

By Juliet Mash, Nike Europe

"The jurisprudence on the dimensions of the [sporting] exception is scanty; its existence is recognised, its extent ill-defined."¹

Introduction

Since the European Court's ruling in 1974 in the case of *Walrave and Koch* (Case 36/74 [1974] ECR 1405) that rules of a 'purely sporting interest' fall outside the scope of the EC competition rules, the European Commission has made clear that it will extend the benefit of this exception to modern rules of sports governance to the extent that they are necessary for the organisation of a sport or are necessary to preserve uncertainty of outcome (see Monti 2001). However, the lack of jurisprudence on the subject from the ECJ, caused to a large degree by the Commission's tendency to close investigations on the basis of an informal settlement, thereby precluding an appeal, means that any clear guidance to underpin the application of this 'evolving' sporting exception is proving illusive. Just as this uncertainty surrounding the application of Article 81 of the EC Treaty to sporting rules was highlighted to the UK national courts by the enactment of the Competition Act 1998, so it has lingered on to pose similar problems in the post "modernisation" era of competition law.

It is arguable that use of a 'rule of reason' label to categorise the Commission's recognition of the specificities of sport when analysing rules with apparent commercial effect, is simply adding to the confusion. Whereas the rule of reason is a US concept involving the balance of pro and anti-competitive effects to determine whether an agreement falls under US antitrust legislation, it is arguable that such analysis does not to date form part of the European approach under Article 81(1). Under European competition law, a sporting rule may be either a rule of the game and therefore fall clearly outside the scope of Article 81(1) – the rule prohibiting anti-competitive agreements between undertakings – or it can be considered as a rule with potentially restrictive economic effects. With the latter, the burden of proof usually shifts to the defendant to prove that the rule or agreement should nevertheless be exempt according to narrow economic-based criteria under Article 81(3). However, in many 'grey area' cases, the European court has been willing (as part of an Article 81(1) analysis), to assess the potential economic impact of an agreement taking into

account the particular context in which the agreement functions. To call this a 'rule of reason' analysis under Article 81(1) however, is to ignore the role of Article 81(3) under European law as the forum for balancing pro and anti-competitive effects, and is arguably misleading. In the sporting context, integrity, competitive balance, protection of stadium attendance – these factors have been recognised as legitimate aims of a sports regulator, but these are not factors traditionally associated with an economic-based balance sheet test. It would appear that as part of the Commission's recognition of the specificities of sport within the legal context, these sporting goals have found their way into a more flexible content-based application of Article 81(1) by the courts. Just how flexible this approach is remains to be clarified.

The principle that does appear to emerge from the case law of the European Court (see for example Case 65/64 and 58/64 *Consten and Grundig v. Commission* [1966], Case 42/84 *Remia v. Commission* [1985], and Case C-250/92 *Gottrup-Klim* [1994]) is that restrictions on conduct that are necessary for (and ancillary to) the performance of a commercial activity which is not in itself objectionable (for example the sale of a business), will not infringe Article 81(1), provided they are proportionate. Of particular significance to the sports sector is the ECJ's recent decision in *JCJ Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C-309/99 (2002)), which appears to extend this principle beyond commercial objectives to public interest or 'regulatory' considerations. If the *Wouters* test of regulatory necessity is applied to rules of sports governing bodies, then subject to the requirement of proportionality, any rule which the association considers 'necessary for the proper performance' of its sport will fall outside the scope of Article 81, despite any incidental restriction on individual conduct. Whilst there remains uncertainty as to whether the Court's decision is limited to rules of regulatory bodies created by statute, it seems that *Wouters* should be welcome by the sports sector as a case that potentially and indirectly clarifies the Commission's piece-meal approach to sporting rules and gives judicial weight to a wide sector-

¹ Statement by Michael Beloff QC., 'The Sporting Exception in EC Competition Law' *European Current Law Year Book* 1999.

The illusive nature of the European Commission's 'Sporting exception'

specific approach. Pending further decisions from the European Court, the alternative route to this legal minefield is for governing bodies to argue for exemption of their rules under Article 81(3). Unfortunately for sports bodies and the national courts alike, this approach is also fraught with uncertainty.

Jurisprudence on the dimensions of the sporting exception is scanty

The Sporting Exception as a recognised concept

It was established by the ECJ as early as 1974 in the case of *Walrave and Koch*, that to the extent that the rule of a sporting body was of 'purely sporting interest' and did not constitute an economic activity, the Community rules (including Articles 81 and 82) would not apply. In line with this approach, competition law is not applied to rules of the game, in other words, those core rules of a sporting activity, such as the number of players on a team or the shape and weight of the ball. It is clear on the face of these rules that they do not have an economic objective.

However, with the commercialisation of sport it is becoming an increasingly complex task to isolate the intrinsic sporting nature of certain governance rules. As the European Commission has recognised (European Commission 1994), this is either because the rule has significant economic consequences or because the rule – traditionally inspired by purely sporting considerations – has acquired a more economic character. Out of necessity therefore, this principle that sporting rules should fall outside the scope of competition law, has evolved to encompass not only the most obvious rules of the game but also those rules which are "otherwise inherent in a sport or necessary to its organisation". This wider scope of the sporting exception was clearly acknowledged by the Commission in its 1999 press statement on the issue (IP/99/133), and subsequently the Commission set out examples of categories of rules which satisfied the sporting exception (European Commission 1999). These included not only 'the rules of the game', but also nationality clauses in relation to national competitions, quotas limiting the number of competitors per country in European and international competitions, transfer deadlines, rules for organising sport on a geographical basis, and rules needed to ensure uncertainty as to results (see Lewis & Taylor 2003: B2.96). The sporting exception principle also has certain recognised limitations, namely that in order to benefit from the exception, the sporting rule must be applied in an objective, transparent and non-discriminatory way and must not go beyond what is

necessary to achieve a legitimate sporting aim (i.e. it must be proportionate) (Monti 2001).

It is arguable that the Commission's rhetoric on the subject of the sporting exception is driven by a clear political policy among Member State governments that, in view of the special social and cultural benefits of sport, its organisation should to a large extent be unfettered by regulatory interference and deserves special analysis under the competition rules. In 1997, the Member State governments annexed a 'Declaration on Sport' to the Treaty of Amsterdam, emphasising the 'social significance of sport' and its 'role in forging identity and bringing people together.' The Declaration, whilst falling short of a legislative exemption for genuine sporting rules, encouraged the EU institutions to listen to the views of 'sports associations' before taking any decisions which would concern them. A further declaration on the 'Specific Characteristics of Sport' was annexed to the Treaty of Nice in 2000, emphasising that: 'the Community must ... take account of the social, educational and cultural functions inherent in sport and making it special...'²

ECJ has yet to clarify the application of competition rules to sport

The limitation of such Commission statements is that whilst authoritative and potentially binding on national courts, there has been no overreaching judgement by the European Court to clarify this 'rule of thumb' approach to the wider sporting exception. In the recent European Court decision of *Meca-Medina v. Commission* (Case T-313/02, CFI decision of 30 September 2004), the CFI did address the application of competition law to anti-doping rules adopted by the IOC and implemented by FINA – the International Swimming Federation. However, in finding that the rules amounted to "purely sporting legislation" with "nothing to do with any economic consideration", the Court applied the straight forward rules of the game exception and declined the opportunity to clarify the scope of the sporting exception for rules with a potentially restrictive effect on market conduct (case T-313/02, paragraphs 61 to 68). As the opinion of the Advocate General in *Deliège* – a case concerning selection rules of the European Judo Union – made clear back in 1999: 'the [European] Court has not yet stated its position on the direct impact which the Community competition rules may have on sport' (Opinion of Advocate General Cosmas 18.05.99 in Joined Cases C-51/96 and C-191/97 *Christelle Deliège v Liège Francophone de Judo et Disciplines Associees ASBL and Others*, paragraph 98). Despite the best efforts of Advocate General Lenz in the Bosman case to issue guidance on the applicability

² In this policy statement, the European Council also expressly recognised the autonomy of sporting associations 'to organise and promote their particular sports, particularly as regards the specifically sporting rules applicable and the make-up of national teams, in the way in which they think best reflects their objectives.' (See paragraph 7).

The illusive nature of the European Commission's 'Sporting exception'

of competition law to rules of sporting associations, this statement still, to a large extent, holds true today (Case C-415/93 *Union Royale Belge des Societes de Football Association (ASBL) v Jean-Marc Bosman*, Opinion of Advocate General Lenz, see paragraphs 254-286). What this means for sports bodies facing a challenge to their rules before a national court is that there is no clear authoritative statement from the European Court of Justice as to how national courts or competition regulators should incorporate the sport-sensitive approach advocated by the Commission into a legal analysis under Article 81.

Where the European Court *has* been active is in the application of the Community rules on free movement to the sports sector. For example in the case of *Dellège*, concerning the freedom of a sports person to provide services, the European Court held that selection rules of the European Judo Union which had the indirect effect of preventing an international judoka from competing in an international tournament, derived from a need inherent in the organisation of the sporting competition, and did not therefore amount to a restriction on the freedom to provide services. The Advocate General also stated in his opinion that: 'Article [81(1)] does not apply to restrictions on competition which are essential in order to attain the legitimate aims which they pursue' (see paragraph 110 of Cosmas Opinion). Applying this principle to the sport, the Advocate-General stated that the selection rules of the European Judo Union did not fall within the scope of Article 81(1) because they were indispensable for attaining the legitimate objectives deriving from the particular nature of judo. This was despite having acknowledged a resulting restriction on competition. Such an approach by the Advocate-General in relation to free movement seems to suggest that the Court would adopt a similar sports-sensitive approach if a question on the application of Article 81 to rules of a sporting association came within its jurisdiction.

Some criticism of the Commission seems justified in any explanation of the legal uncertainty surrounding the sporting exception. Whilst the Commission has claimed to interpret the doctrine in accordance with the growing commercialisation of sport, its tendency to close investigations on the basis of informal settlement, thereby precluding an appeal on the substantive issues, continues to stifle the development of European jurisprudence on the scope of the doctrine, and to deny sporting bodies the legal certainty that they require regarding its application to their rules of governance. Critics might say that the Commission is actually exploiting the lack of legal certainty in this area to

'fudge' cases where wider political pressures have played a part in forcing the Commission to climb down from initial Article 81 infringement allegations. For example, both the Formula One and the recent Premier League investigations both culminated in non-reviewable settlements, and in the Formula One case the Commission's public reasoning seemed more discursive than legally helpful.

Extent ill-defined

This lack of judicial clarification aside, the statements and decisions which the Commission has made in relation to the sporting exception, do reveal a recent trend towards the expansion of the sporting exception. They may also be seen as blurring the 'rule of thumb' approach that only rules which are obviously inherent to the sport should benefit from the context-specific approach. This is perhaps most clearly demonstrated by the Commission's non-infringement decisions in relation to UEFA's broadcasting rules and UEFA's rules on common ownership of competing football clubs, in 2001 and 2002 respectively.

In the former case, the rules at issue were UEFA's revised Broadcasting Regulations that permitted football associations to schedule domestic football fixtures at times that would not clash with simultaneous broadcasting of matches which might affect stadium attendance and amateur participation in the sport. With this objective, national football associations were able to prevent the broadcasting of football within their territory for two and a half hours either on Saturdays or Sundays at hours corresponding to the main domestic fixture schedule. For example, in England, no television channel could show football between 14.45 and 17.15 on Saturdays. In reaching its decision, the Commission found that UEFA's regulations fell 'outside the scope of European competition rules.' Somewhat surprisingly, and without stating any clear authority for its decision, the Commission recognised a collective interest of clubs wanting to protect stadium attendance, as somehow 'inherent' to the sport of football (IP/01/583, 20 April 2001). Following on from the decision, Commissioner Monti added a statement of principle – that the decision reflected: 'the Commission's respect of the specific characteristics of sport and its cultural and social function in Europe'.

The Broadcasting Regulations decision is particularly interesting since the Commission seemed to take account of wider sporting objectives in determining whether the restriction could be justified, rather than those merely 'inherent' to the sport itself. UEFA claimed (and the Commission accepted) that the rules

The illusive nature of the European Commission's 'Sporting exception'

in question were designed to protect the proper functioning of football (in this case right down to the grass roots issues of amateur participation and stadium attendance). However, the rules had a clear knock-on effect on the freedom of broadcasters to televise fixtures at certain times of the day. The Commission has stated however, that the fact that a sporting rule 'may in particular circumstances be damaging to the private interests of an athlete, a club or a league, does not make it any the less a rule inherent in the sport' (European Commission 1994: 31).

The second case that arguably blurs the scope of the sporting exception, is the Commission's recent decision rejecting a complaint by ENIC plc regarding UEFA's rule prohibiting a person controlling more than one of the clubs participating in a UEFA club competition. The Commission found that the rule was theoretically caught by the prohibition, but decided that it fell outside the scope of Article 81(1). In its decision letter addressed to ENIC (case COMP/37 806:ENIC/UEFA, paragraph 38), the Commission stated that: 'the limitation on the freedom to act ...merely constitutes the effect of the application of a rule which is deemed necessary and proportionate to the need to maintain the public's confidence in the fairness and authenticity of the game...' Although ownership issues might at first sight be associated with economic objectives, the Commission's reasoning in ENIC is perhaps more in keeping with the 'inherent' rule of thumb. In short, the Commission rejected the complaint on the basis that the restriction did not go beyond what was necessary to ensure its legitimate aim of protecting the uncertainty of results and the public perception of integrity, with a view to ensuring the proper functioning of UEFA competitions. What is perhaps more controversial is that in reaching its conclusion the Commission relied expressly on the European Court's decision in *Wouters* (see paragraph 31 of ENIC decision) to take into consideration non-competition public interest objectives under its Article 81(1) analysis.

The ECJ's ruling in Wouters

In *Wouters*, the ECJ applied the test of whether the rules of the Dutch Bar prohibiting its members from entering into professional partnerships with accountants, could be 'reasonably considered' by the Bar Association 'to be necessary to ensure the proper practice of the legal profession, as it is organised in the Member State concerned.' The Court expressly allowed for the balancing of non-competition criteria against restrictions of competition, as part of its Article 81(1) analysis.

The test that emerges from this case seems to be whether rules are reasonably necessary to protect and promote the legitimate aims of the association or governing body in the reasonable opinion of the regulator itself. Whilst the element of proportionality was clearly evident, the Court in *Wouters* also recognised a 'subjective' element to the test of what is inherent or 'necessary' to a legitimate interest, thereby acknowledging a degree of procedural autonomy for such bodies. To this extent the decision appears to support the principle put forward in the Nice Treaty that sports bodies themselves are best placed to regulate (Annex IV to Nice Treaty, 7/8 December 2000, paragraph 7: 'The European Council ... recognises that ... it is the task of sporting organisations to organise and promote their particular sports, particularly as regards the specifically sporting rules applicable and the make-up of national teams, in the way in which they think best reflects their objectives.')

Many commentators have welcomed the decision as confirmation of the existence of a 'rule of reason' in Community law. However, the idea of balancing public interest objectives against competition conditions is a new and controversial concept, particularly when applied within an Article 81(1) analysis. Interestingly, the Advocate-General in *Wouters* stated in his opinion that the only 'legitimate goal' that may be pursued under an Article 81(1) analysis is 'exclusively competitive in nature.' The UK Competition Appeals Tribunal has also taken note of that approach in *GISC (Case 1002/2/1/01), The Institute of Independent Insurance Brokers v. DGFT (17.09.01)*, paragraph 176), where Sir Christopher Bellamy concluded, in the context of restrictive rules applied by the General Insurance Standards Council to its members, that 'an appreciable restriction of competition is not taken outside Article 81(1) by the fact that it pursues some public interest objective.' It would appear that the underlying objection is that competition rules are concerned with ensuring the proper functioning of markets, not assessing the impact of public interest considerations that are the preserve of politicians. The Commission however, appears to be taking a different view. Again in April 2002, the Commission dismissed the complaint brought by two swimmers against doping rules adopted by FINA and the International Olympic Committee (it was this decision of the Commission that the applicant swimmers subsequently challenged before the European Court, leading to the CFI's judgment in favour of FINA and the IOC in September 2004). In deciding that the rules were not caught by the prohibitions under Articles 81 and 82, the Commission did recognise the potential of the rules in question to have restrictive

The illusive nature of the European Commission's 'Sporting exception'

effects, but concluded that: 'the resulting restrictive effects may be inherent in the pursuit of legitimate objectives that are recognised as positive in a particular context.' Although later declared by the European Court to be "unnecessary in view of the fact that the legislation in question was "purely sporting" (Case T-313/02, paragraph 64)., the Commission did "for the sake of completeness" apply the *Wouters* analysis in this particular case, and it is interesting that the CFI did not in any way deny that *Wouters* would be the correct test for the more "grey area" sporting exception type cases. As in *Wouters*, the Commission assessed the rules of the swimming federation in the light of the 'overall context' in which the rules would produce their restrictive effect, and considered whether the restriction was inherent to the pursuit of a legitimate public interest (or sporting) objective. The complainant swimmers had been banned for two years for first time anti-doping offences (reduced from four years on appeal from CAS). Their use of competition law arguments to challenge the ban was clearly viewed by the Commission, and subsequently the European Court, as a mischievous attempt to side-step anti-doping sanctions and the appropriate appellate avenues. In a press statement, Commissioner Monti asserted the rule-making autonomy of governing bodies (this time in the context of the fight against doping), and the application of a subjective test: 'it is not [the Commission's] job to take the place of sporting bodies when it comes to choosing the approach they feel is best suited to combating doping.'

Introduction of a rule of reason to Community law?

The question then appears to be this: has the European Court's decision in *Wouters* re-defined the scope of the sporting exception, and if so, on what legal basis? This is where commentators and judges alike seem to take conflicting views. One line of thought is that the Commission has started to apply a US-style rule of reason, effectively as the second limb of the sporting exception doctrine, to those rules with too significant an economic impact to fall within the sporting exception. The case of *Wouters* has been relied on to suggest that the rule of reason approach is capable of taking into consideration specific public interest considerations, such as the specificities of sport, within an Article 81(1) analysis. Another approach, which takes account of the European Court's denial of the adoption of a rule of reason approach into Community law (see 'The ECJ rejects the existence of the rule of reason in Community law' below), is that *Wouters* may be seen as actually extending the scope of the sporting exception itself, advocating as it does a case-by-case

analysis of the peculiarities or 'specificities' of the sector in which the rules operate. The sporting exception doctrine that rules necessary for the organisation of a sporting contest should fall outside the scope of the competition rules, could arguably, in the light of *Wouters* and the UEFA decisions, be re-defined as covering any rules which in the subjective opinion of the sporting association, are necessary (and do not go beyond what is necessary) not only for the proper conduct of a sporting competition, but also for the overall functioning of a particular sport – right down to such issues as protecting stadium attendance or grass roots development.

What is the rule of reason?

As highlighted earlier, the rule of reason is a US concept, adopted to mitigate the absolute prohibition of agreements in restraint of trade found in section 1 of the Sherman Act 1890. Since there is no exemption mechanism within that Act, as is the case in European law under Article 81(3), the US courts have distinguished between agreements which are 'naked restraints' and per se illegal and those which, on a balancing of pro and anti-competitive effects, may be justified because the pro-competitive effects are judged to outweigh the anti-competitive effects. In short, an anticompetitive practice falls outside the scope of section 1 of the Sherman Act if it has more positive than negative effects on competition on a given market.

In EC law, cases such as *Metro v Commission* (Case 26/76 [1977], qualitative criteria for selecting retailers in a system of selective distribution), *Remia v Commission* (Case 42/84 [1985], a non-competition covenant entered into by the vendor of the business), and *Gottrup-Klim* (Case 250/92 [1994], a provision in the statutes of an agricultural co-operative forbidding dual membership of any other association on competition with the co-operative), have been relied on to suggest that where it is not clear that the object of an agreement is to restrict competition, the European Court will apply a 'rule of reason' analysis to determine whether any restrictive effects are justified taking into account the particular context in which the agreement is applied (see for example opinion of Advocate General Leger in *Wouters*, paragraph 103, and Advocate General Lenz in *Bosman*, paragraph 268, and by implication in the Commission's White Paper on Modernisation of the Rules Implementing Articles 81 and 82 of the EC Treaty – OJ 1999 C132/1).

The illusive nature of the European Commission's 'Sporting exception'

The ECJ rejects the existence of rule of reason in Community law

However, despite suggestions that *Wouters* is confirmation that the ECJ does in practice apply a rule of reason approach under Article 81, the European Court itself continues to reject the existence of a rule of reason in Community law, instead describing its approach to cases such as *Gottrup-Klim* as a more flexible interpretation under Article 81. Interestingly, in its decision in *Metropole television* (Case T-112/99) [2001]), the ECJ held that judgements such as *Remia* and *Gottrup-Klim* could not 'be interpreted as establishing the existence of a rule of reason in Community competition law' (Paragraph 76 of judgment). It explained the approach as simply taking into account 'the actual conditions' in which an agreement functions, in particular the economic context, the relevant products or services, and the structure of the market concerned. Therefore without relying on the 'rule of reason' label (described by Bellamy as 'a shorthand and somewhat dangerous phrase', GISC, paragraph 174), it is, in the opinion of the Court, 'possible to prevent the prohibition in Article 81(1) from extending wholly abstractly and without distinction to all agreements whose effect is to restrict the freedom of action of one or more parties.' The Court expressly rejected the idea that such reasoning involves any balancing of pro and anti-competitive effects.

Last year, in its judgement in *Masterfoods* concerning exclusivity clauses in the impulse ice cream and freezer cabinet market, the European Court of First Instance again rejected the existence of a rule of reason in Community competition law (Case T-65/98, *Van den Bergh Foods Ltd v Commission*, [2004] 4 CMLR 1). In this judgement, handed down with full knowledge of the Court's earlier decision in *Wouters*, the CFI stated that the proper framework for weighing pro and anti-competitive effects was under Article 81(3), the purpose of which would be undermined by a rule of reason approach taking effect under 81(1).

An alternative label for the flexible approach

It appears therefore, that whilst the European Court recognises a developing flexibility to its application of Article 81(1), it is not prepared to accept the rule of reason label for this market-sensitive evaluation. Arguably, the common element that can be followed through the European Court's earlier cases (such as *Metro*, *Remia*, *Gottrup-Klim*, etc.), is the idea of the prohibition or rule being necessary for the performance of a legitimate activity or aim (i.e. one that is not in itself objectionable).

Rather than trying to stretch the rule of reason doctrine to encompass these purely economic cases, as well as the public interest approach in *Wouters*, Richard Whish usefully identifies the common theme – of a main legitimate activity to which certain restrictions on conduct are ancillary – as the idea of 'ancillarity'. He then goes on to distinguish this new concept of 'regulatory' ancillarity from 'commercial ancillarity' with which the earlier cases such as *Metro* and *Gottrup-Klim* were concerned (Whish 2000: 122).

On the subject of the scope of *Wouters*, and therefore by implication on its application to the rules of sporting associations, Whish acknowledges that the prohibition on members of the Dutch Bar had a statutory basis, but suggests that since *Wouters* has since been applied in ENIC in relation to the common ownership rules of UEFA (a non-statutory regulatory body) that the case need not necessarily be distinguished in this way. Whilst this is an approach that would certainly find favour with sports governing bodies looking to rely on *Wouters* as an extension of the sporting exception, a judgement of the ECJ will be necessary in order to confirm that this idea of 'regulatory' ancillarity does actually extend the sporting doctrine in this way.

The implications of *Wouters* on the scope of the sporting exception

Arguably what *Wouters* was doing was adding to the sporting exception type analysis, whereby the inherent needs of the particular activity are assessed, and a degree of autonomy of the relevant governing body recognised, rather than introducing an Article 81(3)-type balancing act into Article 81(1). It is not a question of whether the benefits arising from a restriction outweigh the economic restrictions, but whether the restriction is intrinsically necessary in the first place as part of the regulatory function.

Exemption of governance rules

In the context of the sports sector, Article 81(3) also appears to be ill-defined in two ways. Firstly, if a rule is economic in nature it is essential for any sports governing body defending such a rule to have clear guidance on the extent to which it may be defended under Article 81(1), and the point at which the economic restriction concerned will be considered disproportionate to the legitimate regulatory aim. Secondly, if it is accepted that Article 81(3) is the correct forum under European law for a balancing of pro and anti-competitive effects, then questions arise as to the scope of the criteria which must be satisfied in order for a rule to be granted an exemption.

The illusive nature of the European Commission's 'Sporting exception'

In accordance with the Commission's approach to date, rules that go beyond the regulatory needs inherent to the existence or organisation of a sport fall to be considered within the Article 81(3) exemption criteria. Here guidance is needed from the ECJ on the scope of the traditional exemption criteria set out as black letter law in the EC Treaty. The Commission's decision regarding UEFA's collective selling of TV and media rights (See Commission's announcement of 17.08.02 that it would take a favourable view to UEFA's revised TV and media rights policy) and Commissioner Monti's that 'arrangements that provide for a redistribution of financial resources to – for example – amateur levels of sport may be justified, if they are necessary to preserve sport's essential social and cultural benefits,' Monti 2001), surprisingly suggest that, in addition to those economic-based criteria set out in the Treaty, sporting objectives such as financial solidarity and the training of young players may be relied on as the basis for an individual exemption argument. Here again, the Commission has a tendency to close its investigations into collective selling on the basis of informal settlements, as recently occurred in relation to the Premier League's sale of broadcasting rights (see IP/03/1748 (16.02.03). If ultimately accepted by the European Court however, this would mark a significant departure from the purely competition-based criteria envisaged by the Treaty.

Whilst lawyers have gained practice at squeezing efficiency arguments into the narrow confines of the Article 81(3) criteria, purporting to fit solidarity arguments into these economic-based criteria (including the improvement of production or promotion of economic progress) seems particularly awkward and artificial, if not bending the letter of the Treaty to artificial limits. The question as to whether legislation extending the Article 81(3) criteria will be necessary before national courts can formally endorse the Commission's sport-sensitive approach is one that needs urgent consideration in the light of modernisation. Only when the European Court deals directly with these issues regarding the application of competition law and its exemptions to sports-related rules will national courts and parties caught up in the increasingly litigious nature of competition law, be able to deal with Article 81 in its entirety with any degree of legal certainty.

In the meantime, an analysis of Article 81(3) decisions taken in other sectors may give a useful indication that the exemption criteria are capable of expansion in this way. For example, in its decision regarding UEFA's collective selling of broadcasting rights, the Commission considered that the redistribution of revenue between clubs promoted competitive balance such as to justify

an exemption under Article 81(3). Similarly, in the CECED case (OJ [2002] L187/47), the Commission based its exemption on 'environmental benefits', whilst in *Metropole Television SA v Commission*, the CFI expressly held that: 'the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant an exemption under Article [81(3)]' (T-528/93 [1996]). Such cases clearly advocate a market-sensitive approach by the competition regulators. They also represent a stark contrast to the philosophy that public interest defences, such as the preservation of jobs or local commerce, have no place in a competition analysis, and should be considered instead in the political context. A similar philosophy was expressed by Attorney-General Cosmas in *Wouters* and reflected in the statement of former Commissioner Schaub rejecting any move towards legislation for sporting 'exemption' criteria on the grounds that it is 'unnecessary, undesirable and unjustified' (Schaub 08.03.98).

Modernisation

As of 1 May last year, the 'modernisation' of EU competition law and subsequent harmonisation of the UK regime marked the beginning of decentralised enforcement of antitrust. This has meant the abolition of notification of agreements, and reliance instead on 'self-assessment' of agreements under the competition rules. In practice, parties now merely assert the legality of their commercial arrangements and need only defend them if challenged in court or by the competition authorities. From 1 May 2004, the Commission effectively relinquished its monopoly over the granting of exemptions under Articles 81(3), and national courts and competition authorities now share responsibility for the application of Article 81 in its entirety where there is an effect on trade between Member States. Under the new regime, the burden is on the plaintiff to establish a potential restriction on competition. The burden then falls on the defendant to prove that the agreement or arrangement nevertheless satisfies either the sporting exception (argued in this paper to extend to the 'ancillarity' approach under Article 81(1)) or the exemption criteria under Article 81(3).

An important motivation for modernisation and decentralisation was to free up Commission resources in order to focus on the most serious infringements of competition law, and in particular 'hard core' cartels. In a recent paper, DG Competition official Herbert Ungerer predicted that 'one focus of these [Europe-wide] investigations ... will be the New Media – particularly nascent technologies and media such as the new 3G/UMTS mobile generation'. Certainly, his prediction

The illusive nature of the European Commission's 'Sporting exception'

would appear founded in the light of recent Commission investigations announced in January 2004 into the collective selling of 3G and internet rights by the Premier League (IP/04/134). The commercialised sectors of sport, including football, will require greater legal certainty in order to exercise their right of reply to such investigations effectively. For example, will such factors as financial solidarity stand up in court as part of an Article 81(3) defence? Perhaps private litigation will form the catalyst for judicial analysis of these issues that private forum of regulatory settlements has left unresolved.

Conclusion

Recent policy statements and decisions of the European Commission suggest that the 'dimensions' of the sporting exception have been considerably expanded from its narrow 'rules of the game' origins, to take account of the commercial realities of sports sector. However, the observation that judicial authority defining the nature and extent of the doctrine is 'scanty' remains valid, with the European Court of Justice yet to fully state its position on the direct impact of Community competition rules on sport. This legal uncertainty applies not only to the role of sporting considerations under an Article 81(1) analysis, but also to the scope of the economic-based criteria that must be met in order for a sporting body's rule to qualify for exemption under Article 81(3). Commissioner Monti himself has recognised that: 'the sporting world needs to have a clearer legal framework to develop its sporting but also its economic activities' (Monti 26.04.01, SPEECH/01/84). The ECJ's decision in *Wouters* could be said to be a welcome clarification of the position. The Court's reasoning promotes a case-by-case analysis of rules of self-governing bodies (or associations of undertakings), taking into account the context in which the rules operate. On this basis, and in the light of the Commission's recent approach towards UEFA's broadcasting regulations and rules on common ownership, the sporting exception doctrine could arguably be re-defined as covering any rules which in the subjective opinion of the sporting association, are necessary for the proper conduct or overall functioning of a particular sport. To interpret the decision as the acceptance by the ECJ of a full-blown rule of reason into EU competition law, which pools public interest and sector-specific objectives into Article 81 analysis, would however seem to be going a step too far. The decision *does* support the proposition that the European Court is ready to recognise a context-sensitive approach as part of its Article 81(1) analysis in relation to rules made and enforced by a self-regulating statutory body. The sports

sector must now wait for an authoritative statement from the European Court as to whether this approach will extend to rules of non-statutory sports governing bodies, that steer an increasingly blurred path between sporting regulation and commercial governance. BASL

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The Bosman/Kolpak effect: Has sport got it wrong?

By Simon Boyes

The intervention of European Community Law in sporting activity is characterised by the judgment of the European Court of Justice (ECJ) in the case of Jean-Marc Bosman (case C-415/93 *Union Royale Belge des Sociétés de Football ASBL v Jean-Marc Bosman* [1996] 1 CMLR 645.). Latterly, the case of Maros Kolpak (c-438/00 *Deutscher Handballbund v Maros Kolpak* [2003] ECR I-4135), an obscure Slovakian handball player, has further widened the impact of the earlier case law.

The main component of the *Bosman* judgment was the prohibition on transfer fees upon out of contract footballers. The second part of the judgment proscribed player quotas based on nationality, and having the effect of preventing EU nationals from obtaining employment in other Member States. This second element of the *Bosman* litigation was expanded by the ruling in *Kolpak*. *Kolpak*, a Slovakian national employed as a professional handball goalkeeper by a German second division team was considered by the football authorities, as a national of a non-European Economic Area (EEA) State, not to be subject to the rules established in *Bosman*. The Handballbund, the governing body of handball in Germany, placed limits on non-EEA nationals fielded in professional handball fixtures. *Kolpak* successfully relied upon an association agreement between the Slovak Republic and the EU, the ECJ agreeing that it required him to be treated in a manner comparable to an EU national regarding treatment once in employment (see Boyes, S. 'In the Shadow of Bosman: The Regulatory Penumbra of Sport in the EU' (2003) 12(2) Nott LJ 72; van den Bogaert, S. 'And Another Uppercut from the European Court of Justice to Nationality Requirements in Sports Regulations' (2004) 29(2) EuLR 267). It seems that this judgment extends these freedoms to nearly 100 nations (see Branco Martins, R. 'The Kolpak case: Bosman times 10?' (2004) 1-2 ISLJ 26; 'EU says foreign quotas are illegal' (2003) *The Guardian*, 5th August. See also Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura*, judgment of 12 April 2005).

Though *Kolpak* applies only to players lawfully employed in an EU Member State, and does not provide a right of entry or access to employment for association agreement State nationals or a right of movement between EU Member States (*Simutenkov* at para. 58; Branco Martins, cf Gardiner, S. 'Support for quotas in EU professional sport' (2000) 3(2) SLB 1), the widening of the second *Bosman* freedom has seemingly limited the capacity of sports regulators to

prevent "a flood of imported cheap foreign players" (Gardiner, *ibid*; John, E., 'EU Threat to overseas rule' (2004) *The Wisden Cricketer*, April.). The problem has appeared particularly acute, at least in the United Kingdom, in respect of sports such as cricket and the rugby codes. This is primarily because the *Kolpak* judgment extends to the nations constituting the West Indies, to South Africa and to a number of South Sea nations. Moreover, third state nationals have not been slow to realise the benefits of holding citizenship of an EU state; whilst initially prevalent in football, cricket and the rugby codes have seen a steady influx of 'dual qualified' players holding an EU state passport – thus allowing qualification for the *Bosman* freedoms – alongside their 'original' nationality.

The response of sports regulators appears to have been a simple acceptance that *Kolpak* qualified players are to be treated in the same way as EEA nationals for the purposes of nationality quotas. Cricket has taken a slightly more adventurous approach, requiring that any 'foreign' player outside of the two 'official' overseas players should not have played for a Test nation for two years previous to commencing employment, nor should they be seeking to represent such a nation (regulation 2, *Regulations Governing the Qualification and Registration of Cricketers*). More recently the England and Wales Cricket Board (ECB) has introduced a scheme whereby county sides are offered financial incentives to field 'England-qualified' players. Nevertheless, it seems that that these sports have simply taken the view that any restrictions based on nationality will constitute an unlawful restriction under Community law.

However, this universal approach to the ECJ's rulings in *Kolpak* and *Bosman* assumes the existence of a uniform environment across the gamut of professional sport. Unlike football, and to a lesser extent handball – a popular professional sport outside of the United

The Bosman/Kolpak effect: Has sport got it wrong?

Kingdom – many sports, the rugby codes and cricket being prime examples, do not have universal appeal. Rugby League as a genuine professional sport is largely limited to the UK, New Zealand and Australia, and to a lesser extent France. Indeed, Rugby League has been compelled to deconstruct the traditional Great Britain side into its component countries, in order to provide sufficient numbers for a viable World Cup competition. The International Cricket Council has only ten full members representing those nations where cricket is played professionally and participate in Test competition. Rugby Union is further widespread, but still encompasses a limited number of nations. Perhaps more significantly none of these sports are professionalised in only a small minority of EU Member States. On this basis these sports may be in a better position to justify discrimination than football or other more widespread professional sports.

The imposition of quotas based on nationality has been clearly outlawed in *Bosman* and *Kolpak*. On this basis it would seem only natural to extend this across all professional sports. However, in the case of *Dona v Mantero* (case 13/76 [1976] 2 CMLR 578), the ECJ did accept that proportionate, non-economic rules which appear discriminatory can be acceptable where they relate to the particular context and nature of sport and are of only sporting interest.

'Niche' sports may be better able to make a sporting case for discrimination than those more ubiquitous codes. In *Bosman* the ECJ rejected an argument that nationality restrictions were justified by the need to ensure an appropriate supply of suitably qualified players for the national team. The Court took the view that players did not necessarily have to play for a club in any particular country in order to represent that nation in international competition; while opportunities to develop as a player in domestic competition are reduced by the abolition of quotas, there are reciprocal increases in opportunities available in other Member States (at paras 132-134). However, in respect of niche sports of the kind highlighted above there is limited opportunity to access opportunities in other EU Member States, because those opportunities simply do not exist. There is no such obligation to reciprocate from non-EU/*Kolpak* nations, such as Australia and New Zealand, which do not have agreements with the EU, but which may effectively provide *Bosman* 'dual nationality' sports professionals. So perhaps restrictions aimed at ensuring an adequate supply of suitably talented sports persons for national teams could be justifiable in relation to these non-universal sports. Where domestic sport offers the only realistic means of developing suitably

skilled international sports persons and there is no other suitable European league in which to develop, the rejection of this as a justification for discrimination should be less likely. Though the *Kolpak* countries may owe reciprocal obligations, they are not subject to the jurisdiction of the European Court of Justice and nationality limitations in professional sport in those states do not appear to have been eased. Should Community law fail to recognise this it would simply allow the distortion of the single market concept upon which it is premised by allowing what, in reality, are non-EU nationals the capacity to enjoy the freedoms conferred by the Treaty alongside those of their 'first' nationality, without the reverse position being true; thus disadvantaging 'genuine' EU nationals.

That the development of the national team is a significant objective for the organisation of professional sport in these niche areas is easily evidenced; the ECB has invested heavily in the development of 'grass roots' talent in English cricket as well as the development of the best players through the implementation of 'central contracts'. Similarly, the Rugby Football Union gives priority to the England Rugby Union side over and above and often to the chagrin of, the domestic professional game. This is a position supported by the ECJ:

"The pursuit of a national team's interests constitutes an overriding need in the public interest which, by its very nature, is capable of justifying restrictions on the freedom to provide services. In order to meet that overriding need, it is possible to grant certain powers to the sports teams or to the national sports federations, which are also exclusively responsible for selecting national teams." (case C-51/96-191/97 *Deliège v Ligue Francophone de Judo et Disciplines Associées ASBL* [2000] ECR I-2549, opinion of A-G Cosmas at para. 84; cf *McCutcheon, J-P. 'National Eligibility Rules After Bosman' in Caiger, A. and Gardiner, S. Professional Sport in the EU: Regulation and Re-regulation (2001) The Hague: Asser Institute Press, p. 127*).

The ECJ has also acknowledged competitive balance and training as legitimate objectives of sporting bodies:

"In view of the considerable social importance of sporting activities ... in the Community, the aims of maintaining a balance ... by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate." (*Bosman* at para. 106).

Nevertheless, the Court has consistently recognised the need for sport to be able to put in place facilitative structural rules, as long as those rules meet the requirements of proportionality under the 'rule of reason' (as in *Deliège*). It is clearly arguable that the legitimate objectives of youth development and the

The Bosman/Kolpak effect: Has sport got it wrong?

need for a strong national team to provide competitive balance in international sport can justify a degree of discrimination, as long as this is proportionate and necessary. Perhaps outright bans on 'foreign' players may not be acceptable, but models such as that introduced by the ECB to encourage the fielding of 'home grown' players in a positive fashion may be more likely to satisfy Community law. This may be particularly the case where the rules are based on affiliation to a national team rather than upon nationality itself. In sports such as cricket and Rugby Union, where traditionally it has been relatively easy to change affiliation, such an approach might well, indeed, should, be deemed acceptable. Community law should not outlaw reasonable measures aimed, not at economic protectionism, but at the development of sport and the maintenance of competitive balance in international competition.

So where only limited opportunities to play professionally exist elsewhere in the EU and the development of players and international teams is hindered by the participation of the dual nationality 'pseudo-EU citizen', this should justify the imposition of restrictions. Sports bodies would do well to consider the possibilities open to them, and the extent to which current regulations represent a simple and rigid absorption of the Bosman/Kolpak principles or a more realistic approach to the flexible demands of Community law. 

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Current case briefing – G14 versus FIFA

By Ruth Byrne, Advocacy Unit trainee, Herbert Smith LLP.

In early 2001 FIFA held discussions with FIFPro (the association of football players) and a number of clubs at which revision of its regulations on the status and transfer of players was discussed. At no point in those discussions was the issue of release of players by clubs to national teams raised.

Factual Background of Dispute

In July 2001, FIFA adopted revised regulations in relation to the status and transfer of players. In doing so, FIFA amended provisions in relation to the release of players for national matches such that no compensation would be provided for such mandatory release, and such that clubs retained responsibility for insuring players for the duration of their release (Chapter XIII of the FIFA Regulations for the Status and Transfer of Players). The regulations also provide for penalties to be imposed upon clubs in the event of non-compliance.

In April 2004, G14, an association of eighteen of the most powerful clubs in Europe, submitted a formal complaint against FIFA to the Swiss Competition Commission (COMCO) alleging that the regulations imposed by FIFA were illegal, unfair and disproportionate to the running of the game. In November 2004, Oulmers, a player for Royal Charleroi, was injured in a friendly match between Morocco and Burkina Faso. Royal Charleroi initially refused to release the Moroccan midfielder for the international fixture, but FIFA intervened and obliged the Belgian team to release Oulmers for the match. On the basis of FIFA regulations, the Moroccan association refused to pay any compensation to Royal Charleroi for Oulmers' injury and subsequent absence from the team for eight months.

On 11 May 2005, Royal Charleroi brought a complaint in its local Commercial Court alleging illegality of the FIFA regulations and claiming compensation. A preliminary hearing was held on 5 September 2005, following which G14 joined Royal Charleroi as full party to the proceedings in Charleroi against FIFA.

While some national teams insure, and even pay, players for participation in international matches, there is no obligation on the national association to do so, and no mechanism for clubs to seek compensation from national associations in the event that a player is seriously injured and absent from club play.

Summary of legal issues

Jean Louis Dupont, the lawyer who acted in the *Bosman* case 10 years ago, and who is involved in the Charleroi case, has commented that FIFA stages the most successful football show on earth, the World Cup, but gets the main ingredient, the players, for free. This, he says, is an abuse of FIFA's dominant position and a breach of competition law, in particular Article 82 of the EC Treaty. Article 82 of the EC Treaty provides that:

“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.”

EC case law has established that any entity engaged in economic activity, regardless of its legal status, may qualify as an undertaking for the purposes of Article 82. In *Distribution of Package Tours during the 1990 World Cup* (OJ [1992] L326/31, [1994] 5 CMLR 253, para 43), it was held that FIFA is an undertaking for the purposes of EC competition law.

To establish whether a given undertaking is dominant, the market in which it operates must first be identified. G14 will presumably argue that FIFA and G14 are operating within the same market because, at least in part, they are seeking to derive income from the same sources, i.e. football broadcasting rights and football sponsorship deals. The legal test for dominance laid down in *United Brands v Commission* (case 27/76 [1978] ECR 207), is that dominance relates to:

“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.

The Commission's Helsinki Report 1999 established that:

“the pyramid structure of the organisation of sport in Europe gives sporting federations a practical monopoly”.

Current case briefing – G14 versus FIFA

An undertaking in a dominant position has a responsibility not to allow its conduct to impair undistorted competition on the common market. Abuse under Article 82 may consist of refusal to supply, predatory pricing, harming the competitive structure of the market, or abusive use of ties and discounts. The list is not exhaustive. Stephen Weatherill, Professor of European Law at Oxford, comments “what other industry requires an employer to surrender a valuable asset and to receive no compensation if it is damaged?” (‘A case that could transform international football’, *The Financial Times*, 12 September 2005): He views as striking FIFA’s refusal to accord any recognition to G14 or the opinions of the clubs, and its insistence on the pyramid structure of football organisation which relies on national associations to represent club opinions.

FIFA stands accused of violating competition law in that, while acting as regulator of the sport, it is also an agent, interested in the same market as those that it regulates. It organises competitions from which it benefits financially while also having the power to unilaterally impose conditions on clubs requiring them to release their greatest assets for free. The clubs, naturally, want to have a voice and a vote in the organisation of international competitions as well as a share in the profits.

Weatherill further argues: “So clubs are required to provide a free resource, their players, to an undertaking, FIFA, that is at least in part seeking to make profits from the same sources on which clubs would wish to draw. FIFA is not merely the sport’s governing body. It is also a direct competitor with the clubs.” In Weatherill’s judgment FIFA has gone beyond its role of fixing rules for the good of the sport and the onerous and unilateral nature of the rules it has devised, and from which it derives benefit, condemns it as abusive.

The final requirement of Article 82, that the abuse may affect inter-State trade, has been applied to mean that it is “possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States” (*Société Technique Minière v Maschinenbau Ulm* Case 56/65 [1966] ECR 235). That case related to an allegation under Article 81 of the EC Treaty. A test which has sometimes been applied by the ECJ in relation to

alleged violations of Article 82 departs from that in STM in that instead of attempting to identify actual or potential effects, it seeks to satisfy the final limb of the Article by establishing any alteration in the structure of competition within the common market.

In order to distinguish legitimate commercial behaviour from abusive behaviour which amounts to an infringement of Article 82, i.e. in order to defend against an alleged infringement, objective justification and proportionality will frequently be raised by the accused party. Case law seems to suggest that to establish objective justification is difficult; the accused party effectively must demonstrate that the behaviour in question was objectively necessary. Penalties for infringement of Article 82 may include a fine, an order prohibiting the abusive behaviour, and, where necessary, mandatory orders to take positive steps to prevent future infringements.

Press and public commentary

The FA which, like other national associations, receives a modest portion of the profits generated by international tournaments from FIFA, has stated that it is against mandatory payments to clubs, arguing that they would be “unworkable” because smaller national associations would be unable to meet them. The FA pays England players for commercial appearances for “Team England” and also insures English international players against injury. That money is paid directly to the clubs themselves, but they are nevertheless dissatisfied with not getting a direct cut from FIFA’s considerable income and with having no say in the regulation of the sport.

Arsenal Manager Arsene Wenger has called for the abolition of international friendlies and the reorganisation of all of the international competitions, claiming that the timing of international fixtures leaves club managers such as him at a disadvantage. Wenger is annoyed by the indifference of the governing bodies to the difficulty of having a player return from international duty exhausted, and sometimes injured, with little time to prepare for forthcoming club fixtures. In the last two months alone, players of such calibre as Thierry Henry, Patrick Vieira and Zinedine Zidane have all been on the bench for key club matches due to injuries obtained while playing for France. Wenger also called for FIFA to require all national associations to subscribe to a worldwide insurance system to cover players when they are capped. This would, in his view, resolve the issue of

Current case briefing – G14 versus FIFA

economic inequality between certain players' clubs and their native football association.

FIFA has always maintained that it is up to national associations to decide whether to reimburse clubs for players on international duty and that compensation is not the responsibility of the world governing body. FIFA has so far provided limited commentary on merits of the arguments to be advanced in the Charleroi case, but has insisted that football is structured as a pyramid, with clubs and players at the base and the national associations and FIFA at the peak, and has stated that it is determined that there will not be a second *Bosman*.

FIFA has objected to the use of independent courts for adjudication of the dispute, and urged the Belgian football association to enforce sanctions against Royal Charleroi. In response to this move, Thomas Kurth, General Manager of G14, said:

"G14 believes that threatening sanctions on Royal Charleroi simply for having asked an independent court to hear their case strikes G14 as being a disproportionate and inappropriate piece of bullying. Currently every club, not just G14 ones, has to live with rules which are unilaterally imposed on them. Despite several attempts, efforts at dialogue have been rebuffed by the governing body. This has created the present situation. (G14.com (12 September 2005), 'G14 condemns threat of sanctions', available from: www.g14.com).

FIFA President, Sepp Blatter, stated that:

"if a club disagrees with a decision by...FIFA, it has the right to criticise that decision. But it should lodge a complaint with the correct authority...not doing so shows a lack of discipline and respect...In a family, when there is a disagreement, it should be solved inside the family. It should not be debated in public, at a neighbour's house or in front of a judge. The G14 is not recognised by UEFA or FIFA. These are clubs who are in financial trouble, some of whose presidents have been indicted with various charges" (FIFA.com (18 May 2004), 'Football must work for peace'. Available from: www.fifa.com).

Blatter has also attacked the excesses of modern football, in particular club football, and claims that "greed is threatening the beautiful game" ('Greed is threatening the beautiful game', *The Financial Times*, 11 October 2005). The press has been cynical about his outburst however, citing past offences such as Blatter's suggestions that the goal posts be widened and matches be divided into four quarters so as to enhance the appeal of football to the US advertising market. The fact that FIFA will take £970 million in TV revenue and a further £347 million from advertisers such as McDonalds

and Coca Cola for the forthcoming World Cup™ in Germany has not served to weaken press cynicism.

In response, FIFA cites its old argument that, after costs (approximately £69 million last year), its profits (approximately £63 million last year) are redistributed mainly to poorer national associations and to the "Goal" development programme. Blatter suggests that national associations are losing the battle for control of football to the ever-more-powerful clubs, and that while the wealth of the bigger clubs balloons, the fortunes of the national associations of poorer and developing nations dwindle. If rich European clubs were allowed a central role in FIFA, as well as a major share of its profits, the development money would be affected and the inequalities in football would increase in severity. In addition, FIFA argues, the clubs already benefit from the enhanced profile of their players and the sport which the international game entails.

The outcome?

Since FIFA refuses to recognise G14, let alone enter negotiations with it, the chance of an accord between FIFA and the major clubs seems remote, and the likelihood that the litigation in Charleroi will continue seems consequently high. While the outcome of litigation is uncertain, commentators appear to take G14's case seriously. If G14 wins, the decision will dramatically alter the balance of power in football. The voice of the clubs will be much louder, and the exclusive grip of the governing authorities on decision-making which directly affects the commercial interests of the clubs will be loosened.

Whether a decision in favour of G14 and Royal Charleroi will destroy international football in the way that FIFA seems to fear is a matter for some debate. It certainly seems plausible that the ascendancy of the richer European clubs to power can only mean a downturn in the fortunes of the football associations of traditionally poorer nations and consequently, and more importantly, talented young players living there. However, some suspect that there is room for FIFA's rules to be adjusted so as to comply with EC law without catastrophic effect.

Such adjusted rules may for example, while requiring release of club players for international fixtures, entail a corresponding obligation on the governing bodies to provide compensation. In order to cope with the difficulty faced by poorer football associations in providing such compensation, a revenue pool could be established from a portion of FIFA profits, from which

Current case briefing – G14 versus FIFA

national associations could draw funds to meet compensation requirements. There are also suggestions that a committee should be set up, independent of both FIFA and the clubs, with authority to determine the balance of interests and obligations between the two.

Four questions

1. The case has been described as being potentially as important as the *Bosman* ruling of ten years ago – how does this legal challenge really compare?

The *Bosman* case changed football more than any individual when he won his challenge in relation to players' contracts. The verdict had a massive effect on football's finances, particularly transfers and player's wages. It addressed very different issues, and an entirely different aspect of EC law (i.e. freedom of movement), to those raised in the present challenge in Charleroi.

Notwithstanding these differences, a decision by the Commercial Court in Charleroi in favour of Royal Charleroi and G14 could conceivably have a lasting and profound impact upon the organisation of football. This depends entirely upon the penalties imposed by the Court. The Court might simply impose a fine and a requirement that FIFA adjust its regulations to provide for obligatory insurance of players when they are capped and to provide for a mechanism for compensation to the clubs. Such a sanction would not necessarily entail a revolution in the organisation of football hierarchy.

However, if the Court was persuaded that the "abusive" behaviour of FIFA warranted closer scrutiny and sanction, it might impose a mandatory order on FIFA requiring it to take certain positive steps. Such steps could conceivably include a requirement to form an independent committee with authority to regulate matters such as the release of club players for international games, and to which clubs, national associations and FIFA could make representations in relation to their interests. Although perhaps unlikely, the Court could go so far as to order a complete restructuring of the organisation of football.

The Court might view any ongoing commercial or profit-making activity by the body authorised to regulate football as untenable, and could conceivably require FIFA's commercial interests (i.e. the World Cup etc.) to be divested to a separate entity. That new entity, together with the clubs, could then assume responsibility, in proportion to their earnings, for funding FIFA as a purely regulatory authority, in return for which

they would receive governance and an opportunity to make representations or complaints to FIFA. This latter scenario is merely an illustration of one possible outcome and is, in all likelihood, remote.

2. What are the strengths of G14's case and in turn the legal arguments which FIFA can present in its defence?

In some respects, G14's case is relatively clear. FIFA seems to be a dominant undertaking and therefore, by virtue of Article 82, it has a responsibility not to allow its conduct to impair undistorted competition on the common market. There appear to be strong arguments that by unilaterally imposing conditions on clubs requiring them to release their greatest assets for free to play in competitions which it organises and from which it derives significant economic benefit, FIFA is abusing its position. FIFA may assert a number of arguments in defence of its actions (for which, see further below).

The final element which G14 will need to establish in order to succeed in its case is the requirement to show that FIFA's behaviour may affect trade between Member States. There are a variety of tests which may be applied by the Court in Charleroi to this limb of Article 82. The guidance provided by the Commission suggests that, in cases where a practice is liable to affect the competitive structure inside the Community, Community law jurisdiction is established. In this instance it seems arguable that, in exploiting its position, FIFA has an impact on its "down-stream" trading competitors (i.e. football clubs) whose competitive position is altered, thus potentially affecting patterns of trade between Member States.

Say, for example, that Zidane was consistently injured in international matches such that he was unable to play for Madrid, and Madrid, while shouldering the burden of Zidane's medical expenses, suffered a downturn in fortune in La Liga such that some of its more lucrative sponsors withdrew their support, choosing instead to purchase advertising at World Cup matches, a potential effect on inter-state trade might be construed. In such circumstances, Real Madrid's hands would be tied by the regulations imposed by FIFA such that the structure in which it competes for sponsorship etc. may be affected.

In its defence FIFA may argue that there was an objective justification for its behaviour, i.e. the overall good of the game and the promotion of football throughout the world, and that it was therefore not abusive. FIFA may contend that club football benefits

Current case briefing – G14 versus FIFA

enormously from the enhanced profile of the sport and the players which is created by events such as the World Cup, and that FIFA's profits, after costs, are distributed to the national associations, which in turn promote and regulate football at a national level, and charities which identify and train the football stars of tomorrow.

In reply, G14 may claim that the benefits of promoting and maintaining the game of football might have been achieved by FIFA by other means; and that unilaterally imposed rules requiring release of players without compensation is not objectively necessary for the good of the game.

FIFA might also argue that clubs involved in recognised competitions agree to submit to FIFA regulations. Such clubs are free to secede from their respective national federations and set up rival independent leagues should they so wish. Whilst these defences may be persuasive, the unilateral nature of FIFA's decision-making together with its refusal to acknowledge G14 and the absence of a formal discussion procedure where clubs may represent their views, might inhibit their success.

In addition, G14 and Royal Charleroi may say that they have no wish to secede from FIFA and their respective national federations, but simply seek a portion of the revenues generated by their employees, and a say in the circumstances in which they are required to release those employees. As US experience has demonstrated, setting up rival, independent sports leagues is fraught with difficulty (although in view of the growing power of G14, the possibility should not be dismissed entirely).

3. Is it unlawful for football clubs to be excluded from the process of rule making and is conflict of interest a valid reason for them to be excluded?

The Commercial Court in Charleroi might find the particular rules in question, i.e. the rules on release of players, to be an abuse of FIFA's position and therefore unlawful without finding the overall process to be abusive. Alternatively, if the unilateral nature of FIFA's rule-making process is found to be a persuasive factor in establishing abuse by the Court, it may determine that FIFA's procedures require adjustment in order for future abuse to be avoided and in order for FIFA's responsibility not to distort competition to be observed.

Arguably FIFA as well as G14 has a conflict of interest in the administration of world football. A system where all parties with a commercial or economic interest in football (i.e. FIFA, the international associations and all

football clubs) have an opportunity to make representations in relation to the rules and governance of the sport, but where an independent committee evaluates those representations and determines how to govern for the good of the sport, would clearly be preferable. Whether a decision in favour of G14 in Charleroi would go so far as to produce such structural change is open to speculation.

It would certainly seem unfair if the present claim resulted in the G14 clubs being permitted a role in the administration of football with no such role being granted to other clubs. Arguably such a structure would be even more likely than the current pyramid to yield abusive and anti-competitive behaviour.

4. Is this case going all the way or is this merely a leverage tactic in a World Cup year?

Given FIFA's refusal to entertain discussions with G14 it seems unlikely that this dispute will be resolved out of court. In addition, while G14's complaint is motivated by financial considerations, it does seem to exhibit a genuine concern about the way in which football is governed and the lack of club input. Arguably, such concerns might only be resolved through pursuit of the complaint through litigation.

In the light of the pre-existing complaint brought by G14 in Switzerland, the timing of the claim in Charleroi in a World Cup year appears to be coincidental. It may be hoped that benefit will be gained by one party or the other through increased press coverage of football generated by the World Cup. More probably, the press attracted by the dispute will further damage the sport as a whole. While G14 clubs are portrayed as money-grabbing corporate machines, FIFA, the supposed guardian of the integrity of international football, is painted as a hypocrite – bleating about underprivileged countries while raking in enormous sponsorship profits and lambasting Royal Charleroi for having the temerity to refer a dispute to its national court rather than resolving it "inside the family". There are no heroes in modern commercial sport. 

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Sports Law Foreign Update

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

1. General		7. Property law (including intellectual property law)	
Conferences, meetings, lectures, courses, etc.	42	Land law	76
Obituaries	42	Intellectual property law	76
Lawyers in sport	42	Other issues	76
Digest of other sports law journals	43	8. Competition law	
Sport and international relations	44	National competition law	77
2. Criminal law		EU competition law	77
Corruption in sport	47	9. EU law (excluding competition law)	80
Hooliganism and related issues	49	10. Company law (including sports associations)	
"On-field" crime	53	Bankruptcy (actual or threatened) of	82
"Off-field" crime	56	sporting clubs & bodies	
Security issues	57	Other issues	82
Other issues	58	11. Procedural law and Evidence	84
3. Contracts (including employment law)		12. International private law	84
Media rights agreements	59	13. Fiscal law	84
Legal issues arising from transfer deals	59	14. Human rights/Civil liberties (including race and gender issues)	
Employment law	60	Racism in sport	85
Sporting agencies	62	Human rights issues	85
Sponsorship agreements	62	Gender issues	86
Other issues	62	15. Drugs legislation and related issues	
4. Torts and insurance		General, scientific and technological	87
Sporting injuries	64	developments	
Libel and defamation issues	65	Doping issues and measures –	88
Insurance	66	international bodies	
Other issues	66	Doping issues and measures –	89
5. Public law		individual countries	
Sports policy, legislation and organisation	67	Doping issues –	90
Public health and safety issues	73	individual sports	
Nationality, visas, immigration and related issues	74	16. Family Law	95
Sporting figures in politics	74	17. Issues specific to individual sports (including disciplinary proceedings)	
Other issues	74	Football	95
6. Administrative law		Cricket	98
Planning law	75	Rugby League	99
Judicial review (other than planning decisions)	75	Other sports	99
Other issues			

1. General

Conferences, meetings, lectures, courses, etc.

German seminar on the laws relating to horses

In March 2003, there took place in Essen, Germany, a day-long seminar on the law relating to horses in the light of recent reforms in the German law on civil liability. It was addressed by many prominent academics and practitioners in this particular field (*Neue Juristische Wochenzeitung* 13/3005, p. XVIII).

Belgian workshop on doping

In May 2005, the Industrial Law Institute (*Instituut voor Arbeidsrecht*) of the University of Leuven (KUL) organised an afternoon workshop on "Doping and medically responsible sporting activity" (*Doping en medisch verantwoord sporten*) (*Rechtskundig Weekblad* 2004-5, p. 1520).

German seminar on televised sport

In June 2005, the Mainz Institute for Media Studies (*Mainzer Medieninstitut*), in co-operation with the University of Mainz, organised a seminar entitled "Sport and Television: a double act which breaks the rules" (*Sport im Fernsehen: ein Doppel mit Regelverstößen*). It was addressed by many prominent figures in this area of the law (*Neue Juristische Wochenschrift* 23/2005, p. XX).

Obituaries

Bob Stuart

Bob Stuart, who captained the New Zealand rugby side which toured the British Isles in 1953-4, died in May 2005 aged 84. Following his illustrious playing career, he became an effective rugby administrator on the International Rugby Football Board (IRFB) (*The Times of* 27/5/2005, p. 75).

Johnnie Cochran

At the age of 67, Johnnie Cochrane, the lawyer who earned considerable fame through his successful defence of former football star O. J. Simpson in the mid-1990s, has died of a brain tumour. He began his career as a crusader against abuses perpetrated by the police, frequently in cases involving black clients. However, it was for his feat in securing the acquittal of Mr. Simpson in 1995 that he earned his place in legal history. The latter had been accused of murder when, in June 1994, his ex-wife Nicole Brown Simpson and Ronald Goldman were discovered stabbed to death, and

was subsequently acquitted despite what the prosecutors described as a "mountain of evidence" against him.

One of defining stages in the trial occurred when Mr. Simpson appeared incapable of donning a pair of gloves connected to the murder. This prompted Mr. Cochrane to inform the jury: "If it doesn't fit, you must acquit" (*The Times of* 30/3/2005, p.33). Mr. Simpson was not the only celebrated personality which Cochrane counted amongst his clientele. These included singer Michael Jackson, football star Jim Brown, Geronimo Pratt (a former member of the Black Panther movement wrongly accused of murder) and Abner Louima, a Haitian immigrant who had been tortured by police in Brooklyn. At the Simpson trial, he was surrounded by a wealth of other legal talent, including F. Lee Bailey, Robert Shapiro, Alan Dershowitz and Barry Scheck. However, Mr. Cochrane was the undisputed star by his skilful handling of the overburdened judge, and the predominantly black members of the jury.

Although the victory he earned in the Simpson trial made him a household figure, it earned him much vilification from those – mainly white – who were unable to believe that O.J. Simpson was anything other than totally guilty, and who held the controversial attorney personally responsible for preventing a black man from being found guilty of murder. To many black people, however, he was a hero, who redressed the balance somewhat after the injustices and legalised oppression which had often disfigured race relations in the US (*The Independent of* 31/3/2005, p.34).

George Mikan

US basketball player George Mikan, who died aged 80 in June 2005, was the first true superstar in the sport. His domination was so complete that he caused three rule changes to occur, which were all designed to reduce his impact. From 1967 to 1989 he served as Commissioner of the American Basketball Association (ABA), which competed with the National Basketball Association (NBA) before the two bodies merged. In the 1980s, he chaired a commission which brought the NBA back to its original home of Minneapolis (*The Guardian of* 7/6/2005, p. 25).

Lawyers in sport

[None]

1. General

Digest of other sports law journals

Recent editions of *Zeitschrift für Sport und Recht*

The second edition of this German sister journal (see *Neue Juristische Wochenschrift 2005/19, p. XXVI*) leads – predictably enough – with an editorial on the recent German football refereeing scandal, of which more later (below, p. 000), by Ulrich Fischer. The author asks a number of fundamental questions on the amateur status of German referees, as well as the prohibition on betting imposed on sporting participants. More particularly, he ponders ways of reducing the incidence of such manipulation, and tries to establish where exactly lies the border between incorrect refereeing decisions inspired by pure error and conscious manipulation. In an article entitled “Sporting Public Limited Companies in the Regional Football League”, the author Jorg Englisch examines the opportunities which are open to clubs in the Regional Football League – being the third level of professional football in Germany – to adopt the legal form of a sporting public limited company. He goes into the motives which can play a part in any such decision, including limited liability, considerations of transparency, as well as creditor protection and the maximisation of profit margins.

The intellectual property rights in the playing schedules and classification tables of the professional sporting leagues are examined by the authors Thomas Summerer and Holger Blask, taking as their prime example the German Football League (DFL). Professional leagues in all sports, particularly football, basketball, ice hockey and handball produce, at considerable expense, fixture lists, league tables and lists of results. These products are sold not only in the betting market, but also in the context of other commercial activity. The authors examine the intellectual property protection at the disposal of the DFL and the German Football Association (DFB), which are provided by the rules of copyright and trade mark law, and even by competition law. They arrive at the conclusion that the commercial utilisation of these facilities in principle require the acquisition of relevant licences.

The author Karl Hammacher analyses the exclusive marketing rights for major sporting events, as well as their limits, particularly in the light of the laws on trade mark protection. Both the Olympic Games and the football World Cup are increasingly becoming commercial challenges for the organisers, which is why their marketing has become an issue of major importance. The author concerns himself with the specific protection given to the logos and emblems of the International Olympic Committee (IOC), as well as

the relevant remedies which are available at the national level, as well as with the trade mark protection enjoyed by the World Cup 2006, including its scope. He arrives at the conclusion that the courts have hitherto been somewhat restrained in the manner in which they have defined the scope of trade mark protection.

The decisions reached by the Court of Arbitration for Sport (CAS) as a result of the Athens Olympics of 2004 are the focus of a piece by Dirk Rainer Martens and Frank Oschütz. As was reported in the previous issue of this Journal (*[2004] 2 Sport and the Law Journal p. 93 et seq*), the CAS was compelled to establish a special Division at these Games in order to deal with a number of doping cases, as well as issues of accreditation and disqualification. Particularly the case of the top German equestrian rider Bettina Hoy is an interesting one. In a shorter contribution, Gabriele Vogt concerns himself with the issue of the tax deductible nature of fees paid to foreign artists and sporting performers, particularly in view of the imminence of a decision on this subject by the European Court of Justice. The author summarises the case law hitherto fashioned by the ECJ on this issue.

In the third issue for 2005 (see *Neue Juristische Wochenschrift 26/2005, p. XXVI*) the author Brian Valerius, in a contribution entitled “Faster, higher, richer?”, concerns himself with the criminal law aspects of cheating in sport which result from betting. In so doing, he examines the rules which cover cases of pure result distortion, as well as the other financial gains which stand to be made from such activities, in the light of Article 263 of the German Criminal Code (*Strafgesetzbuch*). He arrives at the conclusion that there are limits to the effectiveness of the criminal law in sport. The criminal law may be effective in dealing with the loss caused to betting enterprises as such, but not in relation to the federations, sporting clubs or performers involved. Only the rules applied by the sporting federations can lead to the imposition of penalties in such cases.

The author Stefan Grötz also concerns himself with the possible involvement of the criminal law in sport, in a contribution dealing with the criminal law aspects of cheating in sport – in the first instance from the point of view of doping offences. He examines the impact of this offence on the various victims, i.e. the bonus-paying sponsors, the event organisers, and the equipment providers. He arrives at the conclusion that financial loss cannot be proved in such cases – only where there is an employment relationship can this be so. In that case, the appropriate remedy would appear to be dismissal.

1. General

Sport and international relations

Zimbabwe question continues to cause international ructions

Tour by New Zealand in danger after Government refuses visas

The lamentable human rights record of the Mugabe regime in the African state of Zimbabwe has for several years now caused both the political and the sporting authorities of those countries with whom it entertains competitive relations to ponder the legitimacy of such sporting contacts. As readers of previous issues of this Journal will recall (*e.g. [2003] 2 Sport and the Law Journal p. 11 et seq.*), this caused considerable disruption in the last cricketing World Cup when England refused to compete in its fixture with Zimbabwe, thus forfeiting a considerable sum by way of cancellation money (see also below). Now New Zealand face a similar fate if, as looks likely, the visit to New Zealand by the Zimbabwe team, originally scheduled for December 2005, is also called off.

Initially, nothing seemed to present an obstacle to the various fixtures between the two sides – the August tour of Zimbabwe by the Kiwis, and the return visit referred to above. Even though there were plenty of domestic pressures to abandon the tours – with the Prime Minister, Helen Clark, being prominent among the chorus of protestors – New Zealand Cricket, the Kiwis' national authority, had announced that the tours would go ahead, but that no disciplinary action would be taken against players who refused to take part. The first cracks started to appear when Stephen Fleming, the Kiwis' skipper, announced in mid-April that he was considering a personal boycott of the visit to Zimbabwe (*The Independent of 15/4/2005, p.73*). However, Mr. Fleming was among a full-strength squad named in late June for the tour by NZC, which continued to resist both official and unofficial pressures against the trip. Martin Snedden, the national body's Chief Executive, pointed out that NZC would be fined at least £1 million by the International Cricket Council (ICC) if the trip were to be cancelled (*The Daily Telegraph of 23/6/2005, p.52*). Under current arrangements, international cricket sides may only abandon tours on grounds of safety or because of intervention by the host government.

However, shortly after this announcement, it was learned that the New Zealand government had refused to issue visas for the Zimbabwean squad for the December visit to their country. Foreign Secretary Phil Goff explained this decision by reference to the human

rights abuses of which the Mugabe regime stood accused (*Daily Mail of 25/6/2005, p.106*). This decision came as details were emerging of the ruthless manner in which the "rehousing" policy of the Zimbabwean authorities, which involved demolishing thousands of homes and business owned by government opponents, was being enforced (*The Daily Telegraph of 11/6/2005, p.56*). The New Zealand authorities' decision also raised the possibility of a retaliatory ban by Mr. Mugabe, who is the patron of Zimbabwe Cricket. Mr. Goff confirmed that his Government's decision would not prevent Stephen Flemings' team from touring Zimbabwe, but called upon the ICC to intervene (*Daily Mail loc. cit.*).

At the time of writing, the New Zealand tour of Zimbabwe was about to get under way. However, in July, Henry Olonga, the former Zimbabwe fast bowler who left his native land in 2003 after staging protests against the Mugabe regime (see [2003] 2 Sport and the Law Journal p. 16), announced that he would launch a campaign aimed at preventing the tour. More particularly, he was to join Rod Donald, joint leader of the country's Green party, on a speaking tour of New Zealand in order to "turn up the heat" on the latter's national authorities (*The Guardian of 11/7/2005, p. S23*).

England agree compensation to avoid Zimbabwe return

It will be recalled from the previous issue ([2005] 1 Sport and the Law Journal p.48-9) that, as part of the contortions performed by the English national and cricketing authorities over their sporting relations with Zimbabwe, the planned Autumn tour by England to the African state had been reduced to five one-day internationals, with the two Test Matches which had been originally scheduled as part of the tour being held in abeyance. In practice, there was never any realistic prospect of these matches being played at a later date, and all that remained to be settled was the financial aspect of the affair.

The inevitable settlement was reached in late March 2005, when it was announced that the England and Wales Cricket Board (ECB) had agreed to pay the sum of £135,000 to Zimbabwe Cricket (ZC) by way of compensation for the cancellation of these two tests (*The Times of 24/3/2005, p.84*). This brought to an end three years of acrimony in which ZC had sought a much higher figure in the course of protracted negotiations. David Morgan, on behalf of the ECB, had successfully argued that no compensation was owed for the one-day fixtures which had been cancelled during the previous year's abbreviated tour following a dispute over journalists' accreditation (*The Guardian of 24/3/2005,*

1. General

p.32). Mr. Morgan maintained that the ECB had been correct in persisting with the curtailed tour in November and December 2004, commenting:

“It was crucial that we took a touring party to Zimbabwe last year to enable us to move on from the issue and look forward. The whole matter is now closed”
(*The Guardian, ibid.*)

As matters stand, England will not be required to tour Zimbabwe until 2009, by which time there may have occurred a change of government in the host country.

Zimbabwe rebels return to the fold

In March 2005, it was learned that three more Zimbabwean cricketers had returned to the fold of national cricket. It will be recalled (*[2005] Sport and the Law Journal p.49*) that there had occurred a major stand-off between several leading Zimbabwe cricketers and Zimbabwe Cricket towards the end of Heath Streak's captaincy. Mr. Streak had objected to ZC selection policy and the alleged conduct of certain officials. However, both he and Andy Blignault agreed to a new contract shortly afterwards. The most recent rebels to recant are Stuart Carlisle, Craig Wishart and Trevor Gripper, who all agreed to sign new six-month deals with ZC (*The Daily Telegraph of 18/3/2005, p.S2*).

India v. Pakistan cricket continues to foster good relations

It will be recalled from the previous issue (*[2005] 1 Sport and the Law Journal, p. 53*) that one of the more beneficial aspects of international cricketing relations was the role the latter played in attempting a rapprochement between India and Pakistan, two neighbouring states which have been at loggerheads with each other over the Kashmiri question (inter alia). In March 2005, the first tour of India by Pakistan in many years got off the ground, and proved extremely successful both on and off the field.

One of the beneficial outcomes of the tour was the opportunity which it afforded to a number of Pakistanis who were born in India but were separated from the country of their birth by the partition of the Indian sub-continent which occurred in 1947. This was the case for Mr. Naim Khan, who was born in the Sikh holy city of Amritsar, but had to flee in the immediate aftermath of partition, when Muslims were being routinely murdered in that part of India. Mr. Khan was one of several thousands of Pakistanis who sought and obtained a visa, ostensibly to follow the tour, but at the same time to reacquaint themselves with their native land. The signs are that this has been a force for good, since Mr. Khan, amongst others, succeeded in forging many

friendships in the course of his travels and emerged from his visit full of praise for the his hosts (*The Independent of 12/3/2005, p.35*).

“Cricket diplomacy” also seems to have produced beneficial results at the official level. Thus the Pakistani president, Pervez Musharraf, successfully appealed for an invitation to one of the Tests, coincidentally or not the one which was played in the Indian capital Delhi. In fact General Musharraf only watched the game for one hour, before leaving for talks with the Indian Prime Minister, Manmohan Singh. Indeed this was a continuation of previous negotiations which had already taken place during the previous year, and had yielded such positive results as the establishment of a joint council aimed at improving trade links, plans for a railway link between Rajasthan in India and Sindh in Pakistan, as well as an agreement to hand over to each other any citizens who inadvertently stray across the Line of Control (*The Independent of 18/4/2005, p.23*).

In a further show of détente, the Indian crowd had given General Musharraf a rousing reception as he arrived for the Delhi Test, particularly as he walked onto the pitch and met the teams. This warmth was on display in spite of the fact that the fans had forced to take their seats by 7.30 am in order to allow the extra security which the General's visit required (*The Daily Telegraph of 18/4/2005, p.14*).

Sport and the Middle East

The words “Middle East” and “tension” are so inextricably linked that very few factors seem capable of providing some much-needed relief for this benighted region. However, there are some hopeful signs that sporting activity could be one of the catalysts for the troubles which too often have caused unnecessary suffering among its people.

Iraq

Iraq stands perhaps as a monument to all that has gone wrong in that region over the past few decades, culminating in the invasion by certain allied forces in early 2003. Ever since, most parts of the country have suffered horrendously, with virtually every day bringing fresh news of bombings and other forms of mayhem. Against this background, any concerns about regular sporting activity may seem frivolous at best, insulting at worst, and yet this dimension has played some part in an attempt to restore normality to the country.

Following the invasion, the Iraqi national football stadium was converted into a US base. Since then, leading players have been killed or maimed, and the

1. General

championship trophy has been stolen by looters. However, the National League has now resumed, even though the stands are ringed by Iraqi soldiers and patrolled by US helicopters. As many as 7,000 spectators have witnessed matches at Baghdad's Sha'ab stadium, in spite of the ever-present danger of constituting a tempting bombing target. It was a rare opportunity for some exuberance in a part of the world where insurgency has created constant mayhem (*The Daily Telegraph of 21/5/2005, p.12*).

Iraqis are proud of their footballing history, which included qualification for the 1986 World Cup and the strong showing of its team in the Olympics of 2004. The government has spent over £1.5 million rebuilding the Baghdad stadium. Thirty-six teams now compete twice per week in the Elite league, with the winners qualifying for the regional competitions. Most sides had continued to train since the invasion, although there were no competitive fixtures (*Ibid.*)

West Bank

Here too, sport has continued to play a part in attempting to improve international relations. The Brazil and Real Madrid footballer Ronaldo has become a goodwill ambassador for the United Nations Development Programme, as part of which he visited Ramallah, the beleaguered city on the disputed West Bank of the Jordan. On a recent goodwill visit, Ronaldo was mobbed by hundreds of fans. Mr. Ronaldo also plans to visit Israel (*The Guardian of 17/5/2005, p.17*).

However, sport does not invariably play the part of peace-making catalyst in that region. In late May 2005, it was learned that Israeli soldiers forcefully entered a Palestinian home and commandeered its television room so that they could witness the European Champions' League final between AC Milan and Liverpool. Footage on Israeli television's Channel 10 showed broken furniture and windows in the relevant house, which is located in the West Bank city of Hebron (*The Independent of 28/5/2005, p.30*). No further details are available of any investigation into this incident.

Afghanistan

It will be recalled from a previous issue of this Journal (*[2004] 2 Sport and the Law Journal p.50*) that one of the victims of the armed conflict in that country appeared to have been one Pat Tillman, who had abandoned a potentially lucrative career as a star of American Football to serve in the US Army and was killed as a result of an ambush on his Rangers patrol in the South-East of the country. In all, this entire episode seemed almost drawn from an archetypal boys' comic story. More particularly

Mr. Tillman was said to have been charging uphill in attacking Islamist diehards, shouting orders to fellow-Rangers, when he was cut down in the ambush.

In fact, it now emerges that this account was equally fictitious as a Dan Dare story. In late May 2005, Mr. Tillman's parents accused the Pentagon of propagating an entirely false account of their son's death, in order to raise patriotic fervour at home. The reality now appears to have been that, far from being ambushed, Mr. Tillman was shot dead by Rangers of his platoon who had mistaken him for the enemy (an incident usually referred to by that most sickening of understatement, "friendly fire"). Army investigators have since described it as an act of "gross negligence".

Mr. Tillman's parents, who learned the truth weeks after a nationally broadcast memorial service, broke their silence by accusing the Pentagon of telling "outright lies", both to the family and to the nation at large. Mr Tillman Senior commented:

"All the people in positions of authority went out of their way to script this. They interfered with the investigation, they covered it up. I think they thought they could control it, and they realised that their recruiting efforts were going to hell in a hand-basket if the truth about his death got out" (*The Daily Telegraph of 24/5/2005, p. 12*).

Mr. Tillman's decision to forfeit his celebrity lifestyle in the Arizona Cardinals team in order to join up with his brother was an enormous coup for the army's image and recruitment. However, the true manner of his death – as support for the Pentagon's post-11 September record was falling fast along with enlistment levels – would have been a public relations disaster (*Ibid.*)

Sport and the tsunami disaster

The shocking images flashed around the world during last year's post-Christmas period of the damage wrought by the tsunami wave in South-East Asia have prompted many acts of generosity and humanitarian intervention on the part of leading sporting figures, as was recorded in a previous issue (*[2005] 1 Sport and the Law Journal p. 52*). These acts of charity have continued since then, and in late March it was learned that leading spin bowlers Shane Warne and Muttiah Muralitharan were to face each other at Lord's during the summer in an all-star fixture aimed at raising further funds for the relief effort. It was thought that the proceeds from that fixture would amount to well in excess of £1 million in terms of television rights and sponsorship. Batsmen Brian Lara and Sachin Tendulkar were also expected to take part (*The Mail on Sunday of 20/3/2005, p.127*).

2. Criminal Law

Corruption in sport

German refereeing scandal – an update

It will be recalled from the previous issue of this Journal ([2005] 1 *Sport and the Law Journal* p.54) that, earlier, this year, German football was rocked to its foundations by the Hoyzer affair, in which a successful young referee had become implicated in a match-fixing scandal. In his attempts to escape the attentions of the criminal authorities, Mr. Hoyzer had made the not entirely successful transformation from poacher to gamekeeper by lifting the veil on a betting ring which exposed yet more match-fixing incidents. Coming as it did a mere 15 months before Germany is scheduled to host the next World Cup, this affair naturally caused the odd tremor among the top echelons of the game in this country.

As time passed, more information has come to light on the origins of this scandal. It now appears that the first incident involving Hoyzer's malpractices occurred during a pre-season friendly fixture between Hansa Rostock and English club Middlesbrough. The match was won by the German side 3-1, Hoyzer awarding a dubious penalty against Ray Parlour. After the game, Middlesbrough's goalkeeping coach, Paul Barron, described Mr. Hoyzer as "arrogant and biased" (*The Daily Telegraph* of 11/3/2005, p.53). This only served to justify the concern expressed by various authorities, not least world governing body FIFA, that these activities had been allowed to go undetected for so long. The inevitable punishment followed for Mr. Hoyzer, and in late April he was banned for life by the tribunal of the German Football Association (DFB) (*The Independent* of 7/4/2005, p.26). In a separate development, Torsten Koop, another German referee, was banned for six months for failing to report his disgraced colleague quickly enough (*The Independent* of 7/4/2005, p.60).

However, there were more revelations to come. In mid-March a German player was arrested on charges of fraud and organised crime in connection with the scandal. Steffen Karl, who plays for Third Division club Chemnitz FC, was more specifically accused of having manipulated the fixture between SC Paderborn and Chemnitz the previous May by giving away a needless penalty. He was also suspected of offering Georg Koch, the goalkeeper of Energie Cottbus, the sum of £14,000 in order to make deliberate errors during a second division fixture (*The Independent* of 12/3/2005, p.75).

Australian snooker ace suspected of match-fixing

Thus far, the world of professional snooker has remained relatively immune from any corruption. However, this may be about to change if claims surrounding the Australian player Quentin Hann prove to be correct. In mid-May, it was announced that a newspaper report alleging that Mr. Hann agreed to fix a match in the China Open in return for cash was to be investigated by the governing body for the sport. Officials at world governing body World Snooker announced that procedures were in place to examine the claim that Mr. Hann had agreed to accept £50,000 in return for deliberately losing to Irish player Ken Doherty. The report, which appeared in the British "newspaper" *The Sun*, alleged that Mr. Hann had concluded a deal with an undercover reporter posing as a front man for a British betting syndicate and Chinese gamblers (*The Daily Telegraph* of 11/5/2005, p.52).

Apparently the entire incident was captured on film and shown on a Sky television channel, which appeared to support the allegations made against the player. However, Mr. Hann's mother denied any involvement by her son in any untoward activity, claiming that the latter had been perfectly well aware that he was being "set up" for this operation. The world governing body for the sport, the World Professional Billiards and Snooker Association, is currently investigating the affair (*The Guardian* of 11/5/2005, p.27).

FIFA official in fraud probe

FIFA, the world governing body in football, is no stranger to allegations concerning the probity of some of its operations (*Sport and the Law Journal* passim!). Its credibility was once more under scrutiny in June, when its marketing director, Jerome Valcke, became linked to a football fraud allegation involving agents. The timing of this allegation could not have been worse, coming as it did at a time when FIFA was set to investigate the role played by agent Pini Zahavi in the controversy surrounding allegations that Ashley Cole, the Arsenal and England defender, had been unlawfully "tapped up".

It has emerged that Mr. Valcke's former company, Canal Plus, is the majority shareholder in leading French football club Paris St Germain, who are currently facing serious fraud charges related to suspicious player transfers. At a hearing conducted by France's National Financial Investigation Division to the effect that a payment amounting to £7 million had been made to a foundation based in Luxembourg, which held a Swiss banking account at the request of a player's brother and agent (*Daily Mail* of 4/6/2005, p.111).

2. Criminal Law

Cricket corruption scandal – an update

The various measures put into place in order to penalise and prevent any recurrence of the corruption scandal which convulsed the world of cricket half a decade ago seem to be working satisfactorily, despite certain misgivings in some quarters (Journals passim). However, almost inevitably the odd problem will arise, as it did recently in Pakistan.

In late April 2005, it was learned that the Pakistani authorities had launched an inquiry after Shaoib Malik, the Test and former Gloucestershire all-rounder, admitted that he had played a domestic game in such a way that his team would lose. He apologised in public for reining in the run chase commenced by Sialkot Stallions against the Karachi Zebras during the first week of the inaugural 20-over competition. He hoped that a Karachi win would prevent Lahore Eagles from qualifying for the knockout stage. He scored 88 not out off 53 balls, but he was at the crease when Sialkot failed to score the 20 runs required off the last four overs, and was jeered by spectators at the post-match ceremony. The match was declared null and void (*The Daily Telegraph of 30/4/2005, p.54.*)

Mr. Malik claimed that he had been annoyed at losing to Lahore in an earlier fixture. He was ordered to attend a Pakistan Cricket Board (PCB) hearing, which took place a few days after his admission. As a result, he was banned for one Test (*The Daily Telegraph of 3/5/2005, p.58.*)

(On the subject of Mr. Malik's bowling action, see below under the heading "Issues specific to individual sports", p.94.)

At around the same time, but in a totally different development, armed police officers, accompanied by officials from the sports ministry, raided the Sri Lanka Cricket (SLC) headquarters. Earlier, SLC's registration had been suspended by the Government because of alleged financial mismanagement. This claim has been challenged in court (*The Times of 4/5/2005, p. 61*). No further details are available at the time of writing.

US Congressman denies "golf trip" irregularity accusations

This issue is dealt with in full under the heading "Public law" (below, p.71).

French sports minister resigns

It will be recalled from a previous issue of this Journal (*[2005] 1 Sport and the Law Journal p.57*) that, in a development which caused some damage to the bid made by Paris to stage the 2012 Olympics (see also below, p. 000), Guy Drut, the former Olympic sprinter who later became Minister for Sport, had become the focus of an investigation into allegations of accepting payments from various firms associated with building contracts for the renovation of French schools. More particularly it was alleged that he held a fictitious post at one such company during the early 1990s. He was charged alongside 46 other defendants in connection with party political fundraising during the tenure of the current French president, Jacques Chirac, as Mayor of Paris (*The Guardian of 10/5/2005, p.33*).

The trial commenced in mid-May 2005, and Mr. Drut appeared in court to deny any involvement in financial misappropriation. He alleged that he had held a legitimate post and had nothing about which to feel guilty. He did, however, offer to stand down from the Paris 2012 bid team if this affair threatened to damage his city's chances (*The Independent of 10/5/2005, p.20*). In fact, towards the end of June Mr. Drut announced that he would do just that (*The Independent of 27/6/2005, p.18*).

Other cases (all months quoted refer to 2005 unless stated otherwise)

Ivan Slavkov. It will be recalled from a previous issue of this Journal (*[2005] 1 Sport and the Law Journal p. 70*) that this Bulgarian Olympic official had allegedly been featured in a secret film made by reporters from the BBC's Panorama programme, in which he informed the latter that he would be prepared to secure votes for the 2012 Olympic bid in return for various favours. He was subsequently suspended from the International Olympic Committee (IOC). He did his case no favours by subsequently making various dubious claims about the IOC, more particularly that it was being run by corporate America (*The Guardian of 18/6/2005, p. S9*). He currently faces expulsion from the IOC. No further details are available at the time of writing.

Yoshiaki Tsutsumi. In late April, it was announced that this Japanese billionaire businessman had resigned as an honour member of the International Olympic Committee (IOC) following a corruption inquiry (*The Daily Telegraph of 28/4/2005, p. S6*). No further details are available at the time of writing.

2. Criminal Law

Kim Un-yong. It will be recalled from a previous issue of this Journal ([2004] 2 Sport and the Law Journal p. 54) that this former Vice-President of the International Olympic Committee (IOC) was found guilty of having embezzled the sum of £1.5 million which had been originally donated to the sporting organisations operated by him. He has since been sentenced to two years' imprisonment for corruption, and has resigned from the IOC (*The Guardian of 21/5/2005, p.33.*).

Willie McKay. In mid-March, it was learned that the Monaco-based Scottish football agent was questioned by French fraud squad detectives as part of investigations into transfers involving top football clubs Paris St. Germain and Olympic Marseille (*The Independent of 10/3/2005, p.51*). No further details are available at the time of writing.

Hooliganism and related issues

Italian hooliganism continues to cause problems

Until recently, Italian football has experienced no greater problems with the mindless minority who cause trouble at matches than most other countries. However, a number of recent developments have occurred in this regard which indicate that the problem could soon be beyond control unless decisive and effective action is taken.

The draw for the quarter finals in the 2004-5 European Champions League brought together the two great Milan clubs, AC and Internazionale. No-one was under any illusion that the ties would be played in an atmosphere reminiscent of a chess tournament, but few could have predicted that the trouble which occurred would actually cause one of the fixtures involved to be abandoned. But that is exactly what happened as a result of the riots which took place during the second leg. AC Milan had secured a 2-0 lead on the first leg, leaving Internazionale a sizeable but not insuperable challenge to overcome during the second leg. However, AC Milan scored after half an hour's play, making Internazionale's task virtually impossible. Esteban Cambiasso seemed to have reduced the deficit in the 70th minute, but the goal was disallowed by German referee Markus Merk (*The Daily Telegraph of 13/4/2005, p.53*). At this point, Internazionale fans started to throw bottles and flares, one of which hit the AC goalkeeper Dida. Incredibly, as the stricken keeper lay on the ground in shock and pain, the "fans" continued to pelt him with flares. As a result, the referee was compelled to remove the players from the field whilst firemen doused the

flares and efforts were made to calm the hotheads. The players then re-emerged after a 25-minute interval, only to be greeted with more flares, aimed this time at Christian Abbiati, the substitute goalkeeper. At this point, Mr. Merk abandoned the game. Remarkably, there had been no intervention on the part of the police (*The Guardian of 13/4/2005, p.32*).

Mr. Merk and the UEFA match delegate, Lars-Ake Lagrell, provisionally awarded the tie to AC 1-0 – a decision which was later overruled by the relevant UEFA committee, which decided to award the match to AC by 3-0 (*The Guardian of 16/4/2005, p.57*). In fact, this disturbance was but the latest in a series of incidents which had occurred during a grim weekend for Italian football, which saw 85 policemen injured following outbreaks of hooliganism at five separate fixtures (*The Independent of 13/4/2005, p.85*). The main trouble had occurred during a fixture between the Roman side Lazio and Livorno at the Olympic Stadium, Rome. The previous month, when Scotland had played Italy at the Milan San Siro stadium, supporters of Internazionale and Verona fought in what Scottish Football Association chief executive David Taylor described as the worst hooliganism he had witnessed in 20 years (*The Daily Telegraph of 14/4/2005, p.52*).

In the immediate aftermath of the riot, Internazionale feared that they might be expelled from the following season's Champions' League, given that this was the second occasion on which its supporters had disgraced the club. Instead, the relevant UEFA disciplinary panel allowed them to escape with a mere four-match stadium ban and a record £132,000 fine. This led to a hail of criticism from the media, which UEFA spokesman William Gaillard attempted to fend off in the following terms:

"There will be some people who think that this is lenient and other people who think that it is harsh. This is the highest fine in the history of UEFA and the loss of four home games will mean that they lose out on revenue for around 8 million euros. You have to put it in the context of the game. There were no further injuries apart from a very slight one to the goalkeeper which we absolutely regret, and it is a very hefty punishment compared to anything in the last five years" (*The Independent of 16/4/2005, p. 76*).

Whether this measure will successfully deter further instances of hooliganism by the Internazionale fans remains to be seen. Certainly the financial consequences of the four-match ban are less dramatic than might seem at first sight. Internazionale would in principle be able to implement the ban through the fixtures played during the early rounds of the

2. Criminal Law

Champions' League, which traditionally attract poor attendances in Italy (*The Guardian of 16/4/2005, p.57*). The fine itself may have set a record by UEFA for this type of misdemeanour, but is hardly likely to make more than a dent in the Milan club's coffers.

It was extremely unfortunate that these events should have occurred only days before the return leg of the Champions' League fixture between leading side Juventus and Liverpool in Turin. This was the first competitive game between these two teams since 39 Juventus supporters died after a wall collapsed at the Heysel stadium in Brussels following a charge by Liverpool fans. The first leg had passed off relatively peacefully, but Italian police feared that the return fixture would be more troublesome, particularly as they had identified a hard core of around 200 Juventus supporters thought to be intent on exacting revenge for the lives lost in the Heysel tragedy. Earlier, chilling warnings had been posted on the internet by some extreme hooligans, known in Italy as ultras, one of which stated that after 20 years of waiting, "it is time for revenge" (*The Times of 13/4/2005, p.77*).

In the event, most of the violence was contained, although there were plenty of incidents. There were ugly scenes both inside and outside the Juventus ground, with flares being lit and thrown at the celebrating visitors' supporters at the end of the game, as the reality of the Merseysiders' victory sank in. As a result, visiting fans were kept inside the ground long after the final whistle. Before the kick-off, a group of around 50 Juventus fans, wielding batons, clashed with riot police outside the stadium. The carabinieri (Italian national police force), having been pelted with bottles and flares, took over 30 minutes to disperse the troublemakers by using tear gas. Two vehicles were left in flames. The offenders, wearing scarves over their faces to avoid identification, broke up into smaller groups as two police helicopters surveyed the scene (*The Guardian of 14/4/2005, p.34*).

Inside the ground, there was further trouble, although most commentators agreed that the measures taken to avoid it were totally inadequate. Only a minute number of police and stewards had been positioned at the curva nord, a notorious trouble spot, and they were incapable of preventing a torrent of missiles flung initially from home fans into the lower section of the Liverpool support. The visitors replied by returning the bottles over the divide into the ranks of taunting home fans. An extra line of police only arrived once kick-off approached. The visiting fans' mood was not improved by a banner referring to the Hillsborough disaster, saying "15.4.89. Sheffield. God exists" (*Ibid.*).

By then, the authorities had twice issued a message over the loudspeaking system to the effect that anyone caught throwing objects faced terms of imprisonment ranging from six months to three years. By the time that message had been reissued, the barrage of missiles had resumed, with a flare spouting fumes from the open terracing in front of the Juventus fans. Nevertheless, it was agreed that, all in all, the outcome of the fixture could have been a great deal worse.

However, Italian hooligans once again cast a pall over their country's record when, ten days after the infamous Milan derby, it was revealed that three extremist fans, known as Ultras, who profess to support Turin club Juventus had been arrested for attempted murder, following a knife attack on a member of a rival gang. The men were detained by police following a knife attack on Rafaele De Vaire which left the victim requiring surgery in a Turin hospital. The attackers were apparently members of the Drughi gang, who have recently wrested control of the "home end" at the Juventus ground from the rival Fighters group. The Drughi had succeeded in placing their banner in the centre of the stadium's South End, an area which up to that point had been controlled by the Fighters for ten years. The Drughi seized the opportunity when leading members of the Fighters were arrested following a pitch invasion at the end of a match against Parma in January 2005 (*The Daily Telegraph of 24/4/2005, p.57*).

Naturally, these events caused considerable concern far beyond the football authorities, and the Italian Prime Minister, Silvio Berlusconi, immediately authorised a high-profile crackdown on football violence. One measure which has already been decided upon by Italy's footballing authorities is to change match regulations on the subject of crowd disturbances. The relevant section now decrees that a referee may not start, or should suspend, a match as soon as dangerous objects or fireworks are thrown onto the pitch. In such cases, the home side will be regarded as being responsible and the visitors will be automatically awarded a 3-0 win (*The Guardian of 14/4/2005, p.34*).

One particular dimension which appears to give an extra edge to Italian hooliganism is the political angle. Thus the Lazio v Livorno match referred to earlier was played to a backdrop of swastikas and hammer-and-sickle flags. Lazio remains linked to the dictator Benito Mussolini, whereas Livorno is a stronghold of the Italian communist party, which was founded there. Lazio were fined for the fascist chants produced by their supporters during that match, but the sums involved were minute (*The Independent of 14/4/2005, p.76*).

2. Criminal Law

Indeed, it is a source of considerable concern that even the players are sometimes seen to identify with these extreme political posturings. Thus the former international Paolo Di Canio, who plays for Lazio, offered a fascist salute when he scored in the Rome derby, and was fined by the Italian football federation for this misdemeanour (Ibid.). Then in June, two other star footballers became enmeshed in controversy when they attended the funeral of the leader of black-shirted skinhead ultras. Francesco Totti, the AS Roma captain, and team-mate Antonio Cassano watched as fans of both Roma and Lazio gave the fascist salute at the funeral of Paolo Zappavigna, who perished in a motorcycle accident. Thousands of fans broke through police cordons to swarm round the coffin and chanted "honour to our comrade". Although both players have condemned the violence which has bedevilled the Italian game this year, and could have been construed as a tacit acknowledgement of the influence wielded by these extremists (*The Times of 10/6/2005, p.42*).

These fans are not part of the official supporters' clubs, but form tightly-knit organisations which often control the football grounds. They espouse racist views, display fascist symbols such as Mussolini portraits and chant slogans praising the latter. Fascism is prohibited in Italy, and the Alleanza Nazionale, being the reformed descendants of Mussolini's Blackshirts, has abandoned its fascist legacy to become a mainstream conservative party. The Italian media were strangely divided on the issue, with the daily La Repubblica even claiming that it was a positive sign that the funeral had brought together rival Lazio and Roma fans. Even more surprisingly, Paolo Cento, the parliamentary leader of the Green Party, and a Roma fan, admitted having attended the funeral together with MPs from the Alleanza Nazionale, because although the gang leader was on the Right and he was on the Left, this was "no time for political polemics" (Ibid).

North Korean fans riot after losing World Cup match

North Korea is not a country whose regime allows its population many expressions of popular dissent, but the normal control exercised by its state machinery was found to be wanting when football fans rampaged through the Kim Il-Sung stadium in Pyongyang after their national side had been defeated by Iran in a World Cup qualifying round fixture. Soldiers and police intervened in an attempt to restore order after defender Nam Song-chol was dismissed from the field for pushing the Syrian referee, Muhammad Kousa, in the course of the match. The unrest continued after the final whistle, with match officials being unable to leave

the pitch for about 20 minutes as more projectiles rained down. The violence then spilled over into the area outside the stadium, where hordes of angry North Koreans prevented the Iranian players from boarding the bus. Riot police finally pushed back the crowd far enough for the Iranians to depart, two hours after the match had ended (*The Guardian of 31/3/2005, p.14*).

British police may be used for 2006 World Cup

One of the by-products of the many years in which hooliganism plagued football in this country has been the expertise and experience acquired by the public authorities in dealing with this problem. This was one of the factors which lie behind a plan to deploy British police on German soil during the 2006 World Cup as part of an extensive security operation intended to prevent outbreaks of hooliganism involving England supporters. British police negotiating with the German authorities believe that an unprecedented use of domestic police officers could help to defuse any tensions in this regard. The notion that police forces within the European Union could have a presence in neighbouring states was discussed informally by British Prime Minister Tony Blair, the German chancellor Gerhard Schroeder, and the French president Jacques Chirac (*The Guardian of 19/5/2005, p.35*).

Administrative stadium banning order not capable of judicial appeal if imposed by way of safety measure. Belgian court decision

This issue is dealt with more fully under the heading "Administrative law" (below, p.75).

Trouble flares at Moscow fixture

The UEFA Cup competition for the 2004-5 season yielded a semi-final fixture between CSKA Moscow and Italian club Parma. Although the Russian side won the tie 3-0, their victory was marred by an incident in which Luca Bucci, the visiting goalkeeper, suffered a head injury when a firecracker exploded near him (*The Guardian of 6/5/2005, p.35*).

Liverpool fans held over attack on Bulgarian barman

In late July, it was disclosed that two Liverpool fans were to stand trial in Bulgaria having been accused of assaulting a barman during a fight which took place shortly after the Champions' League final, which saw Liverpool defeat AC Milan in Istanbul. Michael Shields and Anthony Wilson had travelled onto Bulgaria's Golden Sands resort of Varna following the game. Mr. Shields was accused of having hit Martin Georgiev over

2. Criminal Law

the head with a brick, causing possible brain damage. He was later charged with premeditated attempted murder and aggravated hooliganism and possession of cannabis (*The Daily Telegraph of 25/4/2005, p.55*). No further details are available at the time of writing.

Hooliganism convention ratified in Germany

In December 2004, the German parliament ratified the European Convention on Spectator Violence and Misbehaviour at Sports Events. This is an instrument under which, in order to prevent and control violence and misbehaviour by spectators at football matches, the parties to the Convention undertake to adopt all necessary measures to give effect to its provisions. They shall apply its provisions to other sports and sporting events in which violence is expected (Article 1). By establishing co-ordinating bodies, the parties co-ordinate the policies and actions engaged in by their governments and other public bodies with regard to any violence and misbehaviour engaged in by spectators (Article 2). The most appropriate measures designed to prevent and control crowd behaviour are set out in Article 3. The measures relating to the identification and treatment of offenders are set out in Article 5 (*European Current Law June 2005, p.160*).

Article on Spanish hooliganism

In "Football Hooliganism – national and international/transnational aspects" (*International Sports Law Journal 2004, p. 33-38*), the authors Jose Rey and Diego Grijelmo discuss the ultras football hooligan culture in Spain, as well as the legislation and the case law which are the framework within which attempts are made to control violence in sport. They examine the background to and development of the ultra movement and its place in the international hooligan culture. They also outline the various Spanish legislative measures taken in order to counter hooliganism, including (a) the establishment of the National Commission against Violence at Sporting Events, (b) Law 10/1990 of 15/10/1990 on Sports and (c) the establishment of the position of safety co-ordinator. They also assess the effectiveness of the system deployed in order to control spectator violence in Spain (*see European Current Law May 2005, p.168*).

Safety fears cause cricket umpire to quit

It is an unfortunate fact that, as has been articulated in these columns on more than one occasion in the recent past, cricket is no longer immune from the culture of hooliganism (as anyone who has been unfortunate enough to follow a game in the presence of England's "Barmy Army" will readily attest). However, these have hitherto never been such as to cause a match official to

reconsider his future. Unfortunately, this has now proved to be the case for the Australian international umpire, Darrell Hair, who recently announced that he was leaving top-level umpiring following the 2007 World Cup because of increasing fears for his safety. He commented:

"When I go to South Africa, India, Pakistan and West Indies, which are great places to umpire at, I feel I'm out of my natural environment where I feel safe and secure. Because of the passion for cricket in these countries, your decisions can sometimes cause things to get nasty and that is the aspect I least enjoy about the job"
(*The Daily Telegraph of 17/4/2005, p. S9*).

One particular turning point for match officials in the game was the 1999 World Cup in England, when pitch invasions early in the tournament took the umpires entirely by surprise. Mr. Hair expressed his concern at these developments, particularly as it was unsure as to what agenda some people had when they took part in these disturbances. He also cited the influence of betting at such matches, which meant that controversial decisions could lose some people a good deal of money. Hair added that, as yet, he had not experienced any intimidation personally (*Ibid*).

"Parent hooligans" cause problems in US Sport

In the normal course of events, it is assumed that hooligans are to be found mainly among the young and irresponsible, who generally have to be restrained by their ever-watchful parents. Something of a role reversal may at present be occurring in some parts of the US. Cheering on their children from the touchline no longer seems to be sufficient for some sports-infatuated parents in the States, an increasing number of whom are pushing their young to perform like professionals, and are attacking anyone who stands in the way of their children's success. Incidents of parental passion degenerating into violence towards referees or rival competitors have been a source of concern to the nation. Most recently, a father in Connecticut, apparently dismayed at his daughter's suspension from a softball team, was arrested for allegedly assaulting her coach with an aluminium bat. In a separate incident, a girls' rugby game in California ended in a fist fight involving eight fathers, two coaches and the referee. One coach was left bloodied and unconscious as a result (*The Daily Telegraph of 20/5/2005, p.17*).

Obsessively competitive parents have become such a permanent fixture of life in the US that they have been satirised in a new film, graphically called *Kicking and Screaming*, in which Will Ferrell stars as a "soccer dad

2. Criminal Law

gone bad” when compelled to coach his son’s American football team. This explosion in “sportcentric” parenting has been blamed on the worshipful status given to American football and baseball celebrities, as well as the highly-organised nature of US youth sports, which introduces an adult-like competitive edge to matches. Bob Bigelow, a former basketball player who has written extensively on this problem, blamed the attitude currently prevalent among his generation – i.e. parents in the 40s and 50s, adding:

“We’re the ones demanding we have a child in uniform by five, their first play-off by six and a trophy soon after. These people have lives that are vapid – failing marriages, jobs that stink. This is how they get their jollies, they live through the athletic achievements of their kids, and there’s nothing sadder” (Ibid.)

Another expert on this problem, Sean Heyman, who coaches a girls’ softball team in Westchester, California, commented that it was not uncommon for parents to confront him during matches. In one recent case, an extremely irate father had berated him over his daughter’s position in the field. Jim Taylor, a San Francisco-based psychologist, has treated a large number of cases in which sports-related pressures imposed on children by their parents is so extreme that it causes considerable harm (Ibid.).

Other cases (all months quoted refer to 2005 unless stated otherwise)

Belgrade, Serbia. In late April, at least 27 people were injured and 67 arrested during the violence which affected the Belgrade derby between Red Star and Partizan (*The Daily Telegraph of 25/4/2005, p. S5*).

Madrid, Spain. In mid-March, leading side Atletico Madrid were fined £420 after racist chanting by their fans during a match with Valencia (*The Independent of 16/3/2005, p. 66*).

Rotterdam, The Netherlands. In mid-April, trouble occurred during the run-up to a match between local side Feyenoord and arch-rivals Ajax Amsterdam. Two spectators were taken to hospital later suffering from burns (*The Daily Telegraph of 18/4/2005, p. S5*).

“On-field” crime

ETA targets Madrid bid with bombings

The separatist Basque organisation ETA has long been known for its violent tactics, which have frequently involved political killings and indiscriminate bombings. It was always a possibility that the bid submitted by Madrid was going to attract their interest as a potential focal point for their protest action, and this proved to be the case earlier this year. In late April 2005, two suspected ETA members were detained in France carrying a list of sites thought to be potential targets. These included some which were associated with the 2012 Olympics bid (*The Guardian of 30/4/2005, p.21*). In spite of this preventative action, it was not possible for the authorities to eliminate the risk of bombings entirely. Just days before the result of the bidding process was announced in Singapore, firebombs were hurled at Government officials in two Basque towns, hours after a car bomb had exploded at a sports stadium in Madrid, and a week after the separatists had called a partial truce (*The Independent of 27/6/2005, p.18*).

The blasts caused damage but no serious injuries, and were timed to coincide with the swearing-in of the Basque country’s nationalist Prime Minister, Juan Jose Ibarretxe. They also appear to have been intended to pressurise the new Premier into commencing negotiations on the subject of greater Basque autonomy. At the same time, Molotov cocktails were thrown at offices of the Madrid government in the Basque capital, Vitoria, as well as in San Sebastian, where a fire station was also firebombed. Later, ETA activists targeted the same neighbourhood of Madrid for the third time this year, planting a 20 lb car bomb outside the city’s track and field sports stadium, which was the symbol of the Spanish capital’s Olympic bid. The Peineta stadium was undamaged, and dozens of construction workers sprucing it up were evacuated following an ETA warning. The blasts badly undermined the Madrid Olympic bid – many politicians confirmed that this was precisely the intention (Ibid).

Mali internationals safe following death threats

In late March, a serious incident took place in Mali during a 2006 World Cup qualifying fixture which the national side were playing against Togo. The home side were a goal ahead until the 83rd minute, when the visitors scored two quick goals which looked certain to win the game for them. At this point, some of the 70,000 crowd rioted and stormed onto the pitch, demanding that they should lay their hands on Mali

2. Criminal Law

internationals Frederic Kanouté and Mamadou Bagayoko, threatening to kill them. The players, however, later escaped and were reported to be safe and well (*The Independent of 30/3/2005, p. 53*).

Mr. Kanouté was later reported to be considering his retirement from international football as a result of these incidents (*The Daily Telegraph of 21/4/2005, p. S3*).

Court closes Senna inquiry (Italy)

It will be recalled from a previous issue of this Journal (*[2003] 2 Sport and the Law Journal p.36*) that the fatal accident which caused the death of top Brazilian motor racer Ayrton Senna at the 1994 San Marino Grand Prix has given rise to fresh criminal proceedings. Although the Italian Court of Appeal acquitted various technical personnel closely involved in the event from manslaughter charges in 1999, it was decided to reopen the case in January 2003 because of various "material errors" which were alleged to have affected the original verdict. The new trial opened in mid-May 2005 in Bologna. However, the trial was almost immediately aborted after state prosecutor Rinaldo Rosini requested the court to close the case anew because of the relevant statute of limitations, which meant that the period had expired in which it was possible to press charges (*The Daily Telegraph of 12/5/2005, p. S1*).

Earlier, Mr. Rosini had informed the court of the reasons why the case had been reopened. He alleged that the fatal accident was due to a dangerous modification to Mr. Senna's vehicle which had not been properly overseen by Patrick Head, the Williams team's technical director, and had not been adequately checked by Adrian Newey, the car's chief designer. It is believed that this related to a slight alteration to the steering position aimed at accommodating the driver more comfortably in the cockpit. Lawyers acting for Head and Newey urged the court to proceed with the trial and remove any doubts about the accident by returning not guilty verdicts (*The Guardian of 12/5/2005, p. 30*).

Right-wing extremist admits 1996 Olympic bombing (US)

It will be recalled that the 1996 Olympics in Atlanta were marred by a bomb explosion which cost the lives of two people. Almost a decade later, a Right-wing extremist admitted that he committed this outrage, explaining that he sought to embarrass the US government for its "abominable" sanctioning of abortion on demand. Earlier, Eric Rudolph had appeared in a court in Birmingham, Alabama, and pleaded guilty to planting an explosive device at an abortion clinic. He was subsequently taken to Atlanta, where he confessed to

the Olympic bombing. He pleaded guilty in a deal with the Federal authorities. The Government undertook not to seek the death penalty, in return for assistance by the accused in uncovering 250 lbs of explosives. However, Mr. Rudolph received four consecutive life terms without parole (*The Daily Telegraph of 14/5/2005, p. 16*).

Athlete jailed for posing as a woman (Zimbabwe)

A young Zimbabwean's dream of a career in international athletics came to an inglorious end in mid-July 2005 when the holder of seven southern African junior women's titles was jailed for masquerading as a woman. Munduzi Ngwenya was sentenced to 3 1/2 years' imprisonment after being convicted of impersonation and offending the dignity of a woman athlete who had undressed in his presence, unaware that the accused was a man. When Mr. Ngwenya first appeared in court in February, he had a high-pitched voice, a bosom and feminine facial features. He was granted bail because court officials genuinely could not decide whether he should be held in male or female cells. However, at the trial proper, at Kwekwe Magistrates' Court, he was clearly flat-chested beneath his khaki prison tunic. He expressed his regret and pleaded for leniency, adding that he was the father of a young child of his own (*The Times of 15/7/2005, p. 37*).

The presiding magistrate, Oliver Mudzingachiso, described Mr. Ngwenya as a "dangerous male fraudster" who had represented his country in international athletic competitions. He had been spotted by talent scouts at a school athletics meeting in the impoverished tribal area of Silobela, where he had succeeded in passing himself off as a girl. He went on to set national junior women's provincial records in the long jump, high jump, 400 metres hurdles, javelin and shot putt. Prize money was heaped upon him, sufficient to buy plots of land and cattle in the central town of Kwekwe where he lived. During his trial, a medical report was read out which stated that he had a normal chest, a "functioning penis" and testicles. The magistrate dismissed his claim that he was a hermaphrodite. Mr. Ngwenya claimed during the trial that a witch doctor had removed the penis by means of traditional potions. He also claimed that subsequently his parents failed to pay the bill, and the witch doctor exacted revenge by using a spell in order to restore it (*Ibid*).

2. Criminal Law

Rally drivers fined for speeding (Croatia)

Racing drivers have from time to time fallen foul of the law, but few can have done so whilst actually competing in an event. This is precisely what occurred in mid-May 2005, when a celebrity-studded road rally resulted in up to 33 people being fined for driving at speeds approaching 200mph as a six-day race wound its way through Croatia. The event in question is called the Gumball rally, being a 3,000 mile road race from London to Monaco, inspired by the film comedy of the same name. In the race, which costs £10,000 to enter, those taking part drive through Prague, Vienna and Rome in sports and classic cars. It has sometimes drawn criticism because some participants have been involved in accidents or have been arrested for speeding (*The Guardian of 19/5/2005, p.18*).

French skiing chief found guilty of involuntary manslaughter

In mid-June 2005, a court in Annecy, France, returned a guilty verdict against Xavier Fournier, France's national skiing team chief, on charges of involuntary manslaughter. This related to his role in the death of the world super-G champion Régine Cavagnoud in 2001, after she collided with a German coach when training in Austria. Mr. Fournier, as well as the starter who allowed her to set off on the run, were each issued with three-month suspended sentences and fined €5,000 (*The Guardian of 14/6/2005, p. 27*).

Death threats issued to West Indian cricketers

It will be recalled from a previous issue of this Journal (*[2005] 1 Sport and the Law Journal p.64*) that the difficulties encountered by the West Indies cricket team on the field have been added to by contractual problems off it (see also below, p.57). Recently, however, these difficulties assumed more sinister overtones when it was revealed in late March 2005 that the West Indies captain Brian Lara, as well as six other members of the squad involved in the dispute, had received death threats as a direct result of these contractual problems. The President of the West Indies Players Association (WIPA), Dinanath Ramnarine, said that the players in question:

“face overwhelming pressure including death threats, and threats from WICB [the West Indies Cricket Board] never to play again, threats and intimidation from sponsors, and pressure from the highest political levels within the length and depth of the Caribbean community” (The Independent of 1/4/2005, p. 58).

He added that the dispute in question had made the WICB “tyrannical and despotic” (*Ibid*). Since then, however, no further news of any criminal intimidation has been forthcoming.

Armstrong interviewed by Italian police on intimidation claims

Texan Lance Armstrong is one of the most remarkable sporting figures of our time, who has achieved immortality by winning the Tour de France seven times running (or should that be cycling). He has not been entirely without controversy, but this has mainly surrounded rumours – thus far totally unsubstantiated – that his remarkable prowess owes something to the consumption of unlawful substances. However, in late March 2005 it was revealed that he had been questioned by Italian police as part of an investigation into the intimidation apparently incurred by Italian rider Filippo Simeoni during the previous year's Tour de France.

Mr. Armstrong voluntarily travelled to the Tuscan town of Lucca to explain why he had chased down Simeoni during the 18th stage of the marathon race, even though the latter was no threat to his sixth Tour victory. The magistrate in question, Giuseppe Quatrocchi, had formally opened an investigation after Mr. Simeoni had claimed that the Texan threatened him because he (Simeoni) had given evidence in the trial concerning Dr. Michele Ferrari. The latter was one of Armstrong's principal advisers until he was issued with a suspended one-year sentence for sporting fraud and supplying drugs. Mr. Armstrong had always supported Dr. Ferrari, stating that he was an honest man, but ended their professional relationship after the guilty verdict (*The Guardian of 1/4/2005, p.27*).

After having given his version of the events, Armstrong could still face charges of *violenza privata* by having intimidated a trial witness, but he no longer carries the risk of being taken into custody whenever he travels to Italy (*Ibid*).

Nigerian “wonderkid” receives death threats (Norway)

In May 2005, it was revealed that John Obi Mikel, the Nigerian teenage talent signed by Manchester United, had been assigned a round-the-clock bodyguard after receiving death threats. Norwegian club FC Lyn Oslo, who hold Mr. Mikel's registration until January 2006, had taken the threats seriously and moved the Nigerian player to a “secure place”. Norwegian journalists had traced him to an Oslo hotel, and he was quoted in the leading newspaper *Aftenposten* as declaring himself extremely frightened. The source of the threats was not clear, but Mikel's current employers are taking no chances. The club confirmed that they had moved him into a hotel and were employing security guards (*The Guardian of 11/5/2005, p.34*).

2. Criminal Law

"Off-field" crime

Robin Van Persie accused of rape (The Netherlands)

Over the past two years, various accusations of sexual assault have been levelled against a number of leading footballers (although hardly any of them has actually led to a conviction). The latest soccer star to be thus indicted has been Netherlands international Robin Van Persie, who currently plays for English Premiership side Arsenal. He was arrested in Rotterdam in mid-June following an incident alleged to have taken place over the weekend, and was remanded into custody (*The Independent of 15/6/2005, p.71*). He was held for three weeks before being provisionally released by the Rotterdam public prosecutor (Officier van Justitie). He nevertheless remained a suspect, and it was announced that investigations into the alleged incident were continuing (*The Daily Telegraph of 28/6/2005, p.7*).

Further details concerning the allegation started to emerge. It appears that the alleged victim was Sandra Krijgsman, a former Miss Nigeria Holland, and that the incident took place in a Rotterdam hotel. The Netherlands Justice Department stated that a thorough investigation could drag on into September, by which time Arsenal's season in the Premiership will have started. This prompted Arsenal manager Arsène Wenger to urge the Dutch authorities to expedite proceedings in the case, though why the police should deal with a case more quickly because the accused is an Arsenal footballer is not exactly clear to the present author (*The Guardian of 23/7/2005, p.56*). No further details are available at the time of writing.

Fischer becomes Icelandic citizen in bid to escape US justice

It will be recalled from a previous issue of this Journal ([2004] 2 *Sport and the Law Journal p.60*) that the former chess champion, Bobby Fischer, remained a target of the US prosecuting authorities because of his defiance of the UN sanctions imposed on Yugoslavia by engaging in a rematch there with the Russian master Boris Spassky in 1994. The US authorities had applied for a deportation order from Japan, where Mr. Fischer was in residence, and the Japanese authorities had granted this application, pending an appeal against this decision. However, since then there has been a further twist to this somewhat bizarre affair.

In mid-March, Mr. Fischer was dramatically released by the Japanese authorities after a remarkable intervention

by the Icelandic authorities. He succeeded in obtaining his freedom, following nine months in a Japanese detention centre, as the holder of an Icelandic passport thanks to a decision by the Reykjavik parliament to grant him full citizenship. This decision, which accelerated its way through the Icelandic legislature in the record time of 12 minutes, thwarted Japan's plans to extradite Mr. Fischer. The latter immediately boarded an aeroplane for his new homeland together with his long-term Japanese partner, Miyoko Watai (*The Independent of 24/3/2005, p.30*).

His release was hailed as a victory by his supporters, who had fought very hard to prevent the deportation applied for. They claimed that his arrest had been a politically-motivated attempt to extradite him through the back door. More particularly they questioned the legality of cancelling his US passport. This had been the basis for his arrest at Tokyo's Narita airport, as he was accused of trying to leave the country on a revoked passport (*The Daily Telegraph of 25/3/2005, p.17*). There had been an allegedly political dimension to the attempts made to have Mr. Fischer deported, since he has been a virulent critic of US foreign policy, in particular its Middle East strategy.

Former Indian test cricketer held on poaching charge

Mansoor Ali Khan, known in his day under the honorific title of the Nawab of Pataudi, was in his day one of the figures who allowed Indian cricket to emerge from the lowly international status it held until relatively recently. In early June 2005, however, he appears to have fallen from grace somewhat by being arrested for poaching. He was detained because police found the carcasses of a black buck and two rabbits in a vehicle found in the northern state of Haryana. He was later charged under wildlife protection laws (*The Daily Telegraph of 7/6/2005, p. 12*). No further details are available at the time of writing.

Rakti owner arrested in the US

In late May 2005, it was reported that Gary Tanaka, the owner of Rakti and one of the leading players in international flat racing, was being held without bail by the US authorities after having been accused of stealing funds from clients of his investment company in order to purchase at least three racehorses. Mr. Tanaka normally does not buy bloodstock at the annual yearling sales, preferring instead to purchase horses which are already in training. In addition to Rakti, who has carried off five Group One events in his career to date, he owned *Dernier Empereur*, the 1994 Champion Stakes winner, as well as the top milers *Keltos* and *Docksider*.

2. Criminal Law

He also owned Golden Apples, the winner of several top races in the US (*The Guardian of 30/5/2005, p.28*).

Alberto Vilar, Mr. Tanaka's partner in Amerindo Investment Advisors Inc, which is based in New York, was also arrested and charged separately with stealing \$5 million in client funds (*Ibid*).

Brazilian footballers continue to be targeted by kidnapers

It will be recalled from a previous issue of this Journal (*[2005] 1 Sport and the Law Journal p. 60*) that the mother of Robinho, one of Brazil's most promising young football talents, was kidnapped from her home, not far from the city of Sao Paulo. Unfortunately, far from being an isolated incident, this appears to be part of a wider trend under which well-known footballers have attracted the attentions of the criminal fraternity for the purposes of extortionate financial gain.

In mid-March 2005, Ines Fidelis Regis, the mother of the Sporting Lisbon defender Rogerio, was abducted by three armed men who broke into her house in Campinas, around 60 miles from Sao Paulo. Her daughter was gagged and bound. Two weeks earlier, the 45-year-old mother of Porto striker Luis Fabiano was snatched away near her flat in Campinas. No further details on either case were available at the time of writing. The police were working on the assumption that the women had been snatched by the same group. In another incident, the 51-year-old mother of Sao Paulo striker Grafite was held for 24 hours before being rescued by police (*The Guardian of 23/3/2005, p. 18*).

Security issues

Security concerns affect England tour of Pakistan....

As a nation, Pakistan does not have the most enviable record on internal security, mainly in view of the many bombings and other terrorist activities perpetrated by political and religious extremists. Particularly the Southern city of Karachi has suffered the attentions of these violent people. Already, this has had an effect on the nation's ability to host major international sporting events. When a suicide bomber killed 11 French naval technicians outside the hotel where the New Zealand cricket team were staying in 2002, the latter aborted their tour of the country. Since that attack, both South Africa and India have refused to play there. It will also be recalled from a previous issue of this Journal (*[2005] 1 Sport and the Law Journal p.60*) that earlier this year, the Australian hockey squad withdrew from the Champions' Trophy fixture in Lahore because of security concerns – the previous week having seen a suicide bombing which killed four people at a mosque in the city.

Security concerns were therefore foremost to the minds of those responsible for organising the planned England tour of Pakistan later this year. In June 2005, two English security experts started the process of inspecting various venues in Pakistan on behalf of the England and Wales Cricket Board (EWCB). In addition to Karachi, the security team visited Multan, Lahore, Rawalpindi and Faisalabad, which are all proposed venues for the three test matches and five one-day internationals scheduled for the autumn. Two representatives from the Professional Cricketers' Association (PCA), John Carr and Richard Bevan, also visited Pakistan after receiving reports from the security experts (*The Daily Telegraph of 27/6/2005, p.S11*). Earlier, Pakistan had already dropped Peshawar, which is close to the Afghanistan border, from the itinerary because of similar security concerns (*The Daily Telegraph of 6/6/2005, p.S4*).

Following these visits, the various authorities' fears and concerns were not allayed in their entirety, and as a result, the England team will not be playing a test match in Karachi. In addition, following talks with the officials from the Pakistan Cricket Board (PCB), the latter suggested to England that the touring party should play back-to-back one-day internationals in Karachi (*The Guardian of 6/7/2005, p.88*). At the time of writing, it was not known whether the ECB had agreed to this request.

2. Criminal Law

... and Lions' tour of New Zealand

Another major sporting tour which has been dogged by security concerns – albeit perhaps of a slightly more paranoid nature than those adumbrated in the previous section – has been the British and Irish Lions' tour of New Zealand which took place during the summer of 2005. This was perhaps the most keenly awaited Lions tour ever, and obviously a number of precautions needed to be taken to ensure the players' safety. However, when the tourists decided to post various police officers around their training ground at Takapuna Rugby Club, located near the team's hotel, more than one local voice was raised in protest. Susan Slater, a representative of a local pressure group which deals with law and order issues in Auckland, New Zealand's largest city, she berated this decision in the following terms:

"If we had an abundance of police resources I wouldn't worry about it. But with all the mayhem going on in our city, why should the taxpayer support the rugby union, who should be able to pay for the security they need? The Lions have more chance of being murdered on the street than on the field at a training run. They're not royalty, for goodness sake" (The Independent of 31/5/2005, p. 66).

Indeed, there seemed to be less concern about the safety of royalty, in the shape of Prince Harry who later was to join the party because of his "stature" (whatever that may mean), than there was for the Lions' best-known star, Jonny Wilkinson. Whenever the latter appeared in public, as he did at a memorable Maori welcoming ceremony at Rotorua, he is accompanied by security guards, and the Lions openly admitted that they were taking regular advice on "the logistics of getting in and out of places". The New Zealand Prime Minister herself is surrounded by less security than a visiting rugby fly-half.

As if this were not enough, the Lions erected fencing around the pitch at Takapuna in an effort to bar prying eyes, and have even blanked out the windows of the clubhouse just in case some silver-ferned tactician with a pair of powerful binoculars and a false moustache should find his way to the bar. Whilst the Lions were training one Sunday morning, a dozen or so police officers were available to prevent groups of enthusiastic youngsters from taking a look at the line-out drills. Perhaps for their next tour the Lions should invite not only Alistair Campbell, but George Smiley as well (Ibid).

Other issues

Swiss sporting agent faces criminal charges

This issue is dealt with fully under the section "Sporting agencies" (see below, p.58).

3. Contracts

Media rights agreements

Indian cricket authorities tune in to new venture following media rights dispute

In mid-April 2005, it was learned that India's cricket board was considering establishing its own 24-hour television channel. This would yield £2 billion in the first five years from transmitting at least 29 Tests and 43 one-day internationals every year. This news broke as it emerged that the Board of Control for Cricket in India (BCCI) is currently involved in a legal dispute with Zee Telefilms, which had submitted a bid of £140 million for broadcasting rights for the next five years. The BCCI has allegedly cancelled the agreement and awarded the rights to Doodarshan, the public service broadcaster, on a series-by-series basis (*The Times of 15/4/2005, p.85*).

Legal issues arising from transfer deals

Manchester United finally get Stam transfer cash

It will be recalled from a previous issue of this Journal ([2003] 2 *Sport and the Law Journal* p. 47) that the transfer to Lazio Rome from Manchester United of Dutch international defender Jaap Stam had experienced considerable financial difficulties, to the point where the British club were prepared to launch legal action against the Italian side. In early May 2005, the Manchester club finally withdrew the threat of legal proceedings after announcing that the Italian club had finally paid off the £16 million transfer fee for the central defender – nearly four years after the latter had left Old Trafford. The leading Premiership side also disclosed that the failure on behalf of the Roman club to pay the full amount within a year of the Stam signing, as was stipulated in the contract, had landed them a further £1.3 million. As part of a rescheduled agreement, the Old Trafford board insisted that Lazio should pay interest by way of compensation which would, in effect, raise the Stam transfer fee to £17.3 million. Mr. Stam later moved to Milan for a reported fee of £4 million (*The Guardian of 6/5/2005, p.34*).

The alternative was the possibility of legal action, under which the English club had threatened to sue their Roman counterparts. In mitigation of their failure to pay the required sum, Lazio had pleaded "serious financial difficulties". United had called in European governing body UEFA as long ago as September 2002 after revealing that they were still owed £12 million under the deal. Their lawyers subsequently obtained a

contractual guarantee from Lazio's parent company, Cirio, that the fee would be paid in full (*Ibid*).

Portuguese agent in dispute with Proactive Sports

In early May 2005, it was learned that Jorge Mendes, an agent whose client list reads as a who's who of Portuguese football, was being sued by British company Proactive Sports Management, which claims to be owed several millions of pounds following a series of high-profile transfer deals. Almost every major Portuguese player to have joined a British club in recent times, including Hugo Viana, Cristiano Ronaldo and Paulo Ferreira, is represented by Mr. Mendes – as indeed is the Chelsea manager, Jose Mourinho. Proactive alleges that it signed a binding agreement with Mr. Mendes to represent his interests in Britain, and that it is therefore owed a percentage of the relevant agents' fees charged for recent deals. These contracts are enforceable under Portuguese law, and the case is scheduled to be heard later this year by a Lisbon court. Relations between Proactive and Mr. Mendes have comprehensively broken down over the disputed payments (*The Guardian of 7/5/2005, p.S17*).

Because the case is now sub judice, neither side is able to confirm the figures involved, although it is known that Mendes earned as much as £1 million from Cristiano Ronaldo's transfer from Sporting Lisbon to Manchester United in 2003. It is not expected that any of the high-profile footballers involved will be required to testify (*Ibid.*). No further details are available at the time of writing.

Existing restrictions on transfers between amateur clubs post-Bosman. Austrian academic article

Thus far, the implications of the Bosman decision on the world of football transfers have been discussed and implemented mainly at the level of professional football. However, players performing for amateur clubs are also capable of changing clubs, and, in Austria at least, such transfers remain subject to a large number of restrictions – such as the payment of transfer compensation, the observance of certain transitional transfer periods and waiting periods. The author of this paper examines the lawfulness of such restrictions under Austrian law, in particular in the light of the constitutionally guaranteed freedom of association (*Christ, P., "Vereinswechsel im Amateurfußball" [2005] 10 Österreichische Juristenzeitung p. 370 et seq.*)

The author arrives at the conclusion that these restrictions are extremely dubious from a constitutional

3. Contracts

viewpoint. The contingency of a transfer on the payment of a release fee, and the observance of a waiting period on the part of the player seeking a transfer, affect the latter considerably in his/her freedom of disposal, whereas there are, in the author's opinion, very few reasons why such a system should be made compulsory for the clubs in question. This imbalance in the interests concerned would not give rise to such great concerns if it were not for the power wielded by the Austrian Football Federation (ÖFB) in the field of organised football. This monopolistic position occupied by the Federation leaves the individual club member with the choice between submitting to the rules which regulate transfers between clubs, or renouncing any role in organised football whatsoever. In the author's opinion, the various restrictions imposed are, accordingly, both immoral and unlawful, and should for that reason be declared null and void. This is the case even though the relevant rules are seldom applied, because in most cases the clubs and players involved succeed in finding an arrangement which suits all parties concerned. The existing restrictions should, in the author's view, be replaced by a system of training fees, which would compensate the clubs for the training already afforded to the transferred players, and provide an incentive for the clubs to improve their levels of training for young players.

Employment law

Football federation was right to allocate to another club a footballer who was constructively dismissed. Belgian court decision

The decision by the European Court of Justice (ECJ) in the Bosman case has produced many consequences for the world of football, many of which can broadly be said to be beneficial, in that the professional footballer has been given greater freedom of disposal over his/her own career by being able to move freely at the end of his contract of employment. However, it has also given rise to some by-products which are less fortunate in their effects, and which may exercise the football authorities of Europe in the future, if a recent and interesting Belgian court decision is anything to go by (*Decision of the Brussels Court of Appeal (Hof van Beroep) dated 14/12/2004, in Rechtskundig Weekblad of 30/4/2005, p. 1384 et seq.*).

Throughout Europe, there have been certain suspicions that a number of clubs have attempted to circumvent the freedom of contract conferred by the Bosman decision by selling the player at a time when the

contract of employment is still in force, which still enables them to charge a transfer fee for the player. This what appears to have been the case when, in July 200 – i.e. one year before his contract of employment was due to expire – a professional footballer employed by a club (anonymously referred to as S.L. in the relevant court decision) came under heavy pressure from his club to sign a new agreement. The object of the exercise was to bind him to the club under a new five-year agreement, so that they could sell him in the course of the latter by means of a traditional transfer – with the related traditional fee. The player, referred to as De B., refused to bow to such pressure.

As a result, the club decided to penalise Mr. De B for his obstinacy by refusing to select him for first-team matches, which obviously had serious economic implications for the player. The other professional clubs seem to have entered into some kind of "solidarity pact" with the club in question by undertaking not to buy the player. (In the meantime, this has given rise to an investigation by the Belgian Ministry of Economic Affairs into allegations of the forming of an unlawful cartel by Belgian football clubs.) Faced with what he regarded as unacceptable blackmail, the player withdrew from his contract of employment with the club for "urgent reasons" – in other words, he claimed constructive dismissal, under Article 35 of the 1978 Belgian Law on Contracts of Employment. He also requested the Belgian Football Federation (KBVB) to allocate him officially to the club with which he wished to conclude a new contract of employment.

For this purpose, the player summonsed the KBVB to appear in summary proceedings, with the club S.L. intervening. At first instance, the action was dismissed because, in the words of the judge, to award it would have meant considerable dislocation for the world of football. However, the player appealed to the Brussels Court of Appeal (Hof van Beroep), which overturned the decision appealed against, on the basis that the player could justifiably regard himself as having been constructively dismissed. It ruled that:

"without making any definitive judgment on this matter, it must be accepted that S.L. appears to have been so deficient in performing its contractual obligations as to render, immediately and definitively, impossible any professional co-operation between employer and employee, and therefore this is sufficient to warrant the immediate termination of the contract of employment"
(translation by the author)

3. Contracts

The Court therefore ordered the Belgian Football Federation to allocate the player to the club of his choice, subject to payment of a periodic penalty (dwangsom).

Sports shop employee has right to convert to full-time employment, rules French court

In April 2005, the Paris Court of Appeal (Cour d'appel) overturned the decision of a lower court which had denied a part-time sports shop assistant the right to convert to a full-time position. It ruled that, under Article L.212-4-9 of the Employment Code (Code du travail), as well as under the terms of a collective agreement governing the working conditions of those employed in the sports and entertainment industries, part-time workers enjoy priority in being awarded any full-time post of the same professional category, or its equivalent, which becomes available in the firm which employs him/her, and that the relevant employer is obliged to give a reply to any such request in writing, by registered post, and stating reasons for any refusal. The worker in question had for four years repeatedly applied for full-time positions which had become available, without ever receiving any written and reasoned reply. The worker in question was able to reveal a large number of offers of full-time employment made by the employer during the period under review, whereas the latter was unable to show that there was no vacancy in the professional category, or in a similar category, occupied by the worker, or that the conversion applied for would have had damaging consequences for the smooth operation of the firm. This failure to observe the formal or substantive legislative rules on this subject had caused loss to the worker in question, who therefore had a right to compensation for the loss incurred (*Decision of the Cour d'appel (Court of Appeal) of Paris dated 5/4/2005, in JCP/ La semaine juridique – édition générale of 25/5/2005, p.988*).

New salary deal agreed in US ice hockey league

It will be recalled from a previous issue of this Journal ([2005] 1 *Sport and the Law Journal* p.63) that, for the first time ever, the national ice hockey championship in the US had to be cancelled because of an industrial dispute between the National Hockey League (NHL) and the players' trade union. In early July 2005, it was learned that the NHL and the union concerned had reached agreement in principle on a new salary deal, which would finally end the lockout. If the agreement is ratified by the 10-strong NHL executive committee, the players will be signed up for the new season, planned to commence in October (*The Guardian of 8/7/2005, p.31*).

Industrial strife in international cricket – an update

It will be recalled from a previous issue of this Journal ([2005] 1 *Sport and the Law Journal* p. 64 et seq.) that a number of industrial disputes have recently caused problems among some of the top teams in international cricket. In the case of the Australian team, it will be recalled that Cricket Australia, the controlling board for the sport in that country, had wanted to offer players set contracts, but that proposal was refused by the players' trade union. The disagreement continued to fester during the Aussies' tour of New Zealand, but was resolved before the party left for the current Ashes series in England. Under the new four-year deal, the Board agreed to continue to allow players a 25 per cent share in the revenue earned by Cricket Australia (*The Daily Telegraph of 18/4/2005, p.S9*).

The dispute between the West Indies' squad and their cricketing authorities has also been resolved, although this has been accompanied by a good deal more acrimony and mutual distrust than was the case with the Australian disagreement. The reader may recall that the disagreement between the players and the West Indies Cricket Board (WICB) was that the latter required certain leading players to discontinue their sponsorship deals with Cable & Wireless, which is a competitor of the Board's official sponsor, Digicel. Because the seven players in question refused to back down, the latter were dropped from the team to meet South Africa and Pakistan. Efforts to find a compromise, which even involved the Grenada Prime Minister Keith Mitchell, had hitherto been unsuccessful.

Some signs of hope materialised at the end of March, when reports surfaced that two of the banned players, Chris Gayle and Ramnaresh Sarwan, had ended the sponsorship deals which sparked the dispute (*The Independent of 31/3/2005, p.58*). However, that left one major figure who remained in dispute, i.e. the captain and record-holding batsman, Brian Lara, who still refused to end his sponsorship deal. The Board belatedly appealed to Lara to play, but he refused to do so unless the other players were also included in the invitation. Accordingly, the first Test against South Africa went ahead without him, the eminently experienced Shivnarine Chanderpaul being honoured with the captaincy. Three other players who emulated Lara's resistance, Fidel Edwards, Dwayne Bravo and Dwayne Smith, also remained outside the team. In late April, however, Cable & Wireless confirmed that they had terminated their deals with these three players. Earlier, the other players involved, Ravi Rampaul, Ramnaresh Sarwan and Chris Gayle, had been released from their

3. Contracts

contracts by Cable & Wireless on a temporary basis, in order to enable them to play (*The Daily Telegraph of 20/4/2005, p.57*).

However, just before this issue went to press, the dispute had taken a new turn. In early July, it was learned that the West Indies party would tour Sri Lanka later that month without Lara or most of their leading players after the WICB and the West Indies Players' Association (WIPA) had failed to reach agreement on fees from the sponsor Digicel. The players' union had demanded fees of £83,000, but the WICB agreed to pay only £28,000 (*The Daily Telegraph of 2/7/2005, p.59*). The dispute had not been settled at the time of writing.

Sporting agencies

UEFA agrees framework of rules for football agents...

It is not only in these columns that recent concern has been expressed over the role and influence carried by football agents at the top end of the professional game. As a result, the regulatory authorities of the game have been pondering ways of reining in their influence, and a working party from the entire football family, including FIFA and UEFA, had an all-day meeting at UEFA's Nyon headquarters in order to elaborate the necessary rules. The collective will is for a code of conduct which will be enforceable throughout the world. Currently, agents have an opportunity to flout the rules by basing themselves in a country governed by one football authority whilst doing business in another whose football federation has no jurisdiction over foreign agents' activity (*Daily Mail of 11/5/2005, p.76*).

.... whilst one of them faces criminal charges (Switzerland)

The urgency of subjecting agents to some form of regulatory framework was emphasised by the news that well-known agent Marc Roget was being held in a Swiss prison. At the time of writing, he was due to face charges related to serious fraud involving the Swiss side Servette, who have gone bankrupt. Roget, whose former clients include footballers Patrick Vieira, Nicolas Anelka and Claude Makalele, took a controlling interest in Servette the previous summer. The Geneva team, who have won more national honours than any other Swiss club apart from Grasshoppers Zurich, went out of business in February 2005 (*Ibid*).

Sponsorship agreements

Major German work on sponsorship agreements

The publication of a major handbook on sponsorship agreements is all the more welcome since the sums for which they account have continued to grow apace – between 1996 and 2003 the total volume of sponsorship money transacted has amounted to approximately €3 billion. It provides a comprehensive introduction to the various areas of sponsorship agreements, including those concluded in a sporting context (*Weiland, N.G., and Poser, U., Sponsoringvertrag (2005) Munich, reviewed in [2005] Neue Juristische Wochenschrift p.1848*).

Whisky sponsorship runs into difficulty in Pakistan

In mid-July 2005, the Pakistan cricket authorities informed the International Cricket Council (ICC) that their players will not wear or display logos of a whisky brand sponsor in the Super series match, to be held in October of this year. Alcohol consumption is prohibited for Muslims in the Islamic state of Pakistan (*The Daily Telegraph of 18/7/2005, p.59*).

Other issues

Organisers of rallying event not contractually liable for assistance van accident, rules French court

In the case under review, during the Granada – Dakar rallying event, an assistance van which, in accordance with the instructions received from the organisers, had monetarily veered away from the marked-out track in order to circumvent a subsidence, collided with an explosive device and was seriously damaged. The Court of Appeal of Versailles had decided that the claimants had failed to prove negligence on the part of the organisers. The Supreme Court conceded that, although the organisers of a high-risk competition are bound by an obligation to perform a service without needing to achieve a certain result (*obligation de moyens*), they must nevertheless give adequate warning of all the inherent dangers. However, the organisers had done exactly that by exploring the route thoroughly beforehand in order to satisfy themselves of the participants' safety. The presence of the explosive device close to the track was a fortuitous one, and nothing could prompt the assumption that it existed and that it should have been detected earlier (*Decision of*

3. Contracts

the Cour de Cassation (French Supreme Court) of 25/1/2005, JCP/La semaine juridique – édition generale of 9/3/2005, p.461).

Irish bookmakers sue BHB over data contracts

It will be recalled from a previous issue of this Journal ([2005] 1 *Sport and the Law Journal* p. 83 et seq.) that, in November 2004, the European Court of Justice (ECJ) seriously undermined the ability of the British Horseracing Board (BHB) to charge bookmakers for racing data such as runners and riders. One of the consequences of this ruling is that the BHB now faces the prospect of being taken to a Dublin court by 60 Irish bookmakers later this year. Ivan Yates, a former Irish government minister who owns 34 betting shops and is leading the action, even issued the apocalyptic warning that the BHB directors could find themselves serving prison sentences.

In mid-May 2005, a writ and statement of claim were served on the BHB by owners of 350 betting shops, in a bid to annul a contract obliging all Irish bookmakers to pay a total of €20 million for horse racing data. Mr. Yates claims that around £30 million had been paid by Irish "layers" (i.e. betters who back horses to lose) since the data levy was first introduced by the BHB in the spring of 2002. He alleges that the ECJ verdict means that database rights, exclusivities and warranties claimed by the BHB are no longer valid, and that therefore the contract by which the latter charged the bookmakers €20 million per annum was excessive. The object of the court action was that the contract be declared null and void, and that the BHB should pay damages (*The Daily Telegraph* of 17/5/2005, p.57).

If the Irish bookmakers' action proves to be successful when their case is decided by the Commercial Court in Dublin, there is the prospect that the BHB could become insolvent – which in turn could lead to the directors being sued. The BHB had, according to Mr. Yates, steadfastly refused a request by the Irish bookmakers to be allowed to pay the cash in question to a ring-fenced account which would be frozen until such time as the action was settled. He added:

"The legal advice we have got fills me full of confidence (sic) and there can be only one outcome to this case. They should not be spending the money we are sending them, but they are spending it. They (the BHB) only have £5 million in loose change at any point in time but they are spending the money, which may mean we will sue the directors personally" (Ibid).

Only the previous week, the BHB had announced that they were reinstating the owners' premium scheme, which was suspended as part of cost savings which were prompted by the ECJ ruling. According to Mr. Yates, the BHB had only itself to blame for this situation, having acted "irresponsibly" and never sought to enter into negotiations on the position which arose from the ECJ ruling. No further details are available at the time of writing.

"Anti-tout" clause in German football federation's World Cup tickets open to legal challenge, claims German author

For the forthcoming World Cup tournament, to be played in Germany in 2006, demand for tickets will understandably be high, and it can therefore be expected that some people will attempt to sell any tickets they have obtained at a higher price than their face value. This has prompted the German football federation (Deutscher Fussballbund – DFB) to insert in their match tickets a clause stating that tickets may only be transferred by their original owner after authorisation by the DFB. This has run into obloquy from some quarters, where it is believed that such an "anti-tout" clause is highly dubious as to its legality. Prominent amongst these is the author Marc-Phillippe Weller, who, in an academic article in a leading German journal, claims that the resale of such tickets cannot be equated with black-market trading. He also contends that these clauses, in their current form, are contrary to German law on general terms and conditions (allgemeine Geschäftsbedingungen), and urges the DFB to revise its strategy on this issue (*"Das Übertragungsverbot der Fussball-WM tickets – eine angreifbare Vinkulierung durch den DFB"*, in [2005] 14 *Neue Juristische Wochenschrift* p. 934).

4. Torts and Insurance

Sporting injuries

No entitlement to damages for injuries sustained using springboard. French Supreme Court decision

In late February 2005, the French Cour de Cassation was called upon to adjudicate in a case arising from a sailing accident. The claim was brought against the company responsible for developing sailing facilities for the town of Gruissan. Its employees set up a springboard along the lake enabling people mounted on bicycles to jump into the water. Several days later, the claimant attempted to dive from the springboard but slipped at the last moment and fell in shallow water, thus causing him serious injury. He and his parents brought proceedings against the company and its insurer, in order to obtain damages for the loss incurred.

The Supreme Court dismissed the application. It held that the company had set up the springboard in such a way as to enable people to run and jump into the water. The claimant knew that he should take a run before plunging in, but decided to perform a standing jump from the edge of the ramp. His injuries did not therefore result directly from the position occupied by the springboard but from the claimant's failure to use it properly. Consequently he was not entitled to claim damages (*Decision of the French Cour de Cassation of 24/2/2005, in European Current Law 4/2005, p.116*).

Football club not held vicariously liable for injuries caused by one of its members. French Supreme Court decision

In January 2005, the French Supreme Court (Cour de Cassation) ruled that sporting clubs, whose objective is to organise, direct and supervise the activity of their members during competitions and training sessions in which the latter participate, are entirely liable for the loss which they cause by virtue of faults which they commit in the shape of breaking the rules of the game. During a friendly football encounter, the goalkeeper who was a member of a club was caught and injured by a player from another club.

The Court of Appeal (Cour d'appel) of Pau had held the latter liable for the loss sustained by the victim. This was in spite of the fact that it had not been demonstrated that the injury suffered by the victim was the result of a fault committed by the other player and that the latter collided with the goalkeeper as part of a lawful manoeuvre. The defendant club had failed to prove that there had been contributory negligence on

the victim's part, or that the injury had not been sustained as a result of force majeure. In the light of all these circumstances, ruled the Court of Appeal, the defendant club was liable even in the absence of a fault on the part of one of its players, since the victim could prove that one of the defendant club's players had played a material part in the production of the damage incurred. The Supreme Court considered that, by thus ruling, the Court of Appeal had wrongly applied the relevant provisions in the Civil Code on vicarious liability (Article 1384). It therefore set aside the court's decision and ruled that the case be tried again by a different Court of Appeal (*Decision of the French Supreme Court [Cour de Cassation] dated 13/1/2005, in JCP-La semaine juridique-edition generale of 16/2/2005, p.340*).

Horse owner and victim held liable for failure to inform trainer of reactions displayed by horse. French Court of Appeal decision

In June 2005, the Court of Appeal (Cour d'appel) of Limoges was faced with a case in which the owner of a horse had entrusted the latter to a professional trainer. The latter sustained physical injury when the horse charged into a cattle truck and he attempted to beat it back it by the use of a whip. The Court ruled that the horse owner had been negligent by failing to inform the trainer of the horse's reactions, particularly its habit of rushing forward at the sight of a whip or a rod. However, the Court also held that the victim was guilty of contributory negligence. As a professional trainer, he should have anticipated a dangerous reaction on the part of a horse which he did not know, and which he was forcing to take up a position in a restricted and closed space by hitting it with a whip, the horse's reaction being dangerous but frequent and predictable in the given circumstances. This contributory negligence was held to account for two-thirds of the loss caused, whereas that on the part of the horse owner was held to account for one-third (*Decision of the Court of Appeal (Cour d'appel) of Limoges dated 9/6/2004, in JCP-La semaine juridique-Edition generale of 6/7/2005, p.1320*).

Liability rests on both parties in the event of unexplained skiing collisions. German Court of Appeal decision

In March 2005, the Bonn Court of Appeal (Landesgericht) decided that, in the event of a collision between two skiers, of whom neither is essentially the faster or of whom neither is skiing from above or from below, there is a rebuttable presumption that both had failed to give to each other the necessary degree of watchfulness, and had therefore both infringed the relevant rules of the FIS (world governing body for the

4. Torts and Insurance

sport) in such a way as to incur tort liability. However, in the case of a collision between a skier and a snowboarder, the allocation of liability should be 60/40 given that (a) a snowboarder carries greater weight than the ordinary skier, and therefore carries greater risks of causing injury in the event of a collision because of the higher velocity which he commands, and (b) a snowboard is more difficult to manoeuvre and needs to take account of a blind angle on every backside turn (*Decision of the Court of Appeal (Landesgericht) of Bonn dated 21/3/2005, in [2005] 26 Neue juristische Wochenschrift p.1873*).

Legal paradoxes in the law of torts applied to sporting activity. French academic article

In France, as practically everywhere else, the world of sport has for some time now given rise to an abundant case law in the field of tort liability. In order to enable this area of the law to take on a life of its own, the courts have even developed rules which are specific to sport, more particularly by imposing limits on the liability of sporting performers in the course of competitions. However, these sporting activities are often at the origin of developments as regards the general rules which apply to tort liability, in particular those which concern vicarious liability – as witness the various developments which have attended the liability of parents for their minor children under Article 1384 of the Civil Code. There is therefore no great distance between the ordinary law of torts and sporting activity; however, the latter can at times enter into collision with the traditional rules which apply to it, or with ordinary considerations of common sense. The result has been a number of paradoxes in the law, which the author sets out in this important article (*Mouly, J, "Les paradoxes du droit de la responsabilité civile dans le domaine des activités sportives", in: JCP-La semaine juridique-Edition generale of 4/5/2005, p.788.*).

Libel and defamation issues

Lance Armstrong sues over book allegations (France)

It will be recalled from a previous issue of this Journal ([2004] 2 Sport and the Law Journal p. 93) that, giving expression to the various rumours which have surrounded the extraordinary prowess of seven-times Tour de France winner Lance Armstrong, a book, called *LA Confidentiel*, was published earlier this year which suggested Mr. Armstrong's involvement with performance-enhancing drugs. Having been unsuccessful in his attempt at having a denial inserted

in the book, Mr. Armstrong has decided to launch a legal action for defamation against its authors (*The Guardian of 23/4/2005, p.S11*).

In addition, he is bringing court proceedings against some of the individuals interviewed by the authors, David Walsh and Pierre Ballester, during the preparatory stages of the book. He has served a writ of summons on Stephen Swart, who was his team-mate at Motorola, and Emma O'Reilly, who was a masseuse for the US Postal team. He has always strenuously denied ever taking such drugs, and recently it has even emerged that he has contributed a large sum of money to help fund anti-doping research (*Ibid*).

Kevin Keegan fails in Danish libel case

In late June 2005, it was learned that Kevin Keegan, the former England player and manager, as well as Proactive Sports Management, a Manchester-based sporting agency, have failed in a libel action brought in Denmark against Olav Skaaing Andersen, the former sports editor of the newspaper Ekstra Bladet, and Palle Sorenson, the former head of the Danish players' trade union. The action was centred on certain comments made in newspaper articles in the course of 2003 concerning the transfer of Danish defender Mikkel Bischoff from AB Copenhagen to Manchester City in July 2002. Documents revealed in court during the trial, which lasted three weeks, indicated that Proactive (currently known as the Formation Group) may have acted on behalf of both Mr. Bischoff and Manchester City in negotiating the transfer, which would infringe the relevant rules elaborated by world governing body FIFA on the subject. Bischoff's agent, Karsten Aabrink, of Proactive Scandinavia, informed the Court that he had been unaware that City had requested Proactive's branch in the UK to officiate in the move. Under Article 14d of the FIFA rules, an agent may only represent one party when negotiating a transfer. (*The Guardian of 23/4/2005, p.S11*).

The unsuccessful libel case has to be viewed against the background of agent Paul Stretford, who founded Proactive in 1987, being faced with an investigation by the English Football Association (FA) into alleged breaches of FIFA and FA regulations over the manner in which he acquired the right to represent England international Wayne Rooney. Mr. Stretford has vowed to fight the charges at a personal hearing. FIFA confirmed that it was aware of the case – as did the FA. It was brought over various articles in Ekstra Bladet which quoted from an internal Proactive memo, which indicated that Manchester City had paid AB Copenhagen £750,000 to sign Bischoff, but had also

4. Torts and Insurance

made a further payment of £350,000 to Proactive in order to secure the player. A spokesman of Proactive had confirmed in 2003 that such a fee had been agreed with City, and insisted that it reflected a percentage of the player's earnings for the duration of a five-year contract. As such it constituted a percentage for the agent of 5 to 10 per cent of the player's earnings. He claimed that this was a figure entirely within FIFA and FA guidelines, and that the payments have been staggered over a number of years.

Andersen, who was aware that Mr. Keegan was a proactive shareholder – as indeed was Mr. Aabrink – at the time when the Bischoff transfer was concluded, wrote in 2003 that:

“British managers have been caught receiving multi-millions in kickbacks before. The suspicion that Keegan has personally received money for the Bischoff deal is well-founded and you would think that the management of Manchester City would be interested in learning all the facts. They keep silent for the time being, however” (ibid).

Reacting to the confirmation that Proactive had received the substantial fee for Bischoff's transfer, Mr. Sorensen, who at the time headed the Danish Players' Union, was quoted in Ekstra Bladet as saying that there “something dodgy” seemed to have occurred, because an agent did not normally earn that much for a transfer of that size.

Mr. Keegan, as well as Aabrink and Proactive Sports Group plc, brought court proceedings against Andersen for libel, since they considered his comments to have implied that the City manager had benefited financially from the Bischoff deal. The former England manager had always denied that he personally benefited from this transfer other than in his capacity of minority shareholder in Proactive. Proactive Scandinavia and Proactive Sports Group plc also claimed that Sorensen's quote implied that they had committed a punishable offence. The judge in the libel action, however, ruled that the Andersen and Sorensen comments did not constitute libel under Danish law (ibid.).

Other issues

French Supreme Court confirms ruling on unlawful use of broadcasting rights

For the World Cup (football) of 2002, the television rights were allocated to specifically designated broadcasters. Nevertheless, there were several attempts by other broadcasters to screen this event. At a certain point, the French television company which was the officially sanctioned broadcaster attempted to prevent another broadcaster from screening various extracts from the World Cup games. The broadcasting of brief extracts of matches is covered by Article 18(2) of the French Law on Sports of 16/7/1984. However, this provision fails to explain what should be understood by “brief” extracts. The Paris Court of Appeal, when faced with this case, applied a strict interpretation of this concept, ruling that such broadcasts should be restricted to one brief extract every four hours, for every period of 24 hours. Accordingly, it found that the unauthorised broadcaster had committed a tort, and ordered it to pay to the officially authorised company the sum of FF 400,000 by way of damages.

This ruling was challenged before the French Supreme Court (Cour de Cassation) on the basis that in so ruling, the Court of Appeal had exceeded its authority by laying down a new rule rather than interpreting the existing law. (In codified law countries, the courts are prohibited from creating new legal rules.) Consequently, the unauthorised company could not be held liable for an action which was not prohibited at the time when the allegedly unlawful act was committed. The Supreme Court dismissed this claim, holding that the Court of Appeal had not formulated a new rule, but merely interpreted the existing law (*Decision of the French Supreme Court (Cour de Cassation) of 8/2/2005, in JCP-La Semaine Juridique-Edition generale of 23/3/2005, p.586*).

Insurance

[None]

5. Public Law

Sports policy, legislation and organisation

2012 Olympic bid soap opera finally ends – but who is the real winner and loser?

It will not have been lost on the discerning reader of this column that its author is less than impressed with the manner in which the process of bidding for the 2012 Olympic Games has developed. It will be recalled from a previous issue of this Journal ([2005] 1 *Sport and the Law Journal* p. 70 *et seq.*) that the various intrigues, dubious tactics and manoeuvres from the unclean tricks departments of the various bidders had reached such an undignified proportion, that the President of the International Olympic Committee (IOC), Dr. Jacques Rogge, was forced to intervene in order to restore some seamliness to the entire process. Dr. Rogge's wise counsel did produce the desired effect – for approximately a week, that is. Very soon, all the puerile spite and acrimony were faithfully on display once again, to the point where some people are now openly wondering whether the entire bidding process should not be abandoned, and that, instead, one permanent site for the Games should be found.

The most keenly felt rivalry by far was that between Paris and London, widely, and justifiably, regarded as the front runners in the race. This was particularly the case after it was confidently reported that, following the all-important inspection by the IOC team in March, London was said to be running neck-and-neck with Paris and New York (*The Times of 30/3/2005, p.72*). The latter was a strong contender on paper, but it would have been seen as a somewhat strange decision to award the Games to a US city for the third time in three decades. In the report in question, London was criticised for its "obsolete" public transport system and for its facilities being dispersed over too many sites. However, the revised plans for the compact model of an Olympic Park in London had made a favourable impression (*Ibid*). The Paris bid, on the other hand, had suffered a number of setbacks. In mid-March, the Olympic inspectors had shared the streets of Paris with tens of thousands of striking workers, even though the French trade unions insisted that they had no desire to wreck the city's bid to host the Games. More than half a million public sector workers had gone on strike in both the capital and other major cities. The industrial action had caused disruption not only to national railways and flights, but also to cross-Channel ferry journeys (*Ibid*).

The London bid had also in the meantime attracted support from some very significant quarters. First, it was reported that the former South African President

and human rights campaigner, Nelson Mandela, had become the most significant foreign politician to back the London bid, by stating that the city's cultural diversity made it the ideal setting for such an event. The support of such a senior statesman, who was also a Nobel peace laureate, was thought to be capable of influencing the vote of some IOC members, particularly those representing Third World countries (*The Times of 7/4/2005, p.74*). Similar considerations applied when the London bid attracted the support of Commonwealth General Secretary Don McKinnon. Although the Australian was unable to lobby directly for London's cause, he formally declared his support. Here again, the sheer number of Commonwealth members wielding a vote in the final selection, as well as the fact that London was the sole Commonwealth country to have submitted a bid, was seen to work in its favour.

However, shortly afterwards the London team attempted a coup which was seen as a setback rather than a boon, when it offered election "sweeteners" (other called it a less flattering word beginning with the letter b) to the amount of £15 million in an attempt to sway the vote. Included in this offer were full-fare economy class air fares to London, 100 free telephone calls from the Olympic village, free Underground travel for two weeks prior to and after the Games, and the opportunity for all athletes' families to stay with a British family free of charge. The London bid team denied that there was anything about this offer which contravened IOC rules (*The Daily Telegraph of 19/4/2005, p.S1*). Whether this was the case or not was never fully established. Days later, the IOC President emphatically reminded all bidding cities of the caution which he had already issued earlier (see above) against the dangers of a bidding war between the contenders. The matter had also been referred to the IOC Ethics Commission. Rather than run the risk of a forced withdrawal, the London team revoked this offer in order to avoid further damage (*The Sunday Telegraph of 24/4/2005, p.S1*). The Ethics Commission accordingly announced that they would not be taking any action against the United Kingdom capital over this affair (*The Independent of 29/4/2005, p.69*). It was generally agreed, however, that this episode had been something of a public relations setback for the London bid (*The Daily Telegraph of 25/4/2005, p.S1*).

Another embarrassment for the London campaign came in the form of a coalition of London businesses threatened by the Olympic bid, who lobbied the IOC against it. The 308 business concerned, which are based in Marshgate Lane, Newham, passed a vote of no-confidence in the bid after meeting the London 2012 campaign leaders and the London Development Agency

5. Public Law

(LDA) at Stratford Town Hall. Dissatisfied with the LDA's response to their request for alternative land to be found for businesses which would be compelled to move, and a gap in land valuations, they arranged to write to the IOC setting out their concerns (*The Guardian of 27/4/2005, p.36*). There were further hints of underhand goings-on when it was suggested that the London bid communications chief was in the habit of making telephone calls to selected journalists, suggesting some "awkward" questions which might put Paris on the back foot. One of these concerned the possible effect the banning of Muslim headscarves in French schools could have on the bid (*The Independent on Sunday of 29/5/2005, p.S2*). It also seemed that an increasingly irrelevant set of developments was being pleaded either in favour or against the contenders' bids – one of which was, incredibly, the French negative vote on the European constitution!

The London team also came in for a good deal of criticism over some of its promotional literature. One particular item threatened once again to bring the bid team into disrepute. It concerned the "leap for London" campaign launched in early June, which used as its backdrop a picture of the medal-winning long jump made by Bob Beamon at the 1968 Mexico Olympics. It so happened that Mr. Beamon was a board member of the New York bid, and he wrote to the London bid leaders demanding a public apology for this perceived slight. He accused London of overstepping the mark and Lord Coe in particular of a lack of respect. He called for the offending literature to be withdrawn (*The Guardian of 3/6/2005, p.36*).

In the meantime, the other contenders were still blithely putting forward the best possible arguments for their case. New York's hopes appeared to receive a boost when the city's trade unions agreed to unprecedented no-strike pledges (*The Guardian of 25/3/2005, p.31*). Another boost for the Big Apple came with the news that the New York Jets, the city's renowned American football team, had obtained clearance from the city's Transportation Authority to acquire from it a 13-acre site behind Pennsylvania station in mid-town Manhattan. The Jets' plan, would transform the somewhat run-down Hudson Yards neighbourhood which runs between 8th Avenue and the Hudson River. The centrepiece of the proposal is a 75,000-seat stadium built on a large platform over the railway yards, which politicians described as a key feature of New York's Olympic bid (*The Times of 1/4/2005, p.42*). However, this move seems to have misfired. The funding of the proposal needed to be agreed by the relevant New York State panel, which

withheld the \$ 300 million which this project would have required. The mayor, Michael Bloomberg, conceded that this had dealt a severe blow to his city's chances (*The Independent of 8/6/2005, p.65*).

As the contest entered into the last few weeks, the political heavyweights on all sides started to make their presence felt. Particularly the British Prime Minister, Tony Blair, and his wife Cherie decided to give their capital as much promotion as possible by writing letters to all IOC members, and arranging one-to-one meetings in Singapore, where the vote was to be held on 6 July (*The Daily Telegraph of 29/6/2005, p.S1*). The French government, on the other hand, attempted to woo the Kenyan vote on the IOC by announcing that they would fund a technical advisor in order to help develop football in that country. This move was quite a significant one, given that up to that point the East African state had been regarded as a firm supporter of London's case (*The Guardian of 2/7/2005, p.19*). The final few days were fully taken up with frantic – and, some would say, somewhat undignified – lobbying by all the contenders, and the scene was set for a close call on 6 July. Some eyebrows were raised at the Blair's somewhat abrasive campaigning. More particularly the French complained privately that their three days of campaigning, which included meeting more than 20 IOC members, put them at a disadvantage because President Chirac only arrived the evening before the vote was taken. However, they were later cleared by the IOC of any improper conduct (*The Guardian of 11/7/2005, p.S9*).

Contrary to popular belief, London actually started as favourites during the last few days of the campaign, according to leading bookmakers, being quoted at 5/2 as opposed to the Paris odds of 11/4 (with Madrid lagging a long way behind with 10/1). Finally, after a suitable build-up at the award-making ceremony itself, came the heart-stopping moment when the IOC president opened the all-important envelope and announced the winner as being London. Amid the frantic celebrations on the British side, it emerged that the vote had been one of the closest in years. London had won the first round of voting, Madrid the second, and London again came top at the third time of asking. The final showdown was, as expected, between London and Paris, the former winning by a margin of a mere four votes (*The Guardian of 7/7/2005, p.1*).

As we all now know, the jubilation in the British capital was short-lived, in view of the lethal attacks on the London public transport system which occurred the very next day. Naturally the IOC was full of brave words in declaring that the choice remained the right one

5. Public Law

despite the attacks (*The Daily Telegraph* of 9/7/2005, p.51), but the fact is that an attack on London was widely anticipated, and the IOC's choice will make it an even more tempting target. Indeed, it was not only French sour grapes which pondered the question as to whom had truly won and lost in the end....

Problems facing other Olympic cities...

Whilst the 2012 bidding process was building up to its conclusion, other cities on whom the choice had already been bestowed were grappling with their own problems – either as prospective or as past venues. The former category obviously included Beijing, which is to host the next Games in 2008. The various buildings are being erected and seem to be raising few fears as to their readiness in time for the scheduled date. The Bird's Nest, as the Olympic stadium has been dubbed because of its steel lattice work, and the Blue Cube, which is the swimming pool complex, are making good progress. However, these and other new official buildings are setting off a major controversy.

One is a very familiar one, which has been mentioned before in these columns, and concerns the sheer cost of the exercise. It is estimated that some £40 billion are being spent on creating the new city. Leaving aside the Olympic venues themselves, there will be four new underground lines, an airport (designed by Lord Foster) and a new financial district. However, there is another criticism which is becoming increasingly articulated even in a highly prescriptive society such as that of China – and that is that there is nothing Chinese about these buildings. This reflects the fact that they are virtually all the brainchildren of top European and Australian architects, and that they represented a desire by the Chinese leadership to project a new image of their country, as having become more modern and outgoing, particularly following the Tiananmen Square killings of 1989.

In addition, there is some opposition to the way in which the remnants of the old city are being razed to the ground to make way for the new buildings. In the view of one architectural expert, Professor Wu Liangyong of Qinghua University, this has made the city:

“an experimenting ground for foreign architects. These buildings will be a scar left on the face of time, which will record our pains for ever. Once the land is used and this unreasonable urbanisation spreads, it is irreversible”
(*The Daily Telegraph* 11/6/2005, p. 20).

However, it is quite cheering to note that the Chinese people are now allowed to debate these issues – indeed, even the state media have allowed such discussion to

flourish, with the People's Daily even publishing attacks on the loss of the city's character (Ibid).

Meanwhile, Athens, the city which has hosted the most recent Games continues to feel the impact, and not necessarily in a positive manner. The public purse has come under severe strain by the extravagant costs of hosting the Olympics in 2004. At a total cost of £8 billion, these Games are now officially the most expensive ever, with ordinary Greeks facing at least two decades of debt before they are paid for. This has created budget overruns, which in turn have caused strains with the EU authorities. Greece being a member of the Eurozone, its financial authorities are under a constant obligation to keep the public debt within certain limits set by Brussels (*The Guardian* of 30/3/2005, p. 15).

These pressures have caused the Greek government to take some radical fiscal measures aimed at closing this financial gap. Thus they have targeted the country's smokers and drinkers, a measure which will not exactly endear them to the electorate, given that the Greeks are the world's heaviest smokers after the Cubans, and the move will also affect the tourists' avidity for ouzo, the national spirit. The levies also involve increasing the main rate of VAT from 18 to 19 per cent. The Finance Minister, Giorgos Alogoskoufis, has also ordered the nation's tax collectors and financial crime squad to work overtime in order to pursue the rampant tax evasion which occurs in Greece (Ibid).

All these problems were, of course, additional to the question of attempting to find some purpose for the various Olympic venues currently standing idle. Seven months after the Games ended, the Greek authorities unveiled their plans for the future use of these venues. This it was compelled to do in the face of increasing impatience on the part of the electorate at seeing these costly constructs degenerate into a collection of white elephants. The Greek culture minister, Fani Palli-Petralia, stated that:

“The time has come for the gigantic financial investment made for the Olympic Games to pay off a “capital gains” reward for the Greek people. Our policy for the exploitation of these facilities will be to ensure that the money paid by the taxpayer is not lost.”
(*The Independent* of 1/4/2005, p. 27)

To this end, the Government has recently published draft legislation which will enable cultural centres, restaurants and shops to use the grounds of the Olympic sites. These plans were, however, critically short on specifics as to exactly how, when and by whom these sites would

5. Public Law

be used. The only solid proposals to emerge have been an 18-hole golf course and a heliport at the equestrian centre, as well as a marina and five-star hotel at the yachting complex. The Government has been adamant that the sites should remain in the public sector. The venues in question, which include a specialist Taekwondo stadium and a £90 million rowing centre – both under lock and key since the closure of the Games – will cost £50 million per annum just for their maintenance (Ibid.). In addition, the water at the rowing lake is stagnating. The marathon route was hurriedly completed only weeks before the Games opened at the expense of proper drainage, and expensive building work may now be required to fix the problem. Even the Olympic Village, which was promoted as a post-Olympics success story when the Government offered it as housing to low-income families, has failed to meet these lofty expectations. The accommodation in question requires extensive refitting to make it suitable for habitation, and it will not be ready before the end of the current year (*The Daily Telegraph of 31/3/2005, p.54*).

Abramovich to fund “Russian Wembley”...

To those who have been following the depressing saga of the New Wembley project in the UK, either through these columns or elsewhere, it might seem that anyone in sporting authority would experience uncomfortable feelings along the spine whenever such a project is even mooted. Yet no such inhibitions seem to have deterred Russian policy-makers. However, the latter will be less concerned than were their English counterparts about the source of the funding required, as it was announced in mid-July 2005 that no lesser person than Roman Abramovich, the oil magnate who is the main benefactor of English premiership club Chelsea, will be footing the bill.

There are other reasons why the Russian authorities are quite keen on this project. Possibly the government of Mr. Putin regarded plans for a modern, state-of-the-art national stadium as a way of assuaging Russian egos, which were badly bruised when the city failed in its bid to attract the 2012 Olympics. The project – which apparently is already at an advanced planning stage – is also aimed at silencing Russian politicians and ordinary people, who regularly complain that the billionaire Chelsea owner spends too much of his Russian-generated oil wealth in the UK. It should also enable him to remain on the right side of the Kremlin, from where, as has been reported in earlier editions of this Journal (see, e.g., [2004] 1 *Sport and the Law Journal* p. 99), President Putin has sanctioned uncomfortable investigations into the affairs of fellow-oligarchs in recent years (*The Independent of 14/7/2005, p.23*).

Under the proposal, the 55,000-seat venue is to be built over three years. Mr. Abramovich will raise the cash for the multi-million pound project, but will be expected to recover his investment gradually from the stadium's ticket receipts. Its main function will be to host the home fixtures of the Russian national football team, whose mixed fortunes are followed closely by Mr. Putin and are a constant source of joy and frustration for ordinary Russians, who are sceptical of oligarchs such as Mr. Abramovich. The businessman's advisers also voice the hope that in time the stadium could host some of Europe's most prestigious tournaments, such as the Champions' League (Ibid.).

...whilst Germany's Wembley project well on target

With the next World Cup a matter of months away, the eyes of the entire footballing world are now firmly on its hosts, i.e. Germany. Preparations for the tournament have now entered a critical stage, and there is every indication that they are being conducted with the thoroughness for which this nation has become a byword. More particularly its showpiece stadium, the Allianz Arena in Munich, is fully constructed and equipped, and being tried out for the 2005-6 Bundesliga by its joint owners, Bayern and 1860 Munchen. It is a stunning sight, with an exterior which is made from clear panels which are illuminated in either red, blue or white, depending on whom is playing. It has been hailed as the “German Wembley”, but comparisons rightly stop at the name. With a capacity of 66,000, the largest car park in Europe, and all modern comforts, it cost £190 million, about a quarter of what is being spent on the London stadium. And it was completed on time – *Vorsprung durch Technik* indeed.

Another characteristic – unusual in current design terms – is that the stadium includes areas which can be converted into safe terracing for fans who want to stand. This is perhaps the most fascinating innovation of all – 10,000 seats in each of the North and South stands, which fold away. Each seat equates to one standing place, so the capacity remains the same, even though the experience and price vary (*The Observer of 19/6/2005, p.16*).

China cracks down on illegal betting

Ever since the Mao Tse Tung regime took over in China 55 years ago, gambling of any kind or form has been prohibited by the authorities. However, that does not mean that racing as such is entirely absent from that enormous country. Indeed, the local authority of the capital, Beijing, has recently spent £33 million on a fully-functioning racing and bloodstock-breeding centre. The

5. Public Law

venue has professional trainers and jockeys, as well as thoroughbreds racing on turf manicured and tended to rival any course in Britain, but without the bookmakers, few individual owners and a mere handful of spectators (*The Guardian of 24/5/2005, p.29*).

Things were not always so bleak for the Sport of Kings in China. When racing started in Beijing, the ban on gambling was circumvented via a "guessing game", being a semantic trick which must have enjoyed some kind of official approval, since crowds of 5,000 promised to make an early success of this venture. However, the momentum was halted when the season was curtailed by a Government inquiry into illegal betting. This continuing investigation did not focus on the track, but when racing was allowed to resume in April 2005 it was only in the stunted form of fortnightly meetings, heavy cuts in prize money and, crucially, no "guessing game". As a result, the crowds have all but vanished, as have the sales of home-bred horses to what was a slowly-expanding pool of local owners. The action on the track now has a very empty feel to it indeed (*Ibid*).

Child camel jockeys banned – but brutal trade goes underground in UAE

Another form of racing which has attracted the attentions of the public authorities recently is camel racing, a sport which has the patronage of the wealthy in the United Arab Emirates (UAE), but which provides a bleak existence for its child jockeys. However, as from April 2005 under-age jockeys have been banned in the UAE, and its young riders are being repatriated to the countries where they have been traditionally recruited, i.e. Pakistan, Bangladesh, Sri Lanka, India, Yemen and Sudan.

The ban is entirely justified. A typical child jockey can spend six years in bonded labour at stables and tracks on the wealthier side of the Arabian Sea, then be declared too old for the sport, leaving him with ridged scars, the results of bites administered by angry dromedaries. The younger and lighter the riders, the faster the camels can run, which often meant that the jockeys are given as little food as possible. When there is no racing, they are used as cheap labour, a typical working day lasting 18 hours. However, there are many operators who have evaded the ban by whisking their child jockeys into hiding across UAE frontiers, enabling their minders to evade fines of £2,800 or imprisonment. Clandestine races have reportedly been staged on remote desert flats. Though gambling is outlawed, lavish prize money is awarded by corporate or tribal sponsors, and underground bets are scarcely a secret. Officials estimate that there are at least 2,000 child camel jockeys from Pakistan leading an illegal existence

in the UAE, but children's rights groups estimate that the number is much higher and fear that, under the new ban, prices paid for compliant youngsters will climb, thereby fuelling the black market (*The Independent of 29/4/2005, p.36*).

For the recently-liberated child jockeys, most of whom were either kidnapped or sold by poor families to smugglers, happy childhoods will not be instantly resumed. In Karachi, hundreds of boys are being examined by doctors who will treat spinal injuries or lance septic saddle sores. In many cases, the inner thighs will have been rubbed raw, and vulnerable genitals without support have suffered damage. Other boys were thrown off their mounts three times their size and dragged along the tracks or trampled (*Ibid*).

US Congressman denies "golf trip" irregularity accusations

In April 2005, a trip to Britain which included a meeting with Lady Thatcher and much golf in Scotland became a full-blown US scandal, endangering the future career of President Bush's right-hand man in Congress. When Tom DeLay travelled to England and Scotland in 2000 with his wife and entourage, the air tickets and hotel bills were charged to the credit card of a lobbyist currently the subject-matter of criminal and fiscal investigations, according to a report in the leading US newspaper *The Washington Post*. These payments by Jack Abramoff represent a clear infringement of congressional rules by Mr. DeLay, who received three warnings the previous year from the Ethics Committee of the House of Representatives for his irregular use of lobbyist funds. Mr. DeLay, however, has dismissed these charges and press reports as a Democrat-driven conspiracy. He listed the trip as "educational" explaining that he met Lady Thatcher and other politicians. However, the journey also included several golf outings in Scotland. When in London, Mr. DeLay stayed in a luxury room at the Four Seasons Hotel, with its own glass conservatory overlooking Park Lane (*The Guardian of 25/4/2005, p.12*).

South African minister calls on rugby chiefs to resign

That all is not well in the upper echelons of the sport of rugby in South Africa is a proposition which has been explored on several occasions in previous editions of this Journal (*see e.g. [2004] 1 Sport and the Law Journal p.102*). More particularly the spectre of race relations, a legacy of the now-abandoned Apartheid social system, continues to haunt the sport. In the latest episode of this drawn-out saga, the Sports Minister of South Africa and the head of the nation's

5. Public Law

Olympic Committee have demanded the resignations of leading figures in the country's governing body for the sport (SARFU). More particularly Brian van Rooyen, the head of Sarfu, has been lambasted for not doing enough to encourage blacks into the sport, which is one of the most popular in the Union. He has also been dogged by allegations of mismanagement by his two deputies (*The Independent of 25/4/2005, p.24*).

More particularly Makhenkesi Stofile, the sports minister, stated in late May 2005 that the public in-fighting in the organisation had brought shame on the sport and the country. He has criticised van Rooyen's resistance to the selection of black players, commenting that the French team was more cosmopolitan than that representing South Africa. Moss Mashishi, the head of the national Olympic committee, called upon Mr. van Rooyen and his management committee to resign and be replaced by nominees of the Committee (Ibid). No further details are available at the time of writing.

Anti-ticket tout Bill introduced in Irish parliament

In October 2005, it was learned that a non-Government Bill was introduced in the Dail, (i.e. the Irish parliament) which, if passed, will render it a criminal offence to advertise for sale, offer for sale or sell a ticket for a major musical, sporting or theatrical event at a price in excess of that indicated on the ticket (Irish Law Times 10/2005, p. 146). (On the controversies and legal issues of anti-tout measures in Germany, see above under the heading "Contracts", p.63).

New French law on professional sport

In December 2004, the French Parliament adopted Law No 2004-1366 on the reform of professional sport. The main object of the legislation is to strengthen the competitive position of professional sports clubs, particularly in the context of EU competition laws. To this end, it renders more flexible certain legal provisions relating to commercially-operated sporting companies. The legal position of salaried sporting professionals has thus been changed. The legislation also liberalises certain terms on which sporting companies are organised, without subjecting them to the ordinary commercial law. (*For a more extensive treatment of this new legislation, see Carius, M., "La reforme du sport professionnel – Loi du 15 decembre 2004" in JCP-La Semaine juridique- Edition generale of 6/7/2005, p.1273*).

Hungarian legislation on the promotion and development of sport

In October 2004, the Hungarian Government adopted a Decree which establishes the National Sports Office, in order to enable wider sections of the population to have access to a healthy and active lifestyle, to broaden sporting opportunities, to encourage the development of modern sporting establishments, to further a balanced physical and mental condition and health-conscious behaviour of members of the public, to maintain the international success of competitive sports, to cultivate a high standard of success for the latter, and to implement government policy on sport (Section 1). The National Sports Office shall be a central administrative body having its own budget allocation, and shall be based in Budapest. It is operated by the Government and supervised by the Minister heading the Prime Minister's office (Section 2).

In the pursuit of its duties and responsibilities, the National Sports Office will analyse the processes which affect sport, prepare scientifically-based projections and evaluate these against the relevant policies. It will draft and evaluate proposals for sport-related legislation, propose objectives and uses for Government funds intended for sport, coordinate the assessment of the physical state of children and young people in educational establishments, and operate the National Sports Information system Other duties incumbent on the Office include tasks related to sports administration and co-operation with other national and international sporting bodies, promoting the observance of anti-doping rules, contributing towards the development of the sports health care system, making recommendations to the Government on the award of the Sporting Personality of the Nation award, and promoting and developing sporting activity for the benefit of disabled people. It also makes provision for adequate training and education for sporting professionals, the maintenance of State-owned sporting establishments, and participation in the completion of sport-related tasks required by the European Union (section 4). The national Sports office shall be headed by its Chairman, and its employees shall include public officials (section 5) (*See European Current Law 4/2005, p. 334*).

5. Public Law

Flemish decree on sport as part of education

In May 2004, the Regional Government of Flanders adopted a Decree on sport as part of education. It was enacted in the context of the steadily deteriorating physical condition of many young people, which cannot be remedied by a mere two hours of physical education per week at school. Moreover, nearly 50 per cent of young people turn their backs on active sports once they have left compulsory education. The Decree seeks to bridge the gap between sport in an educational context and sport as organised at the club level, or physical activity in a non-organised context, in order to encourage young people to engage in sport for their entire lifetime.

The decree also clarifies the objectives of Flemish government policy on sport as part of education, which are to be implemented through the Flemish Centre for Educational Sport (Vlaams Centrum voor Onderwijsgebonden Sport), which is a new public institution which replaces the old Stichting Vlaamse Schoolsport. The decree contains provisions which regulate the operation, staffing, resources and operational powers of the Centre, as well as the way in which its activity is to be monitored (*Rechtskundig Weekblad of 26/3/2005, p.1195*).

Sports tribunal advocated for Ireland. Article in professional journal

As in any other country, the Irish sporting authorities are faced with disputes surrounding eligibility rules, performance-enhancing drugs, selection criteria, commercial complexities and contractual difficulties. Also, Irish sporting organisations have been particularly alarmed by the recent experiences of the Gaelic Athletic Association (GAA) in the Irish courts. In 2004, the GAA was faced with a number of actions, which mainly took the form of interlocutory injunctions, against decisions made by its internal disciplinary bodies. In this article, Jack Anderson, a leading figure in Irish sports law, considers what Irish sport can do to ensure that it minimises its vulnerability to legal action, as balanced against every citizen's constitutional right of access to the courts. He suggests that the time is ripe to consider a national sports dispute tribunal. Such an agency would preferably operate on a statutory basis and provide a specialist sport-centred body for the resolution of all sports-related disputes without needing to resort to the ordinary court system (*Anderson, J., "Sports and the courts – time for a sports disputes tribunal of Ireland?" Irish Law Times 10/2005, p. 149 et seq.*).

(On the relaxation by the GAA of the ban on football at Croke Park, Dublin, see below under the heading "Issues specific to individual sports", p.97.)

US Senate establishes National Boxing Commission

In mid-May 2005, US senators voted to establish a National Boxing Commission in order to oversee the sport and in an effort to improve its image in the States. This Commission would have responsibility for licensing boxers, trainers, managers and promoters, and would seek to improve standards of health provision for fighters. The legislation is sponsored by John McCain, the Arizona senator who for some time now has campaigned to clean up the world of sport. The legislation proposed still has to go before the House of Representatives, but it is thought that its passage will be a mere formality (*The Guardian of 11/5/2005, p.31*).

Currently, boxing falls within the jurisdiction of the various state athletic commissions. Nevada is widely considered to be setting the highest standards. Once the new commission starts to operate, a nationwide ban will more easily be implemented and rogue states will be compelled to follow the relevant safety guidelines. The World Boxing Association and the International Boxing Federation are amongst those opposing the McCain campaign, arguing that medical staff and ambulances are not necessary at all boxing events (*Ibid*).

Public health and safety issues

Football World Cup inspires road safety drive in South Africa

Following Germany 2006, the football World Cup is destined for South Africa four years later, and is already having an effect on public life in that country. Jeff Padebe, the Transport Minister, declared in mid-May 2005 that the tournament would act as a "catalyst" for the nation's transport policy. As a result, the Government intends to crack down on reckless drivers and dangerous vehicles during the run-up to the competition. The train network will be improved, and old minibus taxis will be scrapped (*The Independent of 21/5/2005, p.29*).

Dakar rally to introduce speed limits

For the 2006 Dakar Rally, motorcycle riders will be restricted to a top speed of 150 kilometres per hour, following the deaths of two riders during the endurance event this year (*The Daily Telegraph of 2/5/2005, p. S5*).

5. Public Law

Nationality, visas, immigration and related issues

India insistent on Pritchard nationality

Over a century after Norman Pritchard won two silver medals at the Paris Olympics in 1900, the athlete remains the focus of a dispute between India and Britain as to who may lay claim to his victories. Mr. Pritchard, who was born in Calcutta to British parents, won a silver medal in the 200 metres and silver in the 200 metres hurdles. He remains the only Indian yet to win a medal in an Olympic athletics event. The website of the International Olympic Committee (IOC) lists him as Indian. However, the athletics statistics book issued for the 2004 Athens Olympics, published by the International Association of the Athletics Federations (IAAF), and which was sent to athletics associations throughout the world, maintains that Mr. Pritchard represented Britain, thus making it possible for the latter to claim the medals (*The Times of 19/3/2005, p.48*).

However, the Indian Olympic Association (IOA) and the Amateur Athletics Federation of India (AAFI) are determined to reclaim the medals for their country, thus salvaging the wounded pride of a nation which had won just 17 medals in the entire history of the summer Olympics. Concerned that Britain could lay claim to the three other Olympic medals gained by Indians prior to their country becoming independent by 1947, AAFI have demanded an explanation from the publishers. In addition, it has initiated a campaign aimed at establishing that Mr. Pritchard was Indian by placing advertisements in Calcutta's newspapers requesting information about him. The IOA has also decided to raise the issue with the Federation. Mark Butler, who edited the 2004 athletics statistics book on behalf of the IAAF, commented that there was a consensus within the international sporting community that Mr. Pritchard was Indian, but because India did not officially enter the Olympics as a nation until 1920, the book was accurate in its claim that the silver medallist represented Britain (*Ibid*).

Sporting figures in politics

Afghan female basketball player and IOC representative stands for parliament

In most other countries, the news that a moderately successful female basketball player and sports administrator was seeking election as a Member of Parliament would fail to excite the newspaper headline writers. However, special considerations apply when the country in question happens to be Afghanistan, and the candidate's name is Sabrina Sagheb. Hers is a very courageous decision in a country where in many areas it remains socially unacceptable for women to leave home without the company of a male relative and the anonymity conferred by the burkha.

Moreover, Ms. Sagheb will campaign on a platform of liberal reform and equality for the genders. She hopes to make the wearing of the burkha a matter of choice for all women, and advocates an end to forced marriages. She is at the minimum legal age for candidacy, and in a country where female literacy is 14 per cent she is exceptional in being a fluent English speaker and a university graduate. She eluded the Taliban bar on female education because her family fled to the relative permissiveness of Iran. Despite her youth, she is already the head of the Afghan Basketball Federation and an International Olympic Committee representative (*The Daily Telegraph of 15/7/2005, p.17*).

Other issues

Blackburn signing spares Finnish national service

In June 2005, Shefki Kuqi signed for English Premier League side Blackburn after his lawyer saved the Finland striker from national service. Kosovo-born Kuqi, who joined the Lancashire club on a Bosman free transfer from Ipswich, was in principle bound to spend the summer in the Finnish army (*Daily Mail of 29/6/2005, p.75*).

6. Administrative Law

Planning law

Lille stadium proposal turned down (France)

At the time of writing, the French Ligue 1 (Premier League) club of Lille remain without a home for their fixtures after a French court rejected a proposal to renovate their ageing ground. The court ruled that the project to renovate the stadium would damage a historic site built in the 17th century. For the next season, Lille will have to play their home Champions League fixtures in Paris or neighbouring Lens (*The Guardian of 9/7/2005, p.23*).

Judicial review

Noise from occasional games played on neighbouring land does not infringe noise abatement legislation. German administrative court decision

Germany has relatively strict legislation on noise abatement relating to sounds which emanate from sporting facilities. In the case under review, the claimant alleged that this legislation had been infringed by those using a neighbouring piece of land for football and volleyball games. Towards the end of 2003, she applied for a court injunction ordering games played by persons over 16 on that piece of land to stop. She claimed that not only the noise made by players, but also the nuisance which resulted from them kicking the ball against her fence of making the ball land in her front garden on several occasions, made life unbearable for her. However, by the time the case came to court, the claimant admitted that, during the intervening period, there were no unreasonable noises emanating from that piece of land, and that the games played on that land were now bearable. The parish which owned that piece of land, being the defendant in the action, pointed out that kicking the ball against the fencing was prohibited anyway, and there was a sign which indicated as much. Moreover, the prescribed rest periods which ran from 1 to 3 pm were observed by all those using the ground. In addition, ball games which are organised spontaneously, without set rules, were permitted in the context of youth action. Regular games organised by youth and children's groups were not being envisaged, although this possibility had to be kept open at all times. The court ruled that, in view of all these circumstances, the activity which took place on that piece of land should be regarded as socially tolerable (*Decision of the Administrative Court of Appeal (Verwaltungsgerichtshof) of Munchen dated 13/1/2005, in case 22 ZB 04.2931.*)

Paintball is not a sport and therefore should not be eligible for sports association licence. French Supreme Administrative Court decision

In April 2005, the French Conseil d'Etat (Supreme Administrative Court) ruled that paintball, being practised largely as a pastime activity, does not necessarily involve sporting participants who seek physical performance in the course of competitions organised on the basis of set rules. The French Sports Minister had refused a sports association licence to the Paintball Sports Federation on the grounds that the paintball did not constitute a sport within the meaning of Article 16 of the Law of 16/7/1984. The federation challenged this decision before the Supreme Administrative Court. However, the latter confirmed the Minister's decision (*Decision by the French Conseil d'Etat (Supreme Administrative Court) of 13/4/2005, in JCP-La semaine juridique- Edition generale of 8/6/2005, p. 1092*).

Administrative stadium banning order not capable of judicial appeal if imposed by way of safety measure. Belgian court decision

On the occasion of the Belgian First Division football match between Racing Genk and Standard Liege in August 1999, a number of violent incidents took place which resulted in the Head of the National Police Force issuing an administrative banning order for 18 months and a fine on the defendant in this case. The defendant was originally a claimant who sought a review of this decision from the Criminal Court of First Instance (Politierechtbank) of Maaseyck. The latter upheld this appeal in part, by reducing the stadium ban to three months and reducing the fine. The national Police Force chief requested a review of this decision before the Belgian Supreme Court (Hof van Cassatie). He argued that decisions of this nature were not capable of appeal if they were imposed by way of safety measure. The Supreme Court upheld this appeal. It ruled that a distinction had to be made between those administrative measures which, under the law of 21/12/1998 on safety at football matches, can be imposed by way of administrative measure – and are capable of appeal before the Politierechtbank – and those measures which can, on the basis of the same legislation, be adopted out of safety considerations. The decision appealed against was therefore declared null and void, and a retrial ordered (*Decision of the Belgian Supreme Court (Hof van Cassatie) of 17/2/2002, Rechtskundig Weekblad of 2/4/2005, p. 1217*).

7. Property Law

Land law

[None]

Intellectual property law

Book on sports image rights in Europe published

The world of sport has become a world-wide business involving billions of pounds. The importance of sports image rights as a means of promoting individual sporting figures has grown accordingly – not least in Europe, which is in fact the focal point of the book under review. This work, written by two of the most senior figures in the world of sports law, provides a legal and practical overview of the manner in which sporting image rights are created, protected and maintained in the 15 member states of the EU, as well as in Switzerland and Norway, comparing their situation with that which prevails in the US. The authors devote a separate chapter to the fiscal aspects of this question (*Blackshaw, I.S. and Siekmann, C.R. (eds) Sports Image Rights in Europe [2005]*).

Other issues

[None]

8. Competition Law

National competition law

Investigation into allegations of the forming of an unlawful cartel by Belgian football clubs

This issue has already been dealt with earlier (see under item "Employment law", p.60).

EU competition law

Commission closes state aid investigation into tax breaks for Italian sports clubs

In December 2002, Italy adopted legislation which amended the accounting rules applying to professional sports clubs, and conferred certain fiscal advantages on them. These measures would have allowed the sports clubs in question to offset losses incurred in the past against future profits for a longer period than is normally allowed. This possibility would have reduced the sports club's tax liability. It will be recalled from a previous issue of this Journal that, in November 2003, the Commission opened a formal investigation into these measures, as it considered that the fiscal aspects of this law might represent a state aid which is inconsistent with EU law ([2004] 1 *Sport and the Law Journal* p. 81).

In March 2004, the Italian authorities agreed to modify these measures with a view to nullifying any effect they may have upon taxation. Having taken note of this undertaking, the Commission suspended its state aid procedure pending the actual adoption of this amendment. In June 2005, the Commission adopted its final decision ruling that the amendments in question meant that the measures under investigation no longer constituted state aid (*Press Statement IP/05/777*).

Commission opens investigation into proposed sale of Tote

In the UK, the Tote (Horseracing Totalisator Board) was created as a statutory body in 1928 in order to provide gamblers with an alternative to fixed-odds betting and providing the British horseracing industry with a stable source of income. Ever since it was created, the Tote has enjoyed a legal monopoly for pool betting on horseracing in the UK, but is also active in the market for fixed-odds betting in competition with other bookmakers. As part of its attempts to modernise the British gambling industry, the British government proposed at a certain point to open the pool market to

competition and to privatise the Tote. It was envisaged to sell the Tote to Racing, being a consortium which represents the various parts of the British horseracing sector, and to replace the monopoly on pool betting with a seven-year exclusive licence for the Tote. After that transitional period, pool betting would be fully liberalised.

These proposals came to the attention of the European Commission in its capacity of supervisory organ over the state aid rules contained in the Treaty of Rome (Article 87). These rules outlaw any form of state aid which distorts, or threatens to distort, competition within the EU Single Market. The Commission examined the terms on which the Tote was sold because the latter offers online betting services to gamblers in other member states, including betting on sporting events in other EU countries. The Commission had certain concerns that the proposed sale might involve a substantial amount of state aid because the Tote is to be sold to the Racing at a price well below its market value – i.e. at only 50 per cent of so-called "fair value" which is itself below the market value. Such aid would benefit both racing and betting activities. However, the Commission had doubts about the consistency of such aid with EU rules because the UK Government had not demonstrated that the aid in question was necessary or proportionate. In this regard, the Commission was particularly concerned with the potential distortions which this might produce on competition in the fixed-odds betting market.

As a result, the Commission has opened a formal investigation into these plans to sell the Tote to the Racing consortium. Obviously the EU competition monitoring process will now be set in motion, but no further details are available at the time of writing (*See Press Statement IP/05/660*).

European Commission continues to probe English Premiership broadcasting rights

It will be recalled from previous issues of this Journal (e.g. [2004] 1 *Sport and the Law Journal* p. 79) that, for a number of years now, the European Commission had expressed its concerns about the competitive position of the broadcasting rights to England's top football fixtures. Following protracted negotiations, a compromise deal was struck which was to end satellite broadcaster BSkyB's monopoly on live television broadcasting of these matches after its current contract expires in two years' time. However, the Commission has remained sceptical about these rights and their incidence on EU competition law. More particularly it has criticised the Premier League set-up for not allowing more matches to be shown live on television in general. This, in its view,

8. Competition Law

restricts consumer choice. However, the Premier League has responded to these criticisms by producing the results of a sizeable survey covering 25,000 football fans, which showed that just 9 per cent thought that more games should be broadcast. The poll also showed that 69 per cent considered the quantity of televised football to be "about right", whilst 22 per cent were of the opinion that too much Premiership football was being screened (The Independent of 13/5/2005, p. 60). It should be pointed out, however, that the criticism levelled by the Commission did not concern the mere quantity of games being shown, but also the fact that too high a percentage was only available on a paying subscription basis.

Nevertheless, the Commission is continuing to press for a new structure guaranteeing that Sky could not purchase the rights for all the games under the next three-year rights deal to be offered, covering the 2007-10 season. The Commission has called upon the UK media regulator, Ofcom, to help with the achievement of this objective (Ibid).

As yet, it is not entirely clear what will be the shape of the next media rights deal to govern English Premiership football. However, there are signs that, even under the watchful eye of the Commission, there remains plenty to play for by BSkyB. The next rights deal could be structured in such a way that BSkyB emerges with the largest share of the matches, while a few games are left to the cable operators or free-to-air broadcasters. However, this is unlikely in view of the Commission's insistence on greater consumer choice and diversity. Another piece of speculation is that live Premier League football could be available on Freeview for the first time. Under this plan, separate packages of live Premiership matches would be offered to the Freeview, Digital satellite, cable and broadband platforms. Thus BSkyB would be allowed to bid for the satellite franchise, but would be prevented from buying the remaining packages (*The Guardian of 12/5/2005, p.21*).

This would mean that a broadcaster with a Freeview slot, such as one of the four terrestrial networks, would be able to screen free live coverage of the Premiership for the first time in the League's history. NTL and Telewest would acquire the cable rights, and internet service providers such as AOL and Wanadoo would be expected to bid for matches to be shown over a broadband network. Such a solution would answer the legal objections raised by the Commission, which is determined to break up any monopoly over the broadcasting of top European football. However, the remedies will need to be commercially viable if the top

English league is not to suffer a drastic cut in income. The Commission's preferred remedy would follow the format of the Champions' League, which is broadcast in the UK by a terrestrial channel, ITV, and a pay-television broadcaster, BSkyB. ITV executives are said currently to be holding their breath over their bid to renew their deal with UEFA for the television rights from 2006 (Ibid).

However, it would be a mistake to believe that the Commission is entirely opposed to the principle of joint selling agreements, which is the one which governs the Premiership's broadcasting deals – at least when it comes to a choice between this and the type of individual deal between club and broadcaster, as Manchester United are reported to be planning for the future. Commission spokesman Jonathan Todd commented:

"We don't have a problem with joint selling, and we have recently given our blessing to a similar agreement with the West German Bundesliga. We have a provisional agreement with the Premier League and we're still talking to them about the terms and conditions of the contracts, but the principle of joint selling is not the problem"
(*The Daily Telegraph of 19/5/2005, p. S1*).

The Commission have, however, indicated that they will not encourage the attempts which Malcolm Glazer, the new owner of the Manchester club, to go it alone with a one-to-one television deal which would challenge the current Premiership collective agreement. For Mr. Glazer, an individual television deal would be the easiest way of increasing revenue for the team. The Manchester club earned £31.7 million from the Premier League the previous season, of which £30.1 million came directly from television fees, and the remainder from sponsorship and licensing. If they were able to arrange their own television deals, the club could expect at least to double their income (ibid). Whether the Commission will take any action should United decide to embark on this particular course remains to be seen.

Article on Meca-Medina decision in Irish professional journal

The decision by the European Court of First Instance (CFI) in *Meca-Medina v. Commission* was extensively reported on in the previous issue of this Journal (*[2005] 1 Sport and the Law Journal p. 80*). This represented the first occasion on which the European Court has considered how competition law principles might apply to sporting authorities. More particularly a challenge had been brought against a doping ban on the basis that the relevant rules of the International Olympic Committee (IOC) infringed EU competition law, which was dismissed by the Court of First Instance. The CFI,

8. Competition Law

however, went further, arguing that the “purely” sporting rules (as opposed to those having an economic impact) of sporting federations should in effect enjoy a legal exemption from these competition rules.

In an important article, the Irish author Eoin Carolan (“Drugs, competition law and “purely” sporting rules – the decision in Meca-Medina, in 9/2005 Irish Law Times p. 139 et seq.) comments that it is one of the peculiarities of the European Court’s analysis of sporting affairs that thus far it has refrained from examining this area from the perspective of EU competition law. That sporting associations – which exercise after all a virtual monopoly in a major field of human activity – are potentially capable of such scrutiny is beyond question. However, hitherto the judicial discussion on this topic has restricted itself to reviewing the extent to which the rules and regulations of sporting federations impinge upon an individual’s fundamental freedoms – specifically the free movement of workers and the freedom to provide services. Considerations of competition law have merely been conspicuous by their absence.

The Meca-Medina decision is therefore the first judicial examination on record of the applicability of competition law principles to the world of sport. This is a significant development in itself. However, the decision is also an important illustration of the attitude of the ECJ towards the conduct of sport in general, and the lawfulness of anti-doping provisions in particular. Coming as it does in the wake of the post-Helsinki acceptance by the EU of the legal specificity of sport, the Meca-Medina decision arguably indicates a continued retreat on the part of the European courts from the more interventionist approach of the era sparked off by the renowned Bosman decision.

9. EU Law

EU law (excluding competition law)

Bosman criticises hypocrisy of wealthier clubs

The man who, by taking on the entire European football establishment in court, made it possible for professional players as much contractual freedom as possible, has fallen on relatively hard economic times, whilst his successors are earning fortunes of which he could only dream. Now Jean-Marc Bosman is seeking some credit for the success of clubs such as Chelsea, arguing that it was his court case which paved the way for Roman Abramovich to develop his all-star multinational squad. He argues more particularly that, by bringing about the free transfer system players were able to renegotiate their contracts and reap the financial rewards. He also has lambasted those who claim that the ruling in his case was responsible for all the game's ills, commenting:

"I have no time for club presidents who are forced to sell players and then immediately blame me. I'm the scapegoat for everything that goes wrong. But when things go right, when those same presidents suddenly get themselves an overseas bargain who costs a lot less than one of their own, do they ever thank Bosman? Of course not. It's such hypocrisy"
(*The Sunday Telegraph* of 3/4/2005, p. S6).

In fact, Mr. Bosman could claim that he personally suffered a good deal as a result of the ECJ's decision. It took four years for him to obtain the compensation for which he was due as he moved through a succession of clubs. Mr. Bosman attributes this to resentment on the part of the football authorities at the fact that he took them on and won. His marriage also fell apart as an indirect result of the case. But he admits that, in some ways, the ruling went too far. He acknowledges that the problem of the poorer clubs losing their most talented players, often free of charge, is a factor which needs to be addressed as a matter of urgency, and he approves of UEFA plans to enforce a quota of home-grown players (see also below under the heading "Issues specific to individual sports", p.96) (Ibid).

(See also the Simutenkov decision, reported below.)

EU law and sport in the Czech Republic. Article in international sports law journal

This contribution outlines the way in which sport is regulated under EU and Czech law, as well as the application of ECJ case law. The author examines the nature of the relationship between Czech football players and their clubs. He also considers the issues involved in applying ECJ case law and human rights principles to sporting activity in the Czech Republic (Harmenik, P., "The impact of EC law on sport in the Czech Republic", *International Sports Law Journal* 3/4-2004, p. 560).

EC/Russia partnership agreement invalidates Spanish rule on limiting non-EU players. ECJ decision

Igor Simutenkov is a Russian footballer who had obtained a residential permit and a work permit in Spain, where he played professionally for Club Deportivo Tenerife under a non-EU player's licence issued by the Spanish Football Federation (RFEF). Under the latter's rules, clubs may, in competitions at the national level, field only a restricted number of players from non-EU nations which are not members of the European Economic Area (EEA). In reliance on the EU/Russian Federation partnership agreement, which prohibits discrimination against Russian citizens on grounds of nationality as regards conditions of employment, Mr. Simutenkov requested that his licence be replaced by an EU player's licence. This request was, however, rejected by the Federation. The matter landed before a Spanish court, which referred the matter to the European Court of Justice, in order to obtain a preliminary ruling on the question whether the rules of the Federation were consistent with the Agreement.

The Court examined first of all whether the principle of non-discrimination embodied in the EC-Russia Partnership Agreement could be relied upon by individuals before the courts of a member state – to which the ECJ replied in the affirmative. The agreement states in clear, precise and unconditional terms a prohibition which precludes any Member State from discriminating, on grounds of nationality, against Russian workers in relation to their own nationals as far as conditions of employment, remuneration and dismissal were concerned.

The Court then proceeded to examine the scope of the non-discrimination principle embodied in the EC-Russian partnership agreement. The ECJ pointed out first of all that this agreement establishes, for the benefit of Russian workers legally employed within the territory of a member state, a right of equal treatment as regards

9. EU Law

working conditions; this right has the same scope as that which, in similar terms, nationals of Member States are recognised as enjoying under the EC Treaty. This right precludes any restriction based on nationality such as that which was in issue in this case, as the ECJ has ruled in other similar cases (e.g. Bosman). The Court then proceeded to rule that the limitation based on nationality does not relate to specific fixtures between teams representing their respective countries, but applies to official matches between clubs, and thus to the essence of the activity performed by professional players. Such a limitation cannot therefore be justified on sporting grounds.

On these grounds, the EC-Russian partnership Agreement precludes the application to a professional sporting performer of Russian nationality, who is lawfully employed by a club established in a Member State, of a rule imposed by a sporting federation of that State which lays down that clubs may field in competitions organised at the national level only a restricted number of players from non-EU countries which are not parties to the EEA Agreement (Case C-265/03, *Simutenkov v. Ministerio de Educacion y Cultura and Real Federacion Espanola de Futbol* – as yet unpublished [Press release No. 32/05]).

EU tobacco advertising ban takes effect

On 31/7/2005, the EU Tobacco Advertising Directive entered into effect. Passed by the European Parliament and the Council in 2003, the Directive bans tobacco advertising in the print media, on radio and over the internet. It also prohibits tobacco sponsorship of cross-border cultural and sporting events. The Directive applies exclusively to advertising and sponsorship which has a cross-border dimension. Advertising in cinemas and on billboards, or using merchandising (e.g. on ashtrays or parasols) therefore falls outside its scope (*Press Release IP/05/1013*).

10. Company Law

Bankruptcy (actual or threatened) of sporting clubs & bodies

Parmalat executives sent for trial (Italy)

It will be recalled from a previous issue of this Journal ([2004] 2 Sport and the Law Journal p. 84) that, as a result of the Parmalat global food company having gone bankrupt, top Italian football club Parma was itself threatened with closure. It was recently learned that the founder of the company, Calisto Tanzi, as well as 15 other executives have been formally charged by a Milan judge for their role in this bankruptcy, which was the result of one of the country's most notorious financial scandals (*The Daily Telegraph* of 27/6/2005, p.25).

Causes of financial crisis among Italian clubs. Article in sister journal

Previous issues of this Journal (e.g. [2004] 1 Sport and the Law Journal p.84) that all is not well as regards the financial aspects of Italian football, as can be seen from the many clubs in the professional game which are in dire economic trouble (and not all of them because of extraneous circumstances, as was the case with the Parma side referred to in the previous section). In the article under review, the author, Quirino Mancini, discusses the apparent reasons for this financial crisis, including: (a) the fact that the Italian football league has received lower than expected revenue for the sale of broadcasting rights to satellite broadcasters, (b) the shortage of alternative revenue streams for clubs, (c) accounting irregularities which the auditors of the Italian Football Federation have failed to detect, and (4) the absence of a salary cap. He also examines the fate of various football clubs which has resulted from this crisis, and assesses the manner in which they might restore themselves to financial viability (*Mancini, Q., "Causes and remedies for a very serious illness" [2005] 3 World Sports Law Review p. 11-13, reviewed in [2005] 6 European Current Law p.161*).

Other issues

Game finally over for Wembley gaming group (US)

It will be recalled from a previous issue of this Journal ([2005] 1 Sport and the Law Journal p. 86) that the US greyhound track and casino company, which owned the English Wembley stadium until 1999, was selling off all its assets, leaving it to exist as a company in name only. The company's last remaining asset, Lincoln Park, was approved in mid-July 2005 by the Finance Committee of the Rhode Island House of Representatives, leaving shareholders in the doomed company with the expectation of a much larger payout than they had expected. This has also cleared the way for the final liquidation of the Wembley company (*The Sunday Times* of 17/7/2005, p. B2).

Question marks over Glazer's US business interests

The recent acquisition by US magnate Malcolm Glazer of a majority shareholding in English Premiership club Manchester United is a matter which, in its domestic implications, currently falls outside the scope of this column, however dramatic they may have been. However, there is every indication that Mr. Glazer's US business interests are not free from controversy either.

Thus in mid-May 2005, it was reported that the US National Football League (NFL) was to interview Mr. Glazer over his acquisition of the Manchester club. He already owns a leading American football team, the Tampa Bay Buccaneers. The NFL is seeking to establish whether his deal to buy the Premiership side conflicts with his ownership of the "Bucs". The NFL does not have the power to block the purchase of Manchester United, but any doubts about the transatlantic acquisition could make life difficult for Mr. Glazer in the US. The League has stringent financial rules because its team share their revenues. NFL spokesman Greg Aiello commented that the NFL was interested in reviewing the Manchester United purchase with the Glazer family because they were "business partners" with 31 other team owners (*The Independent on Sunday* of 22/5/2005, p. B2).

More particularly the NFL wish to establish whether the Glazer family plan is to keep the Buccaneers or to sell the team. They may also wish to know whether they intend to focus investment on new players and marketing for Manchester United, which could be at the expense of the Buccaneers. The League – like many United shareholders and supporters – is waiting to see

10. Company Law

the details of the Glazers' offer in their formal offer document. Under current NFL rules, owners are allowed to borrow a maximum of \$125 million against their team. It is not clear whether the Glazers are using any of their borrowing ability to finance the United deal. The latter's supporters have voiced concerns about the amount of cash that the Glazers are borrowing to fund their £790 million purchase of the Premier League side. The offer document should make it clearer how much interest they will have to pay on the borrowings (Ibid.)

However, this is not the only aspect of the Glazer business empire in the US which is causing concern. Among other assets, the Glazer family has a majority shareholding in a fascinating but somewhat nebulous company, traded on the New York Stock Exchange (NYSE), which rejoices in the name of Zapata Corporation. This is currently a mini-conglomerate based in Rochester, New York State, but this was not always thus. The company was founded by former US President George Bush Senior in 1954 as an oil and gas business. The Bush family sold it in the mid-1960s, and Zapata then diversified into the fishing business in 1972, purchasing a firm which is now called Omega protein, which is a large player in the fish-oil industry. Malcolm Glazer took control of Zapata in 1994, and its Chairman and Chief Executive Officer is currently Avram Glazer, his son. Omega itself is separately quoted on the NYSE, even though 58 per cent of its stock continues to be held by Zapata. Omega harvests menhaden, an oily fish found around the US coast. It converts its catch into fish oil, animal feed and other products.

It is a market leader in its sector with a strong balance sheet, although its prospects are influenced by the fluctuations in the fish catch. The value of Zapata's stake in Omega Protein is around \$100 million. In addition, Zapata has a 79 per cent stake in airbag fabric manufacturer Safety Components International, which is publicly traded on the "over-the-counter" market. Finally, Zapata owns 98 per cent of a failed internet venture called Zap.com. Therefore Zapata owns shareholdings in public companies worth a total of around \$162 million, plus approximately \$30 million in net cash as at 30 March 2005. Thus its total net current assets are nearly \$200 million, as against a current market capitalisation of \$120 million with the stock trading at \$6.25. This represents a discount of 40 per cent to the value of its underlying worth in a break-up – which makes the shares look cheap (*The Sunday Telegraph of 29/5/2005, p. B4*).

There are apparently some caveats in this set-up. Zapata pays no dividend, and consolidates all its

investments in its financial statements, so the annual report is somewhat opaque. No analysts cover the company, although research has been done on fish processor Omega. There are a few institutional shareholders in the company, but the stock is volatile and not very liquid. Moreover, classic corporate governance does not appear to come very high on the agenda of the Glazer companies. In total four Glazer siblings sit on the board, i.e. Darcie, Edward and Bryan, as well as Avram, and the family has around 51 per cent of the shares, so the company will only be sold when they wish to sell. However, it has been reported that the Glazers are marketing a portfolio of 39 shopping malls across eight US states. These comprise 2.5m square feet of 95 per cent let retail property, with an asking price of around \$700 million. This package represents around 75 per cent of the assets of First Allied, their private commercial property business. It may be that the Glazers are selling in order to help fund their \$500 million equity contribution to the highly leveraged £790 million takeover of Manchester United.

Should they decide to raise more cash – or if the shopping centres fail to sell – then perhaps they might liquidate Zapata or even sell out, in which case investors can expect to obtain around \$10 per share, making a tidy profit at today's price. In any event, Zapata looks a rather cheaper buy than the astronomic valuation put on Manchester United by the recent takeover. But perhaps Mr. Glazer knows something about the Manchester club that British investors do not....(Ibid).

11. Procedural Law and Evidence

[None]

12. International Private Law

[None]

13. Fiscal Law

Betfair considers move to Malta

Betfair, one of the leading internet betting exchanges, is reported to be seriously considering relocating its operations to Malta in anticipation of new taxes being imposed on its revenues. The British Treasury is close to completing a review of the fiscal treatment of exchanges and their clients. Betfair currently pays 15 per cent of its gross revenue from commissions to the British Exchequer, but is fearful of a more punitive tax regime (*The Guardian of 10/5/2005, p.33*).

Lazio avoid bankruptcy through tax deal (Italy)

In late March 2005, it was learned that leading Italian football side Lazio Rome had averted bankruptcy through a deal under which they will pay a debt amounting to £96 million to the tax Italian tax authorities over the next 23 years (*The Independent of 30/3/2005, p. 52*).

(On the subject of the two Italian clubs expelled from the Serie A (Premier League) because of financial difficulties, see below under the heading "Issues specific to individual sports", p.97)

14. Human Rights/Civil Liberties

Racism in sport

Former Chess grand master in anti-semitism row (Russia)

In April 2004, it was learned that Boris Spassky, the former chess world champion, had caused uproar in his native Russia by becoming a signatory to a petition in which it is demanded that the country's state prosecutor should ban a number of Jewish organisations. Mr. Spassky was one of 5,000 Russians who signed a latter demanding a ban on all religious and national groups acting on the principle of the Shulchan Aruch, being a repository of Jewish law originally written in the 1560s. The so-called Letter of 5,000 branded Judaism as being "anti-Christian and inhumane", and accused believers of committing "ritual murders". It warned of a "hidden campaign of genocide" against the Russian people and their traditional society and values, and was backed by quotes from anti-Semitic literature from the 19th century.

Later, in the wake of a string of criticism from religious leaders and figures in the world of chess, Mr. Spassky attempted to distance himself from the campaign, claiming that:

"the appearance of my name was a mistake. As a "Chess King" I have always tried to fortify and unite the multinational kingdom of chess, and not to cause division within it. I will remain faithful to that principle in my old age." (*The Sunday Telegraph of 10/4/2005, p. 31*)

However, this does not appear to have been the first occasion on which Spassky has given vent to such sentiments. Eugeny Gik, a Russian chess master and writer who is a long-standing acquaintance of his, and who also condemned the letter, recalled how, in the 1990s, Mr. Spassky had travelled from his home in France to the St Petersburg Chess Club in order to be guest of honour at a dinner party. There, still according to Mr. Gik, Mr. Spassky observed he could not believe how the Russian people could have allowed so many big-nosed people into its government. Several Grand Masters were said to have left the table in protest.

Many leading players of the Soviet era were Jewish, including Garry Kasparov, officially the highest-ranking player in the world but now officially retired. The intense competition created an intense "them and us" division between Jewish and non-Jewish players, who include Spassky. In fact, his life-long rival, US master Bobby Fischer – who himself is of Jewish origin – has frequently shown himself to be a Holocaust denier and anti-Semite, at one time labelling Jews as "criminals, parasites, liars and thieves" and describing the US as a

farce controlled by "dirty, hook-nosed circumcised bastards" (Ibid.).

Aragones furore refuses to die down (Spain)

It will be recalled from a previous issue of this Journal (*[2005] 1 Sport and the Law Journal p. 88 et seq.*) that one of the more disturbing aspects of Spanish football had been not only the incidence of racism among its followers, but also the role played by Spain's national football coach, Luis Aragones, in fomenting such sentiments when he attempted to fire up Spanish international Jose Antonio Reyes by making grossly offensive comments about Reyes's Arsenal team-mate, Thierry Henry, during a training session prior to a World Cup qualifying match in October 2004. Since that incident, there has been a steady stream of voices demanding that action be taken against the coach for the racist attitude which he displayed.

In the event, Mr. Aragones was charged with undignified conduct by the Spanish football federation and fined £2,000. The federation also took into account Aragones's outburst before the friendly between Spain and England in November that year, when he launched a scathing attack on Britain's colonial past. However, this was seen as a very light penalty indeed by some. Indeed, the Anti-violence Commission of Spain has appealed against this sentence. It claims that the charge against Aragones should have been "racist or xenophobic conduct" and not just "undignified conduct" (*Daily Mail of 10/3/2005, p. 77*). If the appeal is upheld, Mr. Aragones could be fined up to £15,000 and have his licence revoked for two years, which would effectively constitute a dismissal (*The Times of 10/3/2005, p. 85*).

In mid-March 2005, the Spanish Ministry of Sport, the Spanish Football League, its Football Federation and Players' Union all signed a joint protocol allowing referees to stop matches for acts of racialism (*The Sunday Times of 20/3/2005, p. S19*). However, the seriousness of the country's footballing authorities in dealing with the problem was once again thrown into doubt the following month with the news that, as has been mentioned earlier (see above, p. 000) Atletico Madrid eluded serious punishment for the third time after being issued with a mere £400 fine for racist incidents which occurred at a home fixture against Espanyol (*The Daily Telegraph of 21/4/2005, p. S3*).

Human rights issues

[None]

14. Human Rights/Civil Liberties

Gender issues

Gender barriers gradually being dismantled in golf (US/UK)

Previous issues of this Journal (see e.g. [2003] 3 *Sport and the Law Journal* p.105) have given testimony to the long journey which the world of golf has yet to negotiate in order to break down long-standing and ingrained attitudes of gender bias against women, at all levels. However, there are some hopeful signs that such attitudes may gradually be changing. This in late April 2005, it was announced that Michelle Wie, the US teenager whose precocious talent and appetite for competing against men have raised her to a status of her own, will make her own contribution towards this development by being allowed to take part in the British Open at the Royal and Ancient club of St Andrews, if she plays well enough at an event called the John Deere Classic, a somewhat obscure tournament of the PGA tour staged in Illinois (*The Guardian of 27/4/2005*, p.36). Since this column was written before this event took place, it is not possible to report whether or not Ms. Wie's attempt was crowned with success.

Mullahs target women athletes in Pakistan

Pakistan is a country which, in spite of its strong Islamic base, does not appear to have become a hotbed of extreme victimisation of women – at least not until recently. There are certain incidents which indicate that such activity could be on the increase, and unfortunately some of these incidents have involved the world of sport. Thus in mid-April 2005, placard-waving women protested against the "Talibanisation" of Pakistan outside the national Parliament after a mob had attacked female runners. The previous week, baton-wielding men had thrown petrol bombs and torched vehicles at a mini-marathon in Gujranwala, 135 miles south of Islamabad. The race was one of the first to allow female participation, and ended with police firing teargas and making over 50 arrests (*The Guardian of 12/4/2005*, p.17).

The threat of further violence has forced the cancellation of other mini-marathons in a direct challenge to the policy of "enlightened moderation" pursued by President Pervez Musharraf. The protesters vented their anger at what they saw as attempts by mullahs to force women back into the home and domesticity. The Gujranwala race was attacked by supporters of the Muttahida Majlis-e-Amal movement, a powerful alliance of Islamic political parties spearheading the rise of the religious right in Pakistan. Since gaining control of provincial government in the North-West Frontier province two years ago, the MMA

has banned music and dancing in public, torn down advertising billboards featuring women, and introduced gender segregation on college campuses. More recently, they have shifted their conservative crusade to the relatively liberal province of Punjab (*Ibid*).

Iranian women athletes fight for gender equality

Iran is a country where radical Islamic governments have, with varying degrees of severity, held sway ever since the Islamic revolution of 1979 which toppled the Western-backed regime of the Shah. Ever since, conditions for women have been on the restrictive side, and this has been particularly the case in the world of sport. However, here too there are some signs that attitudes may be about to undergo some change.

In March 2005, Laleh Sadiq, a PhD student in Teheran who had been motor racing for three years, celebrated a notable victory when she triumphed against an all-male field in a Mazda saloon car. Nicknamed the "little Schumacher", she is seen by her admirers as representing the new type of independent woman who is emerging from the shadows of Iran's strict, and male-dominated, society. At the beginning of the year, Ms. Sadiq was featured on the cover page of *Zanan*, a once-conservative women's magazine which has changed with the altered position of women in Iran. She is also apparently winning over some men, who view her as a force for change as well as a symbol of hope for a new generation of Iranian female drivers who are used to facing prejudice on the roads. She made her name at the Azadi stadium in western Teheran, and although her talent has earned her the approval of hardcore fans, many of them female, there have been some mishaps, particularly in the shape of rough-house tactics from male competitors. In addition, gender discrimination is rife among race sponsors. Nevertheless, the image of a triumphant Sadiq flanked by male runners-up is likely to inspire (*The Independent of 16/3/2005*, p.26).

In a separate development, in early June 2005 it was learned that, for the first time, a small contingent of women was allowed to attend a football international, i.e. a World Cup qualifying match between Iran and North Korea. However, this has remained very much the exception. In fact, women's attendance at football matches had emerged as an issue during the presidential elections in Iran, with the moderate candidate, Mr. Rafsanjani, stating that he favoured lifting the ban altogether (*The Guardian of 6/6/2005*, p.14).

15. Drugs legislation & related issues

General, scientific and technological developments

Gene doping – the latest cheating device?

Some see the campaign against doping in sport as the ultimate futile pursuit, since the legislators and enforcers always need to keep a step ahead of new techniques and substances aimed at evading their watchful eye. Whatever the justice of that contention may be, it cannot be denied that those seeking to ban such practices from the sporting world are faced with an uphill struggle to keep abreast – let alone ahead – of the latest developments.

This appears to be very much the case in relation to the latest scare facing the anti-doping authorities, i.e. gene doping. Earlier this year, Dick Pound, the Chairman of the World Anti-Doping Agency (WADA), painted a doomsday scenario of athletes having the technology to use this kind of artificial stimulant in time for the 2008 Olympic Games in Beijing. In addition, leading scientists have warned that they expect athletes to attempt to exploit the technology without understanding its effects, and with a fine disregard for all the potential dangers it presents. For those performers seeking to steal an illegal edge on their rivals, gene doping appears to have become the ultimate aim. The prospect of genetically modified athletes competing like so many Frankenstein monsters was raised in the US Congress in late April 2005, in the course of a hearing organised to discuss the drugs policy of the National Football league (NFL) (of which more later, see below).

Dr. Lee Sweeney, who has closely examined genetic therapy at the University of Pennsylvania, claims that many in the sporting world have already made direct inquiries about his methods. Dr. Sweeney has experimented with rats and mice using genes that produce insulin growth factor (IGF-1), helping muscles to grow and repair themselves. The genes, introduced into the body through a harmless virus, produce more IGF-1 than the body would normally do, thus stimulating muscle growth. Whilst the leap from animal laboratories to human beings remains hypothetical, Dr. Sweeney and other speakers at last year's annual meeting of the American Association for the Advancement of Science (AAAS) stated that it was inevitable that athletes and their coaches would attempt the research currently being performed on rodents. Gene doping is in fact top of WADA's hit list, and it has set up an investigative panel consisting of some of medicine's leading experts (*The Guardian of 29/4/2005, p.32*).

Heading this panel is Dr. Theodore Friedmann, a professor of paediatrics and director of gene therapy at the University of California. He commented that there was as yet no proof that it has happened already, but ventured the belief that it was likely to happen. Gene doping would not, in his opinion, replace traditional drug doping because gene-based approaches will be more difficult. But as the technology advances, there would inevitably be those with both the means and the motivation who will be willing to try. If they did so, they would be playing a dangerous game of Russian roulette with their health, as Dr. Friedmann went on to explain:

“The technology is evolving very rapidly. The science is not all that difficult and can be reproduced by many well-trained people in many thousands of laboratories all over the world. The research results in the field are rapidly and widely published in the open medical and scientific literature and therefore are available to any and to all to learn. What is extremely difficult is to transfer the underlying basic scientific technology into human beings. For humans, gene therapy remains very immature, experimental and highly risky” (Ibid).

These dangers were illustrated by recent experiences in France. There, during a clinical trial, 11 boys successfully received experimental gene therapy to replace missing protein in order to allow their immune systems to function properly for the first time. However, three of the boys contracted leukaemia as a result, and one has died. The fear at WADA is that scientists with few scruples will encourage desperate athletes to experiment with gene doping without understanding the potentially fatal risks – which include the incidence of cancer. Some officials apparently are already conceding that this is happening in parts of China as the country prepares for the next Olympics...

The potential manipulation which science can operate in sport is becoming all too clear with the passage of time. In April 2005, the first clone of a champion racehorse was unveiled by scientists in Italy on the basis of a skin cell of Pieraz, a multiple world champion in equine endurance races of up to 50 kilometres (Ibid).

Doping test flaws exposed

Nandrolone is one of the steroids which has caused the greatest tremors amongst anti-doping authorities the world over, and has been the focus of strenuous attempts to prohibit and penalise its use by sporting performers. However, these attempts may be faced with a new obstacle, given that new research has cast doubts on the accuracy of established procedures for nandrolone testing, and has raised the possibility that some athletes who have been suspended for failing

15. Drugs legislation and related issues

drug tests could have been wrongfully penalised.

According to a confidential directive issued by the World Anti-Doping Agency (WADA) to their accredited testing laboratories, it is possible that the recent discovery of a phenomenon known as "unstable urine" could invalidate a positive finding for the muscle-building steroid. WADA admits that there is now some evidence that nandrolone, or its related compounds 19-NA and 19-NE, is capable of forming spontaneously after an athlete's urine has been taken for testing. Research is proceeding in order to establish the relevant chemical reaction, but it could constitute the result of bacterial degradation of naturally occurring hormones (*The Sunday Telegraph of 29/5/2005, p.512*).

In the meantime, WADA have instructed laboratories to carry out "stability tests" on urine samples which have a high density, an indicator of instability, and low concentrations of 19-NA and 19-NE. They have also been requested to report any relevant cases immediately. WADA has also taken the unprecedented step of raising the threshold for a positive nandrolone finding from two to 10 nanograms per millilitre of urine in samples shown to be unstable. Previously, the 2 ng limit was regarded as sacrosanct, and, under the strict liability rule, any nandrolone reading above this level was automatically classified as a positive drug test, whatever the athlete's explanation may be. Although the Agency believes that instances of unstable urine are rare, they admit that several new cases have recently come to light. If their laboratories discover more examples, the credibility of the agency's testing procedures could be in jeopardy (*Ibid*).

Simon Davis, a British authority on drugs testing, claims that the new findings could have a bearing on as many as 70 per cent of positive nandrolone cases. He added:

"Further research is undoubtedly needed but if the leaked document is correct, at a minimum all nandrolone positives with high sgs (specific gravity, or density) and two to 10 ng concentration must be rescinded as a matter of urgency" (*Ibid*).

This latest discovery is likely to revive memories of the Diane Modahl case. The British middle-distance runner recently succeeded in proving that high levels of testosterone which were detected in a sample submitted by her in the mid-1990s were the result of a bacterial reaction caused by poor refrigeration of her sample container. Since nandrolone came to prominence in the late 1990s, numerous high-profile athletes have been banned for testing positive for low levels of the steroid. Among the first was Dougie

Walker, a former 200-metres champion, who served a two-year ban, and 400-metre runner Mark Richardson, whose suspension was reduced to one year after he proved that supplements which he had been consuming had been contaminated.

More recently, as reported in these columns (*[2004] 1 Sport and the Law Journal p. 111-12*) Greg Rusedski and several other professional tennis players have recorded nandrolone levels fractionally above 2ng but well below 10ng. All were subsequently cleared by a tribunal after it was successfully argued that contaminated electrolytes issued by trainers working for the Association of Tennis Professionals (ATP) were to blame (*Ibid*).

Doping issues and measures – international bodies

IAAF revises doping tests

In April 2005, it was announced that the International Association of Athletics Federations (IAAF) was to revise its drug testing procedures ahead of the world championships, to be held in Helsinki in August. The Association said that around 100 out-of-competition tests were to be conducted during the month which preceded the championships, in co-ordination with the World Anti-Doping Agency (WADA) (*The Daily Telegraph of 11/4/2005, p. S9*).

Article on Meca-Medina decision in Irish professional journal

This issue has been dealt with more fully above, under the heading "EU competition law" (p.74).

FIA adopts WADA code

In March 2005, it was learned that Formula One racing is to become subject to international anti-doping regulations. At a meeting in Paris, the FIA, the world governing body of the sport, approved the code issued by the World Anti-Doping Agency (WADA). This brings motor racing into line with the majority of other sports (*The Guardian of 31/3/2005, p.29*).

The Balco scandal – an update

When this column last reported on this issue (*[2005] 1 Sport and the Law Journal p. 98*) the doping scandal which has threatened to rock the world of athletics to its foundations had culminated in the commencement of the trial in San Francisco, where various personalities accused in the scandal faced criminal charges of steroid distribution and money laundering. Various tactics

15. Drugs legislation and related issues

deployed by the defence team aimed at aborting or delaying the trial in its preliminary stages had failed. The scene was therefore set for the full denouement of the affair at the trial proper.

Eventually, in mid-July 2005, Victor Conte, the founder of the Balco laboratory at the centre of the steroid scandal, pleaded guilty to the charges in a bargaining plea deal with prosecutors, making it much less likely that leading athletes such as Marion Jones and Tim Montgomery would be compelled to testify about their alleged doping offences. Mr. Conte admitted that he distributed steroids to leading performers, and that he knew such activity to be illegal. The prosecutors agreed to drop dozens of counts against Conte if he pleaded guilty to a single count of conspiracy to distribute steroids and a single count of money laundering (The Independent of 16/7/2005, p. 54). As part of the plea bargain, Mr. Conte was not compelled to assist the FBI with their investigations into anyone else allegedly involved in the affair – including Ms. Jones. In return, Mr. Conte accepted a sentence of four months' imprisonment and four months' home detention, with a further two-year suspended sentence. He will also be expected to pay a substantial fine, as yet unspecified at the time of going to press (*The Guardian of 16/7/2005, p.S11*).

The others involved in the Balco affair also appeared to be willing to co-operate with the prosecuting authorities in return for a lighter penalty. Thus Remi Korchemmy, the Ukrainian-born coach who was working with, amongst others, British athlete Dwain Chambers when the latter tested positive for banned drugs, also agreed to plead guilty to charges of distributing illegal steroid substances. Given Mr. Korchemmy's age, which is 72, his defence team were confident that he will be sentenced to home detention rather than a term of imprisonment (*The Mail on Sunday of 17/7/2005, p.111*).

It will also be recalled from a previous issue of this Journal ([2005] 1 *Sport and the Law Journal* p.98) that the said Marion Jones had started legal proceedings against Mr. Conte in respect of the latter's claim that he had supplied her with the steroids. No further developments have been reported in this case since then.

Doping issues and measures – Individual countries

France announces independent anti-doping agency

When a major city bids for the Olympic Games, it is understandable that its authorities will seek to allay any fears that the top sporting authorities may harbour as regards the reliability of its procedures for dope-testing those who are scheduled to compete. In fact, the International Olympic Committee (IOC) had entertained some doubts about French doping legislation, and it came as no surprise when, as the bidding process for the 2012 Olympics was gathering momentum, France announced the establishment of an independent anti-doping agency. The sports minister, Jean-Francois Lamour, informed the IOC Evaluation Commission chairman that the new French Anti-Doping Agency would seek to become a world leader in the struggle to eliminate doping from the realm of sport.

The initiative was more particularly intended to lay to rest IOC concerns that, were the Games to be awarded to Paris, they could be blighted by scandals uncovered as a result of a rigorous campaign by the French police. The IOC demands that it, and not state agencies, should maintain control over anti-doping measures during the Olympics. However, following raids on the Tour de France and on individual cyclists, concerns had been expressed about the impact of a repeat performance during the Games (*The Guardian of 12/3/2005, p.S21*).

Police make arrests in Spanish steroid distribution racket

In mid-March 2005, the police in Spain arrested 70 people who allegedly formed part of a network producing illegal steroids for distribution in gyms and sports centres. It is claimed that the gang were manufacturing steroids and hormone treatments in illegal laboratories (*The Guardian of 2/6/2005, p.32*).

15. Drugs legislation and related issues

Doping issues – Athletics

Kenteris/Thanou affair drags on (Greece)

The long-running saga of the two Greek athletes who missed three doping tests immediately prior to the opening of the Olympic Games in their native country is one which cast a shadow over an otherwise highly successful Olympics. When this column left this saga ([2005] 1 *Sport and the Law Journal* p. 99-100) the pair had yet to face their national athletics federation on this subject. It was known that the International Association of Athletics federations wanted them banned for two years (*The Guardian of 18/3/2005, p.33*).

In the event, the Greek federation cleared the two athletes, and were therefore free to continue their athletics career. However, it did find their former coach, Christos Tzekos, guilty of failing to inform them that they should make themselves available for tests in the Olympic village, and suspended him for four years. Senior officials of the IAAF were stunned by this decision. They had provisionally suspended the two Greek athletes because their explanations were "unacceptable" (*The Guardian of 19/3/2005, p.S24*). Two weeks later, it was learned that the IAAF intended to appeal against this decision by the national body by referring it to the Court of Arbitration for Sport (CAS), describing the decision as "erroneous" (*Daily Mail of 2/4/2005, p.105*). In addition, the International Olympic Committee announced that they would carry out their own investigation into the affair if the two attempted to compete for the 2008 Games in Beijing (*The Daily Telegraph of 2/4/2005, p.S9*).

Nor did the continued interest in this case end with the sporting authorities. In the meantime, the Greek criminal authorities had also brought charges against the two, as well as against Mr. Tzekos. In June 2005, an initial hearing was held, although the trial itself had not been held at the time of writing (*The Guardian of 7/6/2005, p.27*).

Sprinter White claims to have been treated "like drugs guinea pig" (US)

It will be recalled from a previous issue of this Journal ([2003] 3 *Sport and the Law Journal* p. 107) that US sprinter Kelli White tested positive for the banned substance modafinil at the World Championships in Paris two years ago, and was thus stripped of the gold medals she had won in the 100 and 200 metres events. She was later banned for two years. She was invited to testify at a hearing held by the World Anti-Doping Agency (WADA) in Montreal, where she described

herself as having been used as a "guinea-pig" as she experimented with a cocktail of banned drugs. They included the designer anabolic steroid THG and the blood-boosting hormone EPO, in addition to modafinil.

After she had tested positive, Ms. White had claimed that she used modafinil in order to treat the sleeping disorder narcolepsy. She informed WADA that this was a cover story devised by none other than BALCO chief Victor Conte (see above) and a doctor, Brian Goldman. In fact she told the hearing that she had never suffered from narcolepsy, and did not even know that the word existed until a few hours after the news broke of her positive test (*The Guardian of 19/5/2005, p.31*).

CAS upholds ban on Hungarian athletes

It will be recalled from a previous issue of this Journal ([2005] 1 *Sport and the Law Journal* p.100) that, as a result of a positive doping test, Hungarian athletes Robert Fazekas and Adrian Annus, discus and hammer-thrower respectively, were deprived of the gold medals they won in these events at the Athens Olympics last year. The two appealed to the Court of Arbitration for Sport, which upheld the original decision (*The Guardian of 2/4/2005, p.33*). The CAS found that the athletes were unable to plead any compelling justification for their failure to comply with anti-doping rules (*The Daily Telegraph of 4/4/2005, p.S6*).

Doping issues – Cycling

Hamilton receives two-year ban for blood doping (US)

It will be recalled from a previous issue of this Journal ([2005] 1 *Sport and the Law Journal* p.102) that the US time-trial champion Tyler Hamilton had tested positive for blood doping at the Athens Olympics of 2004, but was allowed to retain his medal because the B sample had proved defective. However, the rider also tested positive in the course of a stage in the Tour of Spain which followed the Games, and this became the subject-matter of a six-week hearing which opened in February 2005. It concluded with a 20-page ruling by the American Arbitration Association which found against Mr. Hamilton. The US Anti-Drugs Agency (USADA) immediately applied the mandatory two-year suspension in the case of a first offence. This ruling is likely to end the career of this rider, a former team-mate of Tour de France-winner Lance Armstrong, as he is currently aged 34.

15. Drugs legislation and related issues

The USADA report noted that Mr. Hamilton had undergone regular blood testing by the world governing body in cycling, the UCI, and that in May 2004 anomalies had been discovered in his blood, including high levels of solids comprising blood-carrying red cells as well as signs that his blood might have been manipulated. Hamilton and his team, Phonak, were warned that he would be subjected to regular testing (*The Guardian of 19/4/2005, p.27*).

Mr. Hamilton has in the meantime appealed to the Court of Arbitration for Sport (CAS) against this penalty in an attempt to overturn the ban (*The Daily Telegraph of 2/6/2005, p.56*). Mr. Hamilton has also been providing some strange explanation to back up his protestations of innocence in this affair – one of which is worthy of Sir Arthur Conan Doyle as it might be called “The Case of the vanishing Twin”. His defence before the CAS will be that he is one of twins, but that his twin died in utero, and, before he/she did so, the other sibling received a small number of “foreign” stem cells, producing subtly different blood cells. These, claim the scientists who are backing his case, could explain the discovery of two types of blood in his system.

The “vanishing twin” is known to be one cause of a condition whereby a person has two types of blood, which is known as chimerism. It was brought to Mr. Hamilton’s attention by Dr. David Housman, a professor of molecular biology with the Massachusetts Institute of Technology, who read about his case in the sporting pages and offered to testify on the US rider’s behalf. However, it appears that scientists are divided over what actually constitutes chimerism. Researchers such as Dr. Anne Reed, of the Mayo Clinic, who has published several studies on this particular phenomenon, claim that it may affect up to 70 per cent of the population and could be the cause of phenomena such as donor bone marrow which apparently matches a recipient, but is rejected. Dr Housman has heavily criticised the scientific credibility of the International Olympic Committee’s test for blood doping, alleging that the testimony of Dr. Ross Brown, a haematologist from the Royal Prince Alfred Hospital in Sydney, is “riddled with factual errors and inconsistencies” (*The Observer of 5/6/2005, p.24*).

The outcome of the appeal before the CAS was not yet known at the time of writing.

UCI expresses “solidarity” with investigated Giro riders (Italy)

The annual tour of Italy, known as the Giro d’Italia, is no stranger to controversy about doping practices, as has been reported in previous issues of this organ (see e.g. [2001] 3 Sport and the Law Journal p. 95-96). This year’s race may also produce further scandals, after police raided the Davitamon-Lotto and Saunier Duval-Prodir teams to discover hyperbaric equipment and intravenous drips. The result of this investigation is not yet known – although the world governing body, the UCI, expressed “solidarity” with these teams... (*The Guardian of 20/5/2005, p.32*).

Other cases (all months quoted refer to 2005 unless stated otherwise)

Raimondas Rumsas. The Lithuanian rider was arrested in late June at his Italian home on a French warrant on doping charges. Mr. Rumsas had previously failed to respond to a summons for questioning by the French authorities after his wife Edita was found to have suspected doping products in her car on the final day of the 2002 Tour de France, in which her husband finished third (see [2002] 2 Sport and the Law Journal p.120) (*The Daily Telegraph of 30/6/2005, p. S7*).

Danilo Hondo. The German cyclist faces a two-year ban after having returned a positive sample for a banned substance. It was confirmed subsequently by his team manager that Mr. Hondo had tested positive for a banned stimulant during the Tour of Murcia in Spain in the course of March, in which he won two stages and finished eight overall (*The Daily Telegraph of 2/4/2005, p.S4*).

Isidro Nozal and Michele Scotto d’Abusco. These two riders, of Spanish and Italian nationality respectively, were banned from the Dauphine Libere race in early June after failing health tests performed by the world governing body, the UCI. Both were found with haemocrit levels above the permitted limit of 50 per cent (*The Daily Telegraph of 6/6/2005, p.S9*).

Nuno Ribeiro. The Portuguese rider, who competes for the Spanish team Liberty Seguros, was dropped from this year’s Giro d’Italia even before it started, after tests revealed that he had a blood haemocrit level of 52 per cent (*The Guardian of 6/5/2005, p.31*).

Dario Frigo. The Italian rider was arrested in mid-July after customs officials found suspected illegal substances in his wife’s car. Both Mr. Frigo and his wife were then released from custody, but remained under

15. Drugs legislation and related issues

investigation on suspicion of having imported and smuggled unlawful substances. Ten vials were found in the boot of Mrs. Frigo's vehicle and were being analysed at a laboratory in Lyon at the time of writing. In 2001, Mr. Frigo was banned from the Giro d'Italia whilst lying second in the overall classification after drugs were discovered in his hotel room. He was banned for six months. On this occasion, the penalty may be more severe. In addition, the couple face up to three months' imprisonment if convicted of the charges brought. No further news was available at the time of writing (*The Independent of 14/7/2005, p.71*).

Michael van Staden. In July, this teenage South African cyclist has the dubious distinction of being the youngest athlete ever to test positive for the banned blood booster Erythropoietin (EPO), and was accordingly banned for six months. He received this relatively light penalty even though the rules of the World Anti-Doping Agency (WADA) require a mandatory two-year disqualification (*The Daily Telegraph of 12/7/2005, p.S7*).

Marc Lotz. This Dutch rider was dismissed by his Quick Step team in June for taking the blood booster EPO. Mr. Lotz admitted in the course of a judicial inquiry that he had used the drug recently (*The Daily Telegraph of 2/6/2005, p.S6*).

Doping issues – Baseball

Congress investigation threatens to lift veil on widespread doping in baseball (US)

Hitherto the world of baseball has remained relatively unscathed by the doping scandals which have rocked other sports to their foundations. At least that is the impression given in the absence of any spectacular positive dope tests or police raids. However, rumours have persisted over the past few years that this picture may not be as rosy as it has been painted, which is why the US Congress has decided to open an investigation into the matter. Earlier this year, it issued subpoenas to seven active and retired major League players, who include some of the sport's most legendary names, as well as four baseball officials, in order to testify before the House Committee on Government Reform on the use of steroids.

The players concerned, acting through their lawyers, announced that they would challenge these subpoenas, and accused Congress of using concerns about doping in order to score points with the general public at the sport's expense. They also warned that the hearings

could compromise the Grand Jury investigation into the Balco affair (see above). The scene was therefore set for a comprehensive showdown between US lawmakers and the baseball authorities. In their response to the players' objections, Congressmen Tom Davis and Henry Waxman indicated their determination to ensure that the players testified. If the players persisted in their defiance of the subpoenas, they faced charges of contempt – and a possible jail sentence (*The Guardian 11/3/2005, p.17*). However, all those summoned finally thought better of their defiance, and were sworn in at the hearing (*The Independent of 18/3/2005, p.56*).

One of the main triggers for this action by Congress is a book which was published the previous month by Jose Canseco, a former baseball star and self-confessed user of steroids, which was enigmatically entitled *Juiced – Wild Times, Rampant 'Roids, Smash Hits and How Baseball Got Big*. Two of the witnesses issued with the subpoena, Sammy Sosa and Rafael Palmeiro of the Baltimore Orioles, were named by Mr. Canseco in his publication, although both players fervently deny the allegations. Another scheduled witness was Mark McGwire, whose spectacular race in 1998 with Sosa to break the single season home run record did much to restore the sport's reputation after the 1994-5 strike. However, two big names are missing from the Congressmen's list. Barry Bonds, the holder of the single season record of 73 home runs, will not be called up, nor will Jason Giambi of the New York Yankees, who, according to leaked testimony from the said Grand Jury hearings, has already admitted to the use of a variety of steroids. Both these players are involved in the Balco scandal, whose tentacles have spread far beyond the world of athletics into the reaches of boxing and American football (*The Guardian of 17/3/2005, p.46*).

At the hearing itself, those summoned were quickly seen to be at odds with each other. In emotional opening statements, Messrs. Sosa and Palmeiro flatly denied ever having used illegal substances. Messrs Canseco and McGwire, as expected, had different tales to tell. However, they took the Fifth Amendment to avoid self-incrimination (*The Independent loc. cit.*). As a result of the hearings, the baseball authorities have been forced to confront this issue head-on, which hitherto was unable to because of the power wielded by the players' union. Henceforth all offenders will be suspended and their names made public. Previously, a fine was the heaviest punishment a player could expect for drug abuse (*The Guardian of 2/4/2005, p.S22*).

15. Drugs legislation and related issues

Doping issues – Equestrian

O'Connor banned – FEI changes rules (Ireland)

The Cian O'Connor affair represents a chapter which will long be remembered in the annals of the campaign against doping in sport – if only because of its comic opera overtones. The reader is referred to the previous issue of this Journal ([2005] 1 *Sport and the Law Journal* p.100) for a fuller account of the more bizarre aspects of this case, which involved the test samples taken from the Olympic medal-winning horse, Waterford Crystal. Inevitably, the matter landed before the world governing body in the sport, the FEI, whose judicial committee met in late March 2005 to consider the case. Not only Mr. O'Connor and his legal team, but also various expert witnesses – including veterinary surgeon James Sheeran – were in attendance.

The explanation proffered by O'Connor for the train of events which led to the imbroglio was as follows. After the initial test proved positive, he informed the FEI that, a month prior to the Olympic show jumping event, Waterford Crystal had sustained a slight fetlock injury. His veterinary surgeon recommended that the horse be issued with a mild sedative in order to prevent him from becoming upset, which might have caused further injury. He further maintained that the surgeon in question informed him that the drug would disperse from the horse's system within a period of 10 to 14 days, and expressed his amazement that the medication could still be present in the horse's system over a month later. However, when the samples taken from Waterford Crystal – one of 40 tested at the Games, which provided no fewer than 4 positive results, including that of Goldfever, the German gold medal winner – were tested at the FEI laboratory in Paris, traces of fluphenazine and zuclopenthixol were discovered in his urine (*The Daily Telegraph* of 25/3/2005, p.S5).

The reader will recall the bizarre train of events which followed. O'Connor exercised his right to have the B samples tested elsewhere. One of these, the urine sample, was eventually sent to the Horseracing Forensic Laboratory in Newmarket. However, the sample never arrived, having been "illegally taken" according to an FEI statement. The other sample, resulting from a blood test, was flown to New York to be tested at the United States Equestrian Drug Testing and Research Laboratory, where the original positive test was confirmed.

However, since these events were last reported in these columns, further allegations have surfaced against Mr. O'Connor. At the Rome Nations Cup show in May 2004, another of his horses, ABC Landliebe, had also tested positive. He had accepted the initial findings without requesting that the B sample be tested, was disqualified and fined €1,600 by the FEI. In addition, the file on O'Connor at the Irish Equestrian Federation in Kildare was stolen during a burglary. The name of the drug found in ABC Landliebe, said to be Guanabenz, was communicated to an Irish radio station (*Ibid*).

In the event, the FEI stripped Mr. O'Connor of the gold medal he had won in the individual show jumping event. It also decided that he should pay a fine of SF 5,000 and be suspended for three months. At the time of writing, it was not yet clear whether the Irish rider would appeal against this decision to the Court of Arbitration for Sport (CAS). What is certain is that, even after the FEI verdict, he remains in denial and insists he has done "nothing wrong" (*The Daily Telegraph* of 29/3/2005, p.S8).

At least the case seems to have produced one useful effect in the sense that the FEI appointed a task force to review its doping procedures, which were found to be somewhat wanting in the course of the entire affair. In early April 2005, a completely new set of rules for dope testing and medication was accepted by the Federation following the recommendations of this task force (*The Independent* of 9/4/2005, p.68).

Doping issues – Rugby Union

Caffeine use revelations may put tablets back on banned list

Another sport which seldom troubles the anti-doping authorities is rugby union. However, here again it may be that the age of innocence is about to end if recent revelations are anything to go by. In fact, these developments may even compel a change in world-wide anti-doping rules. In mid-May, the captain of the Australian Rugby Union team, George Gregan, volunteered the information that not only he, but several other Australian sporting performers regularly consumed caffeine tablets. The latter were removed from the list of banned substances issued by the World Anti-Doping Agency (WADA) early in 2004. However, the Agency had continued to monitor their use for possible signs of abuse. Although there has been no suggestion that anyone has broken the rules, WADA spokesman David Howman commented that the

15. Drugs legislation and related issues

Agency was becoming alarmed at their increasing use. He added:

“That’s troubling. That disturbs us. The only laboratory in the world that indicates a little bit of a worrying trend is the one in Australia. It was a substance that we thought wasn’t going to be abused for performance enhancing (because) you had to have at least 12 cups of coffee to get over the level of start swallowing tablets” (The Independent of 19/5/2005, p. 65).

The WADA announcement followed Mr. Gregan’s admission that he and a number of his Wallabies’ team mates had taken caffeine tablets prior to important fixtures. He claimed that the tablets boosted his performance by seven per cent, and had been approved by the Australian Institute of Sport. Several Australian Rules players had also admitted to taking caffeine tablets (Ibid). The status of caffeine has been discussed by the WADA Executive Board and will be reviewed later this year (*The Daily Telegraph of 19/5/2005, p.S10*).

Doping issues – Football

Vialli denies drug abuse at Juventus (Italy)

Hitherto, allegations of drug abuse in the world of football have been concerned mainly with the recreational use of unlawful substances by players having more money than sense. However, the spectre of performance-enhancing substances has started to loom over the horizon in this sport as well, at least in Italy where a recent scandal has proved something of a shock for those in authority over the sport.

In early March 2005, Riccardo Agricola, the former team doctor at top side Juventus, was issued with a suspended 22-month jail sentence by Judge Giuseppe Casalbore. The latter, whilst absolving the Turin club of any blame, questioned the testimony of several players, including the former Italy striker, and former Chelsea manager, Gianluca Vialli. More particularly Dr. Agricola was found guilty of having administered to the Juventus players various substances which included the banned blood booster EPO, between 1994 and 1998, a period in which the Turin club won three Serie A (Premier League) titles, on Italian Cup, the Champions’ League and the European Super Cup. Mr. Vialli, however, hotly denies any substance abuse during that period, saying:

“I certainly deny the accusations that I knowingly took illegal substances. I have not only been an athlete and a footballer, but I am also a husband, a father and a friend. I have responsibilities for my family. To think that any of us would have wanted to put their own health at risk by

taking illegal substances is absurd”
(The Independent of 10/3/2005, p. 64.)

Naturally, Juventus’s rivals for the trophies referred to above seized on Judge Casalbore’s ruling not only to cast doubts on the legitimacy of the Turin club’s successes, but also to demand that the relevant silverware be removed from them. Thus the Lecce coach, Zdanek Zeman, whose revelations about drug-taking in football several years ago in a magazine interview gave rise to the Juventus investigation, demanded that they be stripped of the trophies. To date, there was no sign of any such development (Ibid).

Doping issues – Other sports

Boxing

Toney positive test means reinstatement for Ruiz (US)

In mid-May 2005, the World Boxing Association (WBA) reinstated John Ruiz as their heavyweight champion when it was announced that James Toney had failed a doping test after having claimed the title from Ruiz. Mr. Toney, who had gained a convincing unanimous decision over Ruiz the previous month, had to return the prize fewer than two weeks after the New York State Athletic Commission overturned the victory. In addition, Toney was suspended for 90 days, fined £5,500 and barred for two years from challenging for the title (*The Daily Telegraph of 19/5/2005, p.S5*).

Ice hockey

Ukrainian competitor tests positive

In early May 2005, it was learned that Oleksandr Pobyedonostsev had tested positive for the banned substance norandrosterone at the world championships which were held in Vienna. No further details are available at the time of writing (*The Daily Telegraph of 6/5/2005, p.S2*).

16. Family Law

[None]

17. Issues specific to individual sports

Football

The Anders Frisk affair

Swedish referee Anders Frisk is a respected, if somewhat over-hyped, match official from Sweden. Although the very nature of his calling exposes him to criticism from various quarters, he was in great demand and never had his personal integrity seriously questioned. It is therefore a great loss to football that Mr. Frisk has felt it necessary to give up top-class refereeing because of what he claimed to be the intimidatory conditions in which he has had to live following threatening messages addressed to him. These appear to have emanated mainly from supporters of English Premiership club Chelsea, and had their origins in a bizarre series of events involving that most bizarre of football characters, Chelsea manager Jose Mourinho.

In early March 2005, Mr. Frisk officiated in a crucial Champions' League tie between Barcelona and Chelsea. During the first leg, played at Nou Camp, Chelsea striker Didier Drogba was dismissed from the field. Afterwards, the Chelsea coach claimed not only that the referee had favoured the home side, but also that he had seen his opposite number at Barcelona, Frank Rijkaard, talking to the referee in the changing room at half time – the clear implication being that the latter had successfully attempted to influence the outcome of the match. This charge was denied by both Rijkaard and Frisk, as well as being rejected by the European governing body UEFA (*The Mail on Sunday of 13/3/2005, p.128*). However, the Chelsea allegation appears to have given rise to a torrent of hate mail directed against the Swedish official, and the latter announced his retirement from top-class refereeing because of his fears for the safety of himself and his family (*The Daily Telegraph of 14/3/2005, p.S1*).

This development naturally prompted a furious reaction from Mr. Frisk's colleagues. Most vocal in his condemnation was Volker Roth, the Chairman of the UEFA referees committee, who branded Mr. Mourinho an "enemy of football" because of his allegations, adding that some coaches were to blame for this type of development (*Ibid*). It also transpired that several of

these hate messages, which actually included death threats, had been made to Mr. Frisk's "secure" telephone number which was supposed to be known only to a few associates. The referee claimed that this was the vital factor which caused him to quit, since it represented a threat significantly worse than an e-mail hate campaign. He concluded that someone must have gone to a great deal of trouble to acquire this number, and was therefore extremely determined to harm him. This development may be particularly significant when it is considered that some Chelsea followers are reported to have links with far-right groups such as Combat 18 (*The Independent of 14/3/2005, p.60*).

Obviously UEFA itself could not remain silent on the affair, and the next day a stinging rebuke addressed to Mr. Mourinho was forthcoming from its Chief Executive, Lars-Christer Olsson, in the following terms:

"We will not allow the slandering of match officials to become part of pre-match tactics. We must sanction anyone in the football family who makes inflammatory statements that jeopardise the security of match officials and brings the game into disrepute. Managers, coaches and players have become role models for society. With fame comes responsibility. Everyone involved in the game should therefore think twice before uttering provocative remarks that could be construed by others as inciting trouble" (*The Independent of 15/3/2005, p. 59*).

He added that he had personally intervened with Mr. Frisk, a fellow-Swede, to change his mind about retirement, but that the latter would not hear of it. Chelsea, for their part, pledged to take appropriate action against any supporters found to have intimidated Mr. Frisk, and made informal representations to that effect to Mr. Olsson following the observations made by Volker Roth as quoted earlier (*The Guardian of 15/3/2005, p.34*). Following this meeting, relations between the European governing body and the London club improved, to the point that UEFA even dissociated themselves from the accusation by Mr. Roth that Mourinho was an enemy of football (*The Guardian of 17/3/2005, p.35*). The issue was scheduled as an emergency item on the agenda of the organisation's executive committee meeting in Tallinn, Estonia, the following month (*The Independent of 17/3/2005, p.49*).

17. Issues specific to individual sports

Even before this meeting took place, however, UEFA had made a statement which in effect cleared the Chelsea manager of forcing Frisk into retirement – although his behaviour remained the subject matter of UEFA scrutiny (*The Independent of 18/3/2005, p.55*). Attempts were also made by Didier Drogba, whose action had sparked off the entire furor, to mend fences with Mr. Frisk, by making a public apology to the latter. He added that he hoped the Swede would change his mind about retirement, but Mr. Frisk reiterated his refusal to do so (*The Independent of 21/3/2005, p.65*).

However, any illusions which Mr. Mourinho and his club may have harboured that the matter would now be allowed to fizzle out were rudely shattered a few days later when UEFA opened disciplinary proceedings against both him and his assistant, Steve Clarke, with the most harshly-worded statement which many European football observers could recall:

“UEFA today announced the opening of disciplinary proceedings against Chelsea, head coach Jose Mourinho, assistant manager Steve Clarke and security official Les Miles for making false declarations, notably in the complaint sent by Chelsea following the Champions’ League match against Barcelona at Nou Camp. By further disseminating these wrong and unfounded statements, Chelsea allowed their technical staff to deliberately create a poisoned and negative ambience amongst the teams and to put pressure on the refereeing officials”
(*The Daily Telegraph of 22/3/2005, p. S1*)

Chelsea responded to this statement in a predictably bland manner, commenting only that they were “reviewing their position”. Later, it emerged that some senior figures at UEFA had even pushed a criminal investigation to be opened against Chelsea and Mourinho for their link with the death threats made to Anders Frisk. Lawyers for the European governing body had argued internally that a clear link existed between Mourinho’s comments and these threats. Ultimately, however, the prevailing view was that this matter should best be kept within the footballing sphere – the more so because specialists in criminal law claimed that any such investigation would inevitably have foundered (*The Guardian of 25/3/2005, p.36*).

In the meantime, Mr. Mourinho admitted that he himself had not seen coach Rijkaard enter the referee’s room during the match at Nou Camp, although he remained steadfast in his contention that the incident did take place (*The Independent of 29/3/2005, p.56*). Further doubts about the justice of Chelsea’s case came when it emerged that UEFA had noticed discrepancies in the statements made by various club representatives. In a

Portuguese football magazine, Mourinho had written that he personally saw Rijkaard enter the dressing room, whereas the official Chelsea statement said that it was Messrs. Clarke and Miles, and not Mourinho, who had witnessed the incident. UEFA also maintained, following an investigation, that it was physically impossible for these two men to have seen the location where the alleged incident took place (*Ibid*).

The ultimate verdict came as something of an anti-climax, Mourinho being issued with a two-match touchline ban, which ruled him out of the crucial Champions League tie with Bayern Munich, and Chelsea themselves being fined £33,300. Steve Clarke and Les Miles were served with lesser punishments in the form of a reprimand for their conduct. These penalties fell well short of that which had been expected in view of the accusations that Chelsea had made “false declarations” in this affair. Chelsea themselves admitted that they were partly to blame for the entire episode when they conceded that the incident allegedly involving Rijkaard and Frisk had been “blown out of all proportion”. The London club seemed also to recognise that the penalties issued could have been much harsher, which is why they decided not to appeal against the verdict – given that a rehearing could have resulted in a harsher punishment (*The Independent of 1/4/2005, p.64*).

UEFA confirms player quota plan

It cannot have escaped the attention of even the most lacklustre of football fans that the make-up of professional football teams throughout the world has become increasingly multinational. Although there can be no objections to this development in principle, there is the overwhelming impression that the motivation behind it is the power of Mammon rather than the brotherhood of humanity. This trend has accelerated particularly since the famous (or infamous, depending on one’s viewpoint) Bosman decision, which has increased the players’ freedom of movement, and therefore also their vulnerability to the highest bidder. Accordingly, an increasing number of people in authority over the game have been heard to advocate placing certain restrictions on the number of foreign players which any professional football team could be allowed to field.

It is with these considerations in mind that the European governing body, UEFA, has been considering plans to impose certain restrictions aimed at avoiding the worst excesses of the current set-up. In late April 2005, it approved the plan to introduce quotas for home-grown players in its competitions. As from the

17. Issues specific to individual sports

start of the 2006-7 season, clubs entering the Champions' League and UEFA Cup must name at least four home-grown players, i.e. two from their own academy and two trained by clubs in the same country) in their 25-strong squads. This quota will rise to six players during the following season, and to eight – i.e. almost one-third of the squad – by the start of the 2008-9 season, under a new policy agreed by all 52 of UEFA's national governing bodies. In order to comply with EU rules relating to the free movement of persons, home-grown players will not be defined by nationality but by nurture. Those eligible will need to have spent at least three years between the ages of 15 and 21 being developed by their club or by another club or academy from the same country (*The Times of 22/4/2005, p.91*).

The system is not without its critics – and not only from the bigger teams either. Some maintain that it will merely encourage rich clubs to buy overseas talent at a much earlier age. In addition, in spite of its attempts to remain in line with the strictures of EU rules, it has been commented that UEFA's stance on this issue goes against the spirit of EU law which is to liberalise rather than restrict the movement of labour. Naturally the most vocal obloquy came from the wealthiest clubs, particularly those in the English Premiership, with Chelsea and Arsenal being in the vanguard of the opposition. Nevertheless, Manchester United appear to have taken a more philosophical line, and announced that the club would “not actively oppose the rules” (damned decent of them) (*The Independent of 22/4/2005, p.71*).

Football to be allowed at Croke Park after 121 years (Ireland)

Gaelic sports are very much part of the Irish identity, and the various traditions which govern them are jealously invigilated by their guardians. One of these has been that their hallowed Mecca, Croke Park in Dublin, should not be used for the purpose of hosting any other sport – not even football which, under the famous Rule 42, is classified as a “foreign sport”. Thus far, few in Irish society have cared to challenge this tradition, particularly as the other major crowd-pulling sports in the Republic – i.e. rugby and football – have had a major venue of their own in the shape of Lansdowne Road. However, the latter is due for a much-needed redevelopment which will take 29 months to complete as from 2007, thus leaving the two sports which it hosts in a quandary as to where to stage their home internationals. The relevant federations therefore made a formal approach to the Gaelic Athletic Association (GAA) for permission to use Croke Park for this purpose. At its annual conference, the GAA relented its

ban on football by 227 votes to 97 (The Observer of 17/4/2005, p. S4). The Irish FA had been exploring the possibility of playing these internationals at Anfield (Liverpool) or Celtic Park (Glasgow), the indignity of which may have been sufficient to sway the votes of any waverers on the issue (*The Guardian of 26/3/2005, p.S15*).

FIFA abandons 10-yard dissent rule

One of the rules in rugby union which has invariably proved effective in maintaining on-field discipline has been that any dissent shown by players against the decisions of match officials is penalised by bringing forward the point at which a penalty is taken by ten yards. FIFA, the world governing body in football, had sanctioned a four-year experiment in the English Premiership and Football League which applied the same rule to free kicks. However, it has now scrapped this rule. The reason given by this august guardian of the “beautiful game” is that non-rugby playing nations are apparently incapable of understanding the logic behind it... (*The Independent of 1/7/2005, p.66*).

Other issues (all months quoted refer to 2005 unless stated otherwise)

Felipe. In March, leading Brazilian club Fluminense's international player Felipe was suspended for six months after video footage showed him punching an opponent (*The Independent of 10/3/2005, p.51*).

Emanuel Pogatzetz. Before he was transferred to Middlesbrough from Bayer Leverkusen, this Russian international was banned for 24 weeks for a tackle which broke an opponent's leg. He duly appealed against this ban in mid-July, but the hearing was postponed (*The Independent of 15/7/2005, p.64*). No further details are available at the time of writing.

Messina and AC Torino. These are two Italian clubs which have recently fallen on hard times financially, and in mid-July they were expelled from the Italian Serie A (Premier Division) for the poor state of their finances. Both clubs indicated that they would appeal, although the outcome was not yet known at the time of going to press (*The Independent of 16/7/2005, p.63*).

Francesco Totti. In April, the Italian Football League banned the AS Roma captain for five matches after they had adjudged him to have kicked Siena defender Francesco Colonnese and then punched him in the face. This ban was subsequently upheld by the country's highest football court (*The Independent of 10/5/2005, p.78*).

17. Issues specific to individual sports

Fabien Barthez. It will be recalled from a previous issue of this Journal ([2005] 1 *Sport and the Law Journal* p. 103) that the controversial French international goalkeeper had been disciplined by his club Marseille for having spat at a match official during a “friendly” game with a Moroccan club. In late April, the disciplinary committee of the French Football Federation (FFF) penalised this infringement by a six-month ban. However, three months of this ban were suspended, whilst the remainder covered the close season, so that the former Manchester United net tender will in effect only lose five matches. The FFF has accordingly taken the unusual step of appealing against this measure of its own disciplinary body, which it considers to have been too lenient. The French Sports Minister, Jean-Francois Lamour, also expressed his surprise at the mild nature of the penalty (*The Independent of 23/4/2005, p.76*).

Australia. In late March, it was learned that the Australian football federation is set to leave the Oceanian Football Confederation and to join the Asian Football Confederation (*The Independent of 24/3/2005, p.59*). No further details are available at the time of writing.

Cricket

Inzamam banned for dissent

The Pakistani captain Inzamam-ul-Haq is not the most volatile of cricketers and normally maintains an even-tempered approach to the game. However, during the recent Test series against India at Bangalore it fell to match referee Chris Broad to penalise him for over-appealing and showing dissent against umpiring decisions. He was suspended for one match and fined 30 per cent of his match fee (*The Guardian of 29/3/2005, p.21*). Mr. Broad subsequently explained the severity of the penalty in the following terms:

“As captain he has to set an example for others to follow. Following the incident that happened in the ninth over of the innings, Inzamam was warned about appealing by the on-field umpires. In addition, I went to the Pakistan dressing room at lunch and requested the Pakistan coach to pass a message about the manner of their appealing. This means that, when this second incident happened, he knew he should not have reacted as he did.”
(*The Guardian of 30/3/2005, p. 33*).

However, a leading newspaper voiced the suspicion that for Mr. Broad it may have been a case of making amends for failing to suspend Inzamam when he was match referee during the recent tour of Australia, where Pakistan's recurring slow over-rate infringed the rules of

the International Cricket Council (ICC) (*The Guardian of 29/3/2005, loc. cit.*).

Bowling action cases

Jermaine Lawson

In mid-July 2005, the West Indian pace bowler was reported to the International Cricket Council (ICC) for a suspected illegal bowling action for the second time. He was reported following the completion of the first Test between Sri Lanka and the West Indies in Colombo. The bowler took eight wickets in the match, but his action caught the eye of on-field umpires Simon Taufel and Nadeem Ghauri, the television umpire Peter Manuel and fourth official Ranmore Martinez. Mr. Lawson was subjected to a similar investigation in 2003 after being reported following the fourth Test against Australia (*The Guardian of 18/7/2005, p. S22*). No further details are available at the time of writing.

Harbhajan Singh

In December 2004, the Indian off-spinner came to the attention of the cricketing authorities after being reported for bowling his famous “doosra” delivery. His action was subsequently cleared, but during the next test in which he played, against India in Calcutta, he was once again reported by match officials after he took four wickets – once again with his contentious delivery. This nevertheless drew a reaction from the opposing team's coach, former England batsman Bob Woolmer, who asked match referee Chris Broad as to why Mr. Singh was allowed to bowl his “doosra” whilst his own player, the suspended Shoaib Malik (see below), was not (*Daily Mail of 24/3/2005, p. 103*).

Shoaib Malik

In mid-May 2005, it was announced that the Pakistan all-rounder's bowling action was cleared of illegality by biomechanical experts in South Africa. His delivery action was examined at the Sports Institute in Cape Town after he had been reported the previous October following a one-day series against Sri Lanka. He had been prevented from bowling by the Pakistan Cricket Board (PCB) after undergoing two tests at the University of Western Australia in Perth. The examinations had disclosed inconsistencies in his elbow extension whilst bowling his off-break and “doosra”. The PCB confirmed that the report would be communicated to the International Cricket Council (ICC) for final clearance (*The Daily Telegraph of 11/5/2005, p.S8*).

17. Issues specific to individual sports

ICC make radical changes to one-day format

Most traditionalists would consider that the one-day international in its present form has already played fast and loose with many of the game's traditions. However, there are others who consider that this type of fixture still remains capable of being spiced up, which is why the International Cricket Council (ICC) have introduced a number of radical changes to this format. Henceforth, the use of substitutes will be allowed by teams. In addition, the number of overs in which fielding restrictions apply has been increased from 15 to 20. It is hoped that these changes will revitalise the middle section of the 50-over game, when batsmen have shown a tendency to prefer to take singles rather than go for boundaries (*The Independent of 16/6/2005, p.74*).

In addition, the 2006 Champions Trophy in India has been reduced from 12 teams to eight in order to make the tournament more competitive. This was in response to criticism that last year's tournament featured too many one-sided matches, including non-Test playing countries such as Kenya (*The Daily Telegraph of 1/7/2005, p.57*).

Other items (all months quoted refer to 2005 unless stated otherwise)

Sourav Ganguly. In mid-April, the India captain was served with a six-match ban by the International Cricket Council (ICC) for slow over-rates during the one-day series against Pakistan. The player responded by stating his intention to appeal (*The Daily Telegraph of 14/4/2005, p.57*).

Daryl Tuffey. In mid-March, New Zealand Cricket announced that their international opening bowler was fined £388 for serious misconduct after having been filmed by two English tourists in a sexual act with a woman (*The Daily Telegraph of 16/3/2005, p.53*).

Rugby League

30-year ban for 16-year-old after attack on referee (Australia)

In one of the most alarming incidents which the sport has ever had to face, it was learned in early April 2005 that Bilal El Zamtar, a 16-year-old Australian player, was banned from the game for 30 years after having assaulted a touch judge. He was issued with this enormous suspension by the Canterbury Junior League after attacking Shane Merry at the end of the Berala Bears' game against St. Johns. He pleaded guilty to the

assault, in which it was claimed that he chased Mr. Merry and kicked him after he fell to the ground. The unfortunate official is currently on crutches with knee ligament damage.

El Zamtar had been hoping for a career in the professional game, but the ban will prevent him playing before December 2035, by which time he will be 46. Non-professional players have been banned for life before, but these punishments have generally been commuted later (*The Independent of 7/4/2005, p.56*).

John Hopoate banned (Australia)

During a match between Manly and Cronulla in March 2005, winger John Hopoate was sent off for a high tackle on Keith Galloway which left the latter with severe concussion. He was suspended for 17 matches for this misdemeanour, and promptly announced his retirement from the game (*The Independent of 23/3/2005, p.58*).

Other sports

Cycling

In mid-June 2005, former world champion Jobie Dajka was suspended from the sport for three years by the Australian cycling authorities after a tribunal found that he had assaulted head coach Martin Barras. Mr. Dajka, who was suspended from Australia's Olympic squad after lying to an inquiry into drug abuse at the Australia Institute for Sport, may appeal to have the penalty suspended after a year if he seeks anger management counselling (*The Daily Telegraph of 17/6/2005, p.52*).

Hockey

In mid-March 2005, the Indian federation banned a competitor for two years for assaulting a national squad member in the course of a domestic competition the previous month. The Punjab Police defender Kanwalpreet Singh fought Deepak Thakur, who incurred a fractured nose as well as hand injuries, and had to spend several days in hospital (*The Guardian of 20/3/2005, p.22*).

Ice hockey

In early April 2005, Czech ice hockey international Bavel Kubina was fined a record amount of £4,500 and banned for 15 matches after criticising a referee. Mr. Kubina, a former player in the US National Hockey league (NHL) who led his club Vitkovice to the Czech league play-offs, had ventured the opinion that referee Petr Bolina had been bribed and put in an

17. Issues specific to individual sports

unprofessional performance when officiating in a semi-final tie (*Daily Mail of 7/4/2005, p.73*).

Motor racing

The US Grand prix, staged in Indianapolis in June 2005, degenerated into farce when only six cars started the race after the teams running on Michelin withdrew because of safety concerns. All seven Michelin teams have been summoned to a hearing before the world governing body of the sport, the FIA. The commercial rights holder for F1 racing, Bernie Ecclestone, could also be sued for the return of the £7.4 million which it cost the Indianapolis organisers to stage the event (*The Guardian of 21/6/2005, p.36*).

Olympic sports

In mid-July 2005, the Olympic aspirations of golf and rugby union were severely dented when they failed in a campaign to be included in the 2012 Games. Hopes for a revival of the Olympic status of these sports were raised when the International Olympic Committee (IOC) had decided to abandon the sports of softball and baseball – the first sports to be dropped since polo suffered this fate in 1936. However, in a dramatic turn of events which was seen as something of a snub to IOC President Jacques Rogge, these sports were not replaced, and the number of sports will be reduced from 28 to 26.

This represented mixed news for the London organisers of the 2012 Games. On the one hand, this move will save them the £50 million which it would have cost them to build temporary grounds for softball and baseball. However, they will not be able to boast the honour of hosting the first Rugby or golf Olympic event (*The Independent 9/7/2005, p.78*). 

Sport and the Law Journal Reports Index

(2005) SLJR 1-8 are reported in the Sport and the Law Journal, Volume 13 Issue 1

(2005) SLJR 1

THE QUEEN v ASTRID CHRISTINE ANDERSEN
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

(2005) SLJR 2

FINANCIAL SERVICES AUTHORITY v (1) SEAN
FRADLEY (T/A TOP BET PLACEMENT SERVICES) (2)
GARY WOODWARD
Financial regulation – communal betting scheme –
collective investment

(2005) SLJR 3

FULHAM FOOTBALL CLUB (1987) LIMITED v JEAN
TIGANA
Football – manager and club – employment –
director's fiduciary duties – contract – transfer
negotiations

(2005) SLJR 4

ZHU v THE TREASURER OF THE STATE OF NEW
SOUTH WALES
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

(2005) SLJR 5

SPEED INVESTMENTS LIMITED & ANR – V –
FORMULA ONE HOLDINGS LIMITED & ORS
Formula One – Shareholders Agreement –
Constitution of Board of Directors

(2005) SLJR 6

FLAHERTY v NATIONAL GREYHOUND RACING CLUB
LIMITED
National Greyhound Racing Club – Stewards Inquiry
– disciplinary decision – review of decision –
apparent bias – outsider present during Stewards'
deliberations

(2005) SLJR 7

REGINA v MARK BARNES
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.

(2005) SLJR 8

ARCYCLING AG v UNION CYCLISTE INTERNATIONALE
Licence – refusal to grant – review of decision – due
process rights

(2005) SLJR 9

JACQUES LICHTENSTEIN v CLUBE ATLETICO
MINEIRO
Professional football – transfer – agent –
commission – whether commission earning event
had occurred

(2005) SLJR 10

LEEDS RUGBY LIMITED v IESTYN HARRIS and
BRADFORD BULLS HOLDINGS LIMITED
Employment – Breach of Contract – restraint of
trade

(2005) SLJR 11

UNITED STATES OLYMPIC COMMITTEE v
INTERNATIONAL OLYMPIC COMMITTEE
2000 Sydney Olympics – Men's 4x100m Relay – USA
Team Gold Medal – Anti-doping – IAAF Rules –
Whether disqualification of one member means
annulment of the team result

(2005) SLJR 12

FLAHERTY v NATIONAL GREYHOUND RACING CLUB
Greyhound racing – disciplinary tribunal – allegation
of bias

Sport and the Law Journal Reports

(2005) SLJR 9

Professional football – transfer – agent – commission – whether commission earning event had occurred.

JACQUES LICHTENSTEIN v CLUBE ATLETICO MINEIRO

*High Court, Queen's Bench Division, Jack J.
29 June 2005 (Reporter: DM)*

Facts

1. On 25 July 2002 an agreement was made between Arsenal Football Club PLC and Clube Atletico Mineiro of Brazil for the transfer of Gilberto Silva to Arsenal for \$7,000,000.

2. Mr. Lichtenstein was a football player's agent licensed by FIFA and he made a claim for 10% commission on the monies received by Atletico Mineiro. The claim was based on a written agreement dated 3 July 2002.

3. The Claimant had a business relationship with the former professional footballer Ronny Rosenthal. They worked together on many transfer deals and split the commission on a case-by-case basis. Around the time of the 2002 World Cup Mr. Rosenthal identified Gilberto Silva as a player who might meet a need that Mr. Rosenthal perceived Arsenal had for a midfielder or defender. He approached Gilberto Silva's agent and his club, Atletico Mineiro. They were interested in a transfer at the right price as were Arsenal and Aston Villa.

4. Mr. Rosenthal arranged meetings with Arsenal on 3 July 2002 and Aston Villa on the following day. He flew over Atletico Mineiro's club representatives. When they arrived on 3 July, they signed an agreement as to payment of commission. Since Mr. Rosenthal was not a registered agent, the agreement was expressed as between the Claimant and Atletico Mineiro. The agreement authorised the Claimant "to interest" Arsenal and Aston Villa in Gilberto Silva. In the case that it was agreed to sell Gilberto Silva to one of those clubs, the Claimant was to receive 10% commission on the transfer amount.

5. The Arsenal manager, Arsene Wenger, had already instigated investigations into a possible purchase of Gilberto Silva. After seeing him play in the early rounds of the World Cup, he had asked the vice-chairman of Arsenal, David Dein, to find out about the player. Mr. Dein used an international sports consultant, Mr. Richard Law to find out whether Atletico Mineiro and the player would be interested in a transfer. Around the

time of the World Cup final on 30 June, Mr. Law met with Atletico Mineiro club officials in Sao Paulo.

6. On 3 July, Mr. Rosenthal took Atletico Mineiro's representatives to a meeting with Mr. Dein at Highbury. Mr. Rosenthal was excluded from the meeting during which no agreement was reached. The trip to Aston Villa the following day did not produce a meaningful bid. On the way back from Aston Villa, Mr. Dein called and, as a result, he met with the club's representatives again before they flew back to Brazil.

7. Arsenal then instructed Mr. Law to make an offer for the player. Arsenal bought the player on 25 July 2002. In addition to the \$7,000,000 payable to Atletico Mineiro, Arsenal paid Gilberto Silva's agent's lawyer \$1,400,000 making the total cost \$8,400,000.

Held

8. The claim failed. The payment under the commission agreement had not been triggered.

9. The commission earning event was that the Claimant was authorised by the Defendant "to interest" Arsenal or Aston Villa in Gilberto Silva. The activity of interesting Arsenal had to be "an effective cause" of the transfer. The strong possibility was that if Mr. Rosenthal had not intervened in the negotiations (which had already started) between Arsenal and Atletico Mineiro, then the negotiations would have taken much the same course as they did in fact take. Arsenal's existing interest was neither created by the actions of Mr. Rosenthal nor materially increased by what he did. On that basis the commission earning event had not occurred.

Commentary

10. As reported in the media, the case is said to illustrate the growing practice of agents claiming a fee even if they have had no direct involvement with a transfer. That analysis seems a little harsh in the context of this case where Mr. Rosenthal clearly put some effort into the transfer. He arguably did have direct involvement in the transfer (e.g. at his own cost he brought the club's representatives to meet with Arsenal for their first face-to-face meeting with Arsenal's vice chairman). He presumably thought he had some direct involvement since he spurned an offer of \$300,000 commission from Arsenal.

11. The hurdle he could not leap was showing that he was an effective cause of the transfer in circumstances where, by chance, Arsenal had already started their own investigations into a possible transfer.

Sport and the Law Journal Reports

12. Other grounds of the defence included misrepresentation (which failed on the facts) and mistake (as to Arsenal's existing interest in the player) which failed because it could not give rise to avoidance of the contract.

13. The final line of defence (the agreement could only be performed personally by the Claimant in the light of FIFA's Licensed Players' Agent Regulations) failed. Article 13 of the Regulations forbids the use of another (other than the player's licensed agent) to carry out agency work such as negotiation on behalf of a club. It was contrary to the Regulations for Mr. Rosenthal to approach Arsenal because he was unlicensed and it was contrary to Article 13 for him to do so as an agent of the Claimant.

14. It was accepted that the breach of the Regulations did not make the contract illegal – the Regulations were not part of English law. The defence was that any authority given by the agreement was an authority given to the Claimant personally and limited to him. The argument failed because the parties had never intended the agreement to be performed in compliance with the Regulations since they were aware that the licensed agent was acting through another.

(2005) SLJR 10

Employment – Breach of Contract – restraint of trade

LEEDS RUGBY LIMITED v IESTYN HARRIS and BRADFORD BULLS HOLDINGS LIMITED

High Court, Queen's Bench Division, Gray J.
20 July 2005 (Reporter: SC)

Facts

1. This case concerned a contract between Iestyn Harris and Leeds Rugby Limited ("Leeds") in which Mr Harris was released from his obligations to play Rugby League football for Leeds ("the release contract"), enabling him to play Rugby Union football for Cardiff RFC ("Cardiff") and Wales Rugby Union ("WRU"). The contract included a clause that in the event Mr Harris exercised a contractual option to leave Cardiff (in this contract with Cardiff) he could be required to return to play for Leeds ("the option clause").

2. Notwithstanding the option clause, Mr Harris granted Bradford Bulls RFC ("Bradford") an option that might require him to play for Bradford and upon leaving Cardiff he entered into a player's contract with Bradford on 1 July 2004.

3. Leeds brought an action for breach of contract and the parties invited the court to determine as preliminary issues whether the options clause and another relevant clause were void as being in restraint of trade, for lack of consideration or for uncertainty.

Held

4. Having determined that the relevant clauses were not void for uncertainty or lack of consideration, the court went on to consider whether the options clause was a restraint of trade.

5. The case was distinct from the ordinary run of cases concerning restraint of trade clauses as the principal object of the release contract was to achieve the release of Mr Harris at his behest and for his benefit. Although the effect of the exercise of the Leeds' option was that Mr Harris was employed, not that he was denied employment, the fact that the clause restricted Mr Harris's freedom to choose his employer and negotiate terms was sufficient to make the clause a prima facie restraint of trade.

6. However, applying the conventional test of whether the restraint of trade clause could be justified on the basis that it was in the reasonable interests of the parties, the court concluded that the option clause was not void despite being a restraint of trade. The fact that the clause was unusual did not mean it was unreasonable. It was reasonable for Leeds to reserve the right to call upon its former star player to play again if he decided to revert to Rugby League, and this was not a means of increasing transfer fee or treating Mr Harris as a chattel.

7. In determining whether the option clause was reasonable in the interest of Mr Harris it was important that the clause was not viewed in isolation but was to be considered in the context of contractual arrangements for the transfer as a whole (amounting to 4 separate contracts). At the time of contracting there was no reason to believe that Leeds would not be Mr Harris's club of choice if he returned to the Rugby League, and he was happy to agree to the option clause as part of the price for being free to follow his dream of playing for Wales. He was not denied employment as a result of the clause, nor was he subjected to any loss of remuneration as a result. Taking into account all these circumstances, the court concluded that to the extent that the option clause was a restraint, it was in the interests of Mr Leeds and Mr Harris and was accordingly not void as a restraint of trade.

Sport and the Law Journal Reports

Commentary

8. A curious case which enabled Leeds to ensure that in the event one of its star players came back to Rugby League he could be prevented from playing for one of its competing clubs. This conclusion has to be tempered against this being a benefit that Leeds had during the currency of its contract with Mr Harris and his wish to switch codes.

(2005) SLJR 11

2000 Sydney Olympics – Men’s 4x100m Relay – USA Team Gold Medal – Anti-doping – IAAF Rules – Whether disqualification of one member means annulment of the team result

UNITED STATES OLYMPIC COMMITTEE v
INTERNATIONAL OLYMPIC COMMITTEE

The Court of Arbitration for Sport
(No. CAS 2004/A/725) 20 July 2005 (Reporter:MO)

Facts

1. The gold medal for the men’s 4x 400m relay event at the 2000 Sydney Olympic Games was won by the USA team. The USA team at the semi-final stage included Jerome Young. In the lead up to the Games, on 26 June 1999, a urine sample taken from Mr Young at the United States National Outdoor Championships in Oregon was found to be positive for nandrolone metabolites. On 11 March 2000 the USA Track & Field (“USATF”) Doping Hearing Panel found Mr Young guilty of doping. However, this was reversed on 10 July 2000 by the Appeals Board.

2. Mr Young was therefore allowed to compete in the Sydney Games. He ran in the semi-final but not the final in which the team won Gold Medals. There was no suggestion that any members of the team, including Mr Young, engaged in doping during the Sydney Games. There was also no suggestion that the other members of the team knew of Mr Young’s offence at Oregon while they competed at the Sydney Games.

3. In August 2003 Mr Young’s doping offence and exoneration was reported in the US media. After some investigation, the matter was referred to the International Association of Athletics Federations (“IAAF”) who, in turn, in February 2004 referred the matter to the Court of Arbitration of Sport (“CAS”) and requested it to overturn the decision exonerating Mr Young. On 29 June 2004 CAS overturned the decision and held that Mr Young should not have been able to compete in the Sydney Games.

4. On 18 July 2004 the IAAF held an Extraordinary Council Meeting to consider how the IAAF Rules should be applied in the aftermath of the CAS decision. It decided that as a consequence of Mr Young’s ineligibility, the results of the USA relay team in the Games should be annulled. The United States Olympic Committee (“USOC”) and all of the members of the USA relay team (except Mr Young) appealed to the CAS on 27 September 2004.

5. The CAS put aside the procedural grounds of the appeal and focussed on the merits of the IAAF decision. They put the issue as follows: whether, under the IAAF Rules in force at the time of the 2000 Sydney Olympic Games, the results obtained by the USA team in the relay event should be annulled.

Held (upholding the Appeal)

6. The relevant IAAF Rule was Rule 59.4 which read:
If an athlete is found to have committed a doping offence and this is confirmed after a hearing or the athlete waives his right to a hearing, he shall be declared ineligible. In addition, where testing was conducted in a competition, the athlete shall be disqualified from that competition and the result amended accordingly. His ineligibility shall begin from the date of suspension. Performances achieved from the date on which the sample was provided shall be annulled.
(“the Rule”)

7. The IAAF’s case was that the effect of the Rule, and in particular the last sentence, was that the result of any relay team in which a disqualified athlete competed is annulled along with the disqualified athlete’s result. The IAAF argued that the express provision of the Rule must be complemented by the rules governing the composition of a relay team and construed purposively. Their argument went as follows:

- a) Young’s performance in the first round and semi-final stage of the 4 x 400 relay were annulled;
- b) the other results of the USA team in which Mr Young ran were also annulled because the team had to compete 4 not 3 legs during qualification;
- c) the results of the USA team in which Mr Young did not run, the final team, were annulled because that team’s right to participate in the final depended on the validity of the results in the earlier rounds;
- d) alternatively, the word “performances” in the Rule should be construed to apply to the team in which the disqualified athlete participated.

Sport and the Law Journal Reports

e) in any event, "it would be perverse and undermine the force of the Anti-doping Code if results achieved through reliance on an ineligible athlete, whether [results] of the athlete or of his team, should stand."

8. Despite seeing the force and logic of the IAAF's position, the CAS came to the conclusion that the proper construction of the Rule was that only the results of the individual athlete could be disqualified. They referred to the lack of any reference in the Rule to teams or team results, compared with references to the individual by virtue of the words "athlete" and "his ineligibility".

9. The CAS also relied on IAAF's own Briefing Note which stated that there was no specific provision for what should happen when a competitor who had been a member of a team was found guilty of doping. Indeed, this was addressed by an amendment to the Rules in 2004-5 which read:

"[I]f an athlete tests positive in an earlier competition or admits doping (and is subsequently declared ineligible) and his results from the date of the provision of his sample through to the imposition of his suspension or ineligibility are annulled, the result of any relay team in which he has competed during such period shall also be annulled."
(Rule 39.4)

10. However the amendment also introduced the concept of "fairness". It went on to read:

[W]here an athlete has been declared ineligible under R40 below, all competitive results obtained from the date the positive sample was provided (whether in competition or out of competition) or other anti-doping rule violation occurred, through to the commencement of the period of provisional suspension shall, unless fairness dictates otherwise, be annulled, with the resulting consequences for the athlete (and, where applicable, any team in which the athlete has competed)...

11. The CAS emphasised that the Rule in force during the Sydney Games did not contain any consideration of fairness and took from this an indication that the Rule was not intended to apply so as to automatically annul the results of a whole team.

Commentary

12. As CAS pointed out, the rest of the USA team was entirely ignorant of their team-mate's doping offence and their behaviour was in no way affected by the rules or their understanding of them. In coming to their conclusions, the CAS relied on the decisions in Quigley's Case (USA Shooting and Q. v/UIT, CAS 94/129) and AC v FINA (CAS 96/149, Award dated 13

March 1997) which emphasised the need for clarity and predictability in the rules governing the sporting community. The CAS recognised the arduous "fight against doping" and the need for "strict rule" but could not allow a "thicket of mutually qualifying or even contradictory rules" to lead to athletes being guilty of offences in circumstances where they could not have reasonably known they were doing wrong.

13. In the end it was only Mr Young who lost his Gold medal, even though he had been part and parcel of the Gold medals that the rest of the team were able to keep. Although little comfort to the winners of the Silver medal, the alternative interpretation of the Rules by CAS would probably have been repugnant to the sense of fairness within the public at large, let alone within the sporting community. The decision sensibly carries on a tradition of tribunals striving to ensure that there is as much certainty as possible for athletes about the normative system in which we expect them to compete. However, as the CAS pointed out, the IAAF Rules have now been amended to catch the very situation facing the USA team albeit subject to a vague consideration of fairness. It remains to be seen whether the application of this new rule will itself breed a new source of uncertainty for athletes competing in team events.

(2005) SLJR 12

Greyhound racing – disciplinary tribunal – allegation of bias

FLAHERTY V NATIONAL GREYHOUND RACING CLUB

Court of Appeal (Civil Division), The President, Lord Justice Scott Baker, Sir Peter Gibson. 14 September 2005 (Reporter: DM)

Facts

1. Tom Flaherty's dog was the favourite for the second round heat of the Greyhound Derby on 11 May 2002 at the Wimbledon Greyhound Stadium. The dog finished last of five runners. After a urine test, it was revealed the dog's urine sample contained "Hexamine". The drug is ordinarily used to treat urinary tract infections in greyhounds as opposed to being the type of drug a rival's owner might administer to nobble another dog.

2. On 10 September 2002, the stewards of the sport's governing body, the National Greyhound Racing Club Limited ('the NGRC'), held an inquiry. The key issue at the inquiry was whether Mr. Flaherty had administered the drug. The hearing lasted 1-2 hours. The stewards found Mr. Flaherty in breach of their racing rules. He was reprimanded and fined £400.

Sport and the Law Journal Reports

3. Mr. Flaherty issued a claim for a declaration that the stewards' decision was in breach of the NGRC's implied obligation of fairness and therefore of no effect.

4. The judge found apparent bias in that the veterinary steward, Mr. Crittall, had sat on the tribunal. The apparent bias was based on his prior relationship with the Wimbledon Greyhound Stadium; his prior professional contact with two of the management team at the Stadium; and the way in which, at the inquiry, he expressed his views about the security arrangements at the Stadium. The judge found that the presence of Mr. Melville, the chief executive of the NGRC, during the deliberations after the hearing had finished also justified a finding of apparent bias. The NGRC appealed.

Held

5. The appeal was allowed. The judge was in error in finding apparent bias on the basis of the participation of Mr. Crittall and he was in error on his analysis of the Melville issue. There was no procedural unfairness and the conclusion of the tribunal was a just one.

6. The test for apparent bias is in two stages. First, the Court must ascertain the circumstances which have a bearing on the suggestion that the tribunal was biased; secondly, it must ask itself whether those circumstances would lead a fair minded and informed observer to conclude there was a real possibility that the tribunal was biased.

Mr. Crittall's relationship with the Stadium

7. Mr. Crittall's veterinary practice had carried out veterinary duties at the Stadium for over 30 years although by the time of the inquiry this business relationship had ceased. He had been a steward for over 12 years. He had been appointed to the inquiry because of his expertise and hands-on experience of what happens in greyhound stadia and the problems faced by trainers and promoters. In the absence of actual bias (the judge had rejected that allegation), Mr. Crittall's integrity was to be presumed.

8. His particular knowledge of Wimbledon Stadium and his expertise did not make it unfair that he should participate in the tribunal. The issue was the likelihood of a third party reaching the dog and administering the drug. This was not an issue on which Mr. Crittall had such expertise that it made it unfair for him to participate in the tribunal's decision.

Mr. Crittall's prior professional contact with the Stadium's management

9. No authority had been cited to support the contention that Mr. Crittall's prior relationship with Mr. Rowe and Mr. Harris (of the Stadium's management) should have disqualified him from taking part in the inquiry. If anything, the authorities pointed in the other direction. In *Man O'War Station Limited v Oakland City Council* [2002] UKPC 28, the Privy Council said it was unreal to suggest that a prior past professional relationship between a witness and the judge gave rise to a danger of partiality.

10. There was nothing to suggest the stewards did not consider the Respondent's case on its merits and there was nothing to suggest that the prior relationship between Mr. Crittall and Mr. Rowe or Mr. Harris in any way militated against Mr. Crittall's fair participation in the inquiry.

Mr. Crittall's expression of his views as to the Stadium's security arrangements

11. The judge had preferred the evidence of the NGRC's witnesses as to what happened at the hearing. The most that could be said of Mr. Crittall's conduct was that his questioning was "robust". The Respondent had still been able to get his points across. The question of the security arrangements was but a relatively small part of the case – it was very much a sub-issue. Mr. Crittall was entitled to put questions on the basis of his knowledge and common sense and he was entitled to do so in a robust manner to test the Respondent's version of events and its inherent probability. Stewards were entitled to use the evidence of their own eyes and their experience.

The Melville Issue

12. Mr. Melville had been present during the deliberations despite not being a member of the tribunal. No complaint had been made about his presence at the deliberations until the Respondent's closing submissions before the judge. The point was taken that the mere presence of a non-member while the tribunal is deliberating is enough to invalidate the proceedings. The judge allowed further evidence to be called the thrust of which was that Mr. Melville played no part other than to confirm that the Respondent had no previous findings against him. The Respondent accepted this evidence without objection.

13. The correct test is whether there was apparent bias and the judge (as both parties to the appeal accepted) was wrong to hold that the appearance of interference in the deliberations of the tribunal by a stranger is a special class of procedural unfairness.

Sport and the Law Journal Reports

14. Although it was not good practice for Mr. Melville to retire with the tribunal, that did not make the proceedings unfair in itself. He was an "outsider" to the tribunal where there was no evidence of impermissible contribution falling foul of the right of the "accused" to be heard and he was not a "brooding presence". The risk of unfairness therefore depended largely on his status and identity. In the circumstances (Mr. Melville was not the prosecutor; he was concerned with administration; he did not instigate the proceedings) there was no risk of apparent bias.

15. In its conclusion the Court highlighted the importance of taking a step back and asking the question posed by Lord Wilberforce in *Calvin v Carr* [1980] AC 574 at p593C – whether having regard to the course of the proceedings there has been a fair result ("...those who have joined in an organisation or contract, should be taken to have agreed to accept what in the end is a fair decision, notwithstanding some initial defect"). The question in every case is the extent to which the deficiency alleged has produced overall unfairness.

Commentary

16. Before analysing the issues, the Court of Appeal expressed concern that a 1-2 hour sporting tribunal had resulted in a 10 day High Court trial followed by an appeal lasting a day and a half. The Court referred to the cautionary observations in *McInnes v Onslow Fane* [1978 1 WLR 1520, 1535F-H that courts must be slow to allow an implied obligation to be fair to be used as a means of making claims in relation to honest decisions of bodies exercising jurisdiction over sporting activities.

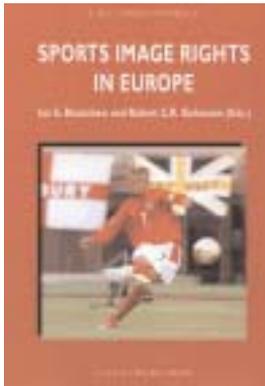
17. The Court's emphasis throughout was on letting sporting bodies get on with the job they are required to do so long as they do their job lawfully and within the ambit of their powers. The ultimate question was the fairness of the overall result in the light of any procedural defects. If that question is answered properly the Court clearly anticipated the need for reference to the courts would reduce.

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Reviews



Ian Blackshaw & Robert Siekmann (eds) (2005), Sports Image Rights in Europe (2005), The Hague: TMC Asser Press (p. 419).

Sports Image Rights in Europe is a comprehensive and largely interesting review of the subject in the 15 pre 1 May 2004 member

states of the EU together with Norway, Switzerland and, by way of comparison, the US. The title of the book of course begs the questions often raised in this context – what is sports law and what are image rights? Whilst the answer to both questions may often be that there is no such thing, nevertheless, image rights as commonly understood are of major commercial importance to leading sports personalities. It is true that in the US the creation of the positively named, sometimes statute based, “right of publicity”¹ contrasts starkly with the more defensively developed protection of image rights in Europe by way of rights of privacy, copyright infringement and passing off. However, as can be seen from this book, there is an inevitable momentum gathering in Europe towards recognising such rights and protecting them, as there should be.

In his foreword, Sam Rush Chief Operating Officer of SFX Sports Group, points out that sports image rights are an exciting and ever changing area. This is undoubtedly true. Blue chip companies such as Pepsi, Vodafone, Nike and Rolex are not going to spend millions of dollars on celebrity endorsement without it being worth their while to do so or being able to protect their investment by legal remedies if necessary. This book is useful in giving a snapshot of the position as at 1 June 2004 although things have since moved on (Douglas -v- Hello, Princess Caroline etc.).

This book is edited by Ian Blackshaw, the experienced English sports law practitioner and academic, and his Dutch colleague Robert Siekmann, director of the ASSER International Sports Law Centre in The Hague. In his introductory remarks, Ian Blackshaw rightly describes the power of brands generally and touches on the potential

impact of the Human Rights Act which I think has yet to be unleashed in this area in the UK. Perhaps this is due to the innate conservatism of some of the judiciary or a slight feeling that sports celebrities do not necessarily deserve the most sympathetic treatment from the courts – think of the recent refusal of a confidentiality injunction to the Beckhams and the comments in the Gary Flitcroft case.

Turning to the contents of the book, Ian Blackshaw slightly optimistically says that “each chapter is devoted to a review of the applicable legal rules on Sports Image Rights in [the various individual countries]”. Therein lies the main weakness of the book which is that several of the 15 EU countries covered contribute little by way of jurisprudence to the subject. As the Irish honourably point out, their own indirect contribution is limited to the fact that their country was the birthplace of Eddie Irvine [Edmund Irvine -v- Talksport Ltd]!

Without wanting to turn this review into a *Eurovision Song Contest* type comparison between the various countries, some comparison is unavoidable.

Inevitably, for the general reader, the most interesting sections are from the countries with well developed case law. The Netherlands for instance does not recognise image rights as such but does have a concept of “portrait rights” which has led to several relevant cases, some with amusingly concise descriptions of judgements such as “the Naturist judgement” in which the fact that the naked Mrs X could not be clearly recognised did not mean that her portrait rights had not been infringed. “The sheep with the five legs judgement” held that well known people have a commercial interest in objecting to the exploitation of their portrait. The reference to “sheep” is not explained. This was one of the clearly written and informative chapters as were those from Germany, the UK and the US. So too, was the chapter on taxation, which contained a good basic overview of the potential tax advantage of proper image rights planning, albeit with a Dutch bias.

Some contributors were hindered by their countries’ lack of jurisprudence (e.g. Austria, Luxembourg and Ireland). More disappointing were the French and Swiss contributions. Privacy and image rights in France in particular have developed in an interesting way, which I thought was not brought out in a structured manner. The

¹ “...many prominent persons far from having their feelings bruised through public exposure of their likenesses would feel sorely deprived if they no longer received money for authorising advertisements...” [Haelan Laboratories, Inc. -v- Topps Chewing Gum, Inc.]

Reviews

translation of this chapter into English also left something to be desired. Switzerland, as the editors point out, plays a central role in the commercial sports business, which I thought could have been dealt with in more detail.

Common themes regarding image rights in different jurisdictions are an interesting area that is apparent from this book. The difficulties of trademarking names, particularly famous names, is a well known problem in the UK. As the UK authors point out, trademark legislation is not designed to protect image rights. In *Sid Shaw Elvisly Yours -v- Elvis Presley Enterprises*, Laddie J. commented that members of the public will purchase Elvis merchandise because it carries the name or likeness of Elvis and not because it comes from a particular source. Traders are therefore able to use famous people's names without infringing trademarks.

The position is similar but not identical in the US where personal names are not inherently distinctive and can only receive trademark protection after they obtain secondary meaning. In order to obtain secondary meaning the name must have widespread use and public recognition so that the mark primarily indicates the source of the goods rather than the goods themselves.

There is also a general balancing exercise carried out in the countries with constitutions or civil codes between freedom of expression (as it is called in the US) or the public right of information (Germany) and rights of privacy. This right of information was exercised against sportsmen in Germany so that a book on tennis technique with a cover photograph of Boris Becker and a photograph of Franz Beckenbauer in a calendar were both allowed. I suspect that this would not have come within the definition of freedom of expression allowed by the US constitution.

This book is a welcome addition to the library of those working in the area of image rights. After all, it is as important to be aware that there is no specific law in a particular jurisdiction as to know what the actual law is in another. The future is going to be interesting. I doubt if the day will come when newspapers and magazines need David Beckham's consent to use his image on their front page. However, what about the sale of postcards of sports personalities and the use of lookalikes and parodies in advertisements, which I suspect, along with many other examples, may become issues? Perhaps by the time the next edition of this book is published, we shall know the answers.

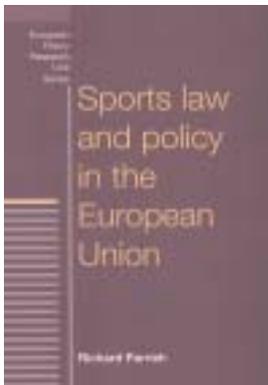
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Reviews



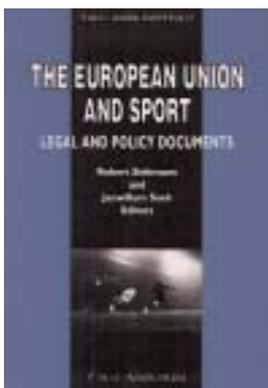
Lars Halgreen, (2004) European Sports Law: a Comparative Analysis of the European and American Models of Sport, Copenhagen: Forlaget Thomson (p.432).

institutions (most prominently the Court and the Commission) to consider all relevant aspects, most of all the cultural dimension? So at European level, more than at national level, the complaint of those subjected to public intervention may be *either* that the special demands of sport have been misperceived *or* that the system locks out consideration of features that should be part of the assessment. Or both.



Richard Parrish, (2003) Sports law and Policy in the European Union, Manchester University Press (p.271).

All the three books under review carry these background rhythms. Halgreen's special contribution is to draw comparisons and contrasts between European and North American practice, Parrish builds his narrative around the notion of 'separate territories', according to which there is 'a territory for sporting autonomy and a territory for legal intervention' (p.3), while Siekmann and Soek's handsomely presented volume collects together the 'EU Sport Acquis' (p.x) of the Court, Council, Commission and European Parliament.



Robert Siekmann and Janwillem Soek (eds), (2005) The European Union and Sport: Legal and Policy Documents, The Hague: T.M.C. Asser Press (p.921).

Halgreen shows how the notions of vertical and horizontal solidarity are developed in very different manners in Europe and in North America. At the risk of superficiality (on the part of your reviewer, not the author), one may identify Europe as more deeply committed to vertical solidarity than North America – promotion and relegation, sharing wealth all the way down to the grass roots, and so on – while North America displays a deeper commitment to horizontal solidarity within professional leagues – the 'draft pick', franchise relocation, and so on. This model can be used – *inter alia* – to track how things might change over time. Halgreen provides a detailed comparative account of the legal treatment of a set of practices that are central to the sports industry: among them, broadcasting rights and competition (anti-trust) law, ownership restrictions, labour relations including player mobility, the regulation of agents, and intellectual property rights.

It is easy to assert that sport is unlike other industries, but it is harder to pin down exactly what that may entail. It does not mean, for example, that price-fixing should be treated any less leniently when it involves replica football kits than when it involves cement or vitamins. Sport is not *wholly* unlike other industries. But it possesses features that are abnormal. The economics of professional leagues are based on the

interdependence of participants. The maintenance of rivals is a necessary element of the whole endeavour. Uncertainty of result is essential to sustain spectator interest. But it not simply in its economics that sport is special. It has social and cultural functions which transcend those to which ordinary industries would lay claim. All this poses challenges for the lawmaker. How to provide room for sport to express its distinctive economic and socio-cultural concerns while not allowing it the wholesale immunity from legal control which would overstate its separation from the norm? And at EU level the problem is all the more acute. How to shape a policy sensitive to sport's peculiarities while also taking account of the limited competence conferred by the Treaty on the relevant European

Sports law in its modern form has a longer pedigree in the United States than in Europe. Some practices to which European actors still cling were long ago suppressed on the other side of the Atlantic. Case C-415/93 *URBSFA v Bosman* was our European 'bombshell' (Halgreen, p.47), pitching us on to a 'legal roller-coaster' (Halgreen, p.379). On paper the decision merely confirmed European Court decisions of the 1970s that sport falls within the scope of the EC Treaty in so far as it constitutes an economic activity. (All the relevant decisions are collected in Siekmann and Soek). To this extent, there was no shock – except for the 'eminent [unnamed] sport and the law lawyer' cited by Parrish who asked 'what the bloody hell has the Common Market got to do with sport?' (p.1): eminence can evidently be

Reviews

achieved without intellectual curiosity. In practice, however, the *Bosman* ruling demonstrated for the first time that EC law could be employed to force radical and immediate change in the structure of the game. Things have never been the same again, as what Parrish aptly labels the commercialisation, juridification and politicisation of sport has intensified and, as he emphasises especially at pp.101, 106, enforcement of the rules of the EC Treaty became a real prospect.

A central question asks just what is the scope of the autonomy that is and should be allowed under the law to governing bodies to set the rules that underpin their sport. It is what the European Court in *Bosman* described as ‘the difficulty of severing the economic aspects from the sporting aspects’ of (*in casu*) football. It is difficult because it is probably impossible. Football teams consist of only 11 players – but that sporting rule has economic implications, because were teams to comprise more players, there would be more jobs. It is very difficult to imagine any ‘sporting rule’ which does not also have a commercial repercussion. Halgreen spends time in the introductory Chapters of his book setting the scene for analysis of the key question, and returns to it in his Conclusions. He observes that ‘... the line between economic and sporting reasons forms the crux of sports law’ and wonders whether one should accordingly abandon the quest to find a *purely* sporting rule (which escapes legal control) and instead think in terms of a rule possessing a *predominant* sporting reason (p.396). As he convincingly observes two pages later the ‘European Model of Sport’ could be defended by separating the regulatory branch of the sports federation from its commercial interests – though the arguments of both the past and the future centre on where to locate the line of that separation. Parrish also addresses these issues, providing a helpful survey of rules necessary for ‘organising the game’ (pp.132-138), including those concerning the single structure model of sport, precluding multiple club ownership and club relocation; and rules governing the supply of labour (pp.138-149), covering most of all the transfer system. He accepts that the divide between the notion of the rule that is inherent to the organisation of the game and the rule that is commercially based is hard to fix, generating a likelihood of a case-by-case approach (p.152), and ‘problematic’ (p.217), but he shows that this does not in any sense undermine the value of a ‘separate territories’ approach. It just reminds us that knowing that there is a divide between the territory of sporting autonomy and the territory of legal intervention is a well-positioned starting-point in the investigation, not an answer in itself.

There is plenty of intriguing material in these books

which allows reflection on just how special sport really is – that is, just what should be tolerated in sport that would not be practised in a ‘normal’ industry. I would not agree with Halgreen’s view that collective selling of broadcasting rights is inherent in the way sport is run (pp.114-115), and nor does the European Commission, if it adheres to the approach it took in its *Champions League* decision. But the point may be revisited, for the possibility of breaking open collective deals is likely to become increasingly attractive to some richer clubs who stand to make more from individual sale of rights to their own matches than from sharing in the collectively-created pool. Whether the collective deals are lawful under competition law will likely become an important element in the commercial manoeuvring. I would be more sceptical of the idea that salary capping can escape legal control than Parrish (p.156), at least in the absence of a deeper participation in agreeing arrangements by players or their representatives than currently occurs in sports organisation in Europe. But my comments in this paragraph are really mere detail. The general point is that the authors have done a great service to scholarship by offering such rich material as the basis for reflection on just how special sport really is.

A key theme for Parrish is the risk that the EC’s focus on economic integration may imperil social and educational concerns within sport. This issue is set out clearly at the beginning of Chapter 6, though it is visible elsewhere. He then shows how the ‘socio-cultural coalition’ (p.161) has endeavoured to prise open the EU’s institutional environment in order to secure deeper recognition of its anxieties. This is an intriguing tale which conveys the breadth of the virtues claimed for sporting activity.

At p.166 it is stated that *Bosman*, labelled a ‘setback’, ‘confirmed the predominance of the EU’s market-based definition of sport at the expense of the social definition’; at p.174 an ‘insensitivity’ in the EU approach to sporting issues is mentioned. I think I would not fully share Parrish’s assessment of the *Bosman* ruling. It was, as he convincingly explains, a landmark in the sense that it demonstrated the live possibility of using EC law in an effective manner to force change in professional sport. Parrish goes further. It ‘struck at the heart of the socio-cultural coalition’s belief system’ (p.204). In so far as that belief system was simply that sport is entitled to autonomy from the law, then I agree. But the book’s claim seems to be stronger. It is contended that the Court in *Bosman* neglected some deeper socio-cultural dimension in sport. As Parrish observes (pp.195, 204, 217) the ‘socio-cultural coalition’ is one of convenience, lacking consensus on policy strategy, but I am still left unsure what really is

Reviews

the core of the perceived damage wrought by *Bosman* to sport's socio-cultural territory. The Court set aside a transfer system that was mediaeval in its treatment of footballer employees; and, strongly prompted by Advocate General Lenz, it refused to accept that the origin of players plays any necessary role in the structure of club football, a view which I have never seen challenged with any intellectual rigour. I would argue that in *Bosman* the Court swept away anachronistic practices that the 'football industry' had no serious basis to defend, either on economic or socio-cultural grounds. In this vein, at p.214 Parrish writes that the analogy between sport and culture was rejected by the Court in *Bosman*. I do not think this is correct. The Court refused to accept that the practices at stake in the case itself had anything to do with 'culture'. In my opinion it was subsequently more accommodating to sports peculiarities in *Dellege* and *Lehtonen* not because it had changed its mind about the worth of socio-cultural concerns in EC trade law but rather because the material presented in those cases was, unlike that in *Bosman*, shown to be relevant to preserving sport's necessary peculiar features. So I would fully endorse Parrish's instruction to sport to abandon the feeble 'we know best' claim (p.219) – but I would depict *Bosman* as a perfect example of such feebleness, rather than as an instance of – in short – commercially-driven legal reasoning overwhelming embedded socio-cultural values.

I am not in any sense taking issue with the core of the thesis advanced with care and skill by Parrish – that there is a territory in which sport sets the rules, and the law is kept at bay, and that a range of interested actors participate in shaping the geography of that territory. My reservation about the use of the 'separate territories' pattern is that it may be used in a way that tends to conceal the misshapen and contested nature of the socio-cultural territory occupied by sport. The 'separate territories' approach is a valuable framework for analysis, but it is, for my taste, appropriate to have a healthy scepticism about just what falls into sport's socio-cultural territory. (I should make plain that nothing in Parrish directly contradicts that view, for his primary concern is to show the analytical salience of the 'separate territories' framework in understanding how EU sports law and policy has evolved rather than to criticise the location of the divide between the territories – I am here indulging the reviewer's privilege of drifting away from the mainstream of the agenda set by the author). There are features of sport that render it distinct from normal industries in *economic* terms – most prominently, the interdependence of clubs in a professional league and the associated need to preserve uncertainty of result, which the Court explicitly recognised in *Bosman* (and at p.100 Parrish observes that the Court in *Bosman* did not treat

sport as any other industry). But what is really culturally different about sport? Perhaps that it is a means to achieve good health – but this would apply to participation in recreational sport and has nothing to do with spectator interest in professional sport. Perhaps that it is a device for promoting a People's Europe, as Parrish suggests at p.203 – but I am not sure what this means. Perhaps that it is a means to promote notions of fair play and tolerance – but your reviewer would need a lot of persuading that has any connection with top-level football. Opportunistic politicians curry favour by playing along with an inflated view of sport's entitlement to autonomy – at pp.190-191 Parrish provides a quote of which I confess I had been unaware, referring to a 'need to safeguard sport, notably, soccer, from the perverseness that has emerged from the (*Bosman*) ruling', attributed to the Portuguese Minister for Sport – but intellectual substance is rarely present. *What* perverseness, exactly? That working-class young men are getting paid more than expensively-educated middle-aged politicians? Sports federations too are very eager to assert the cultural value of their activities as a shield against legal intervention, and the 'separate territories' approach provides an intellectual basis for understanding what this may mean, but, again, the substance of their claims is rarely carefully articulated. My feeling is that much of the cultural worth of sport has little, if anything, to do with its modern top-level professional version. 'Sport' is not sensibly thought of as a homogenous phenomenon. Amateur and recreational sport is not business. Professional sport is. And *Bosman* fits coherently into this logic, in my opinion.

It is not just sports federations that play fast and loose with definitions of sport that make airily unsubstantiated claims about its cultural importance. The biter may be bit. Both Halgreen and Parrish discuss the 'protected events' legislation found in some EU Member States and, at EC level, sourced in the 'Television without Frontiers' Directive (89/552, amended by 97/36, extracted in Siekmann and Soek at pp.73-86). This permits Member States to select events of particular importance that, for the purposes of broadcasting, will be protected in a manner that is not entirely clear (for an exasperated attempt to make sense of the rules, see the decision of the House of Lords in *R v Independent Television Commission, ex parte TV Danmark 1 Ltd* [2001] 1 WLR 1604). It is not a regime that guarantees public viewing access to major sporting events on television, as Parrish claims at p.15: it is, as he acknowledges at p.209, a permissive regime, of which most Member States have chosen not to make use. (Halgreen is also too strong in his description of the rules at p.134). Quite why such a system should exist is not explained in any convincing fashion in these books. Nor can it be. Your bewildered reviewer is unable to fill the gap.

Reviews

To suggest that citizens have a right to watch England play football or cricket is to invite deserved ridicule, yet that seems to what is at stake here. The best one can do in making sense of this system is to conclude that politicians win votes by adopting such rules, and that holders of the relevant rights in the sports sector have not (yet) devised adequate political and/or legal methods to combat such intervention, but to portray the 'protected events' legislation as a manifestation of the socio-cultural dimension of sport increases your reviewer's suspicion that, at least in professional sport, this means nothing more than that sport is popular.

In a way that is the point. Sport *is* popular and plenty of actors have an incentive to shove it up their agenda. For the political scientist in particular, the story of the EU's interventions in sport is – in short – one of 'task expansion', or (to select a label hinting at a greater degree of suspicion about the process) 'creeping competence'. Chapter 2 of Parrish provides a helpful connection between sport and the general literature on the shaping of the modern state of European integration. The EC has no explicit *legislative* competence in the field of sport, which an inspection of Article 5(1) EC might lead one to conclude therefore places it off-limits. But sport as an economic activity has been treated as subject to the basic principles of EC law, including most conspicuously the Treaty provisions concerning free movement of labour and competition policy. And so the EC institutions, in particular the Court and Commission, have been drawn (and not necessarily unwillingly) by a rich mix of public and private actors into the task of shaping a policy of sorts against the unwelcoming Treaty background. On occasion one gets the hint that the absence of general EC competence under the Treaty generates a reluctance to disturb sporting arrangements. For example rules prohibiting multiple ownership of clubs were left untouched by the Commission in *ENIC/UEFA* (2002, Siekmann and Soek pp.576-587) despite vigorous arguments that the rules were disproportionately restrictive means to secure confidence in the absence of match-rigging. But by contrast *FIA (Formula One)* (2001, Siekmann and Soek pp.458-468) and most of all *Bosman* itself stand for a vigorous engagement with sporting practices and an uncompromising unwillingness to tolerate the sporting status quo. EC law makes a conditional grant of autonomy to governing bodies, and the role of its institutions in shaping the content of those conditions forms the heart of Parrish's exploration of the extent to which ambitions to develop a policy on sport is undermined by the tensions between the regulatory and commercial implications of decisions taken by sports federations and the (even wider) concern of policymakers to reflect and promote the much broader (if ill-defined)

socio-cultural context within which sport is viewed in Europe. Parrish's 'separate territories' presents a model on which Halgreen draws, and Chapter 3 of Parrish explores – in short – who wants what and how this plays out against the background of coalition-building inspired by the distinctive readings of sport as economic and sport as socio-cultural in its impact.

Task expansion can be propelled by material that might seem to the lawyer to be rather woolly. Halgreen shows how the 'feeble and vague' Amsterdam Declaration (p.58) has generated a political dynamic to think seriously about the shaping and even promotion and defence of a 'European Model of Sport'. The gulf between the Treaty's barrenness and the ambitions of the Commission's Helsinki Report (in particular) is proof of the reality of task expansion. Parrish handles the impact of the Amsterdam Declaration skilfully (e.g. pp.15-16, 19, 104, 176, 196) and makes a convincing case that one should not underestimate the force of soft law. At p.213 he makes the nice point that use of soft law to trumpet sport's special virtues may satisfy both those dedicated primarily to market solutions and sceptical about sport's socio-cultural claims (because soft law is not binding) and those eager for recognition of sport's special socio-cultural features (because soft law is, after all, better than nothing and the best that can be extracted from the EU as currently structured). Parrish's more broadly theoretical Chapter 2 has embedded within it the important perception that policy evolution is driven by a much broader pattern of sources than binding rules alone (e.g. p.59). This is then vigorously demonstrated by his treatment of the environment within which the Court operates (Ch.4) and examination of the Commission's contribution through the application of the competition rules (Ch. 5). Equally, to inject the sober lawyer's anxiety, the constitutional fragility of the Commission's claim to be able to extract a defensible European model from the Treaty is good reason for scepticism about how much can be done in law should the economically powerful actors in European sport decide to opt more aggressively for an American model. There is here a fascinating point (and Halgreen makes it at p.394) that sports federations, having long lamented the incursion of EC law, may come to see it as a friend in so far as it may provide some shelter from the ruthless ambitions to restructure the game held by some of the more powerful clubs. Three very worthwhile books, which I enjoyed reading and will certainly use again and often.

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