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BRITISH ASSOCIATION FOR SPORT AND LAW LIMITED

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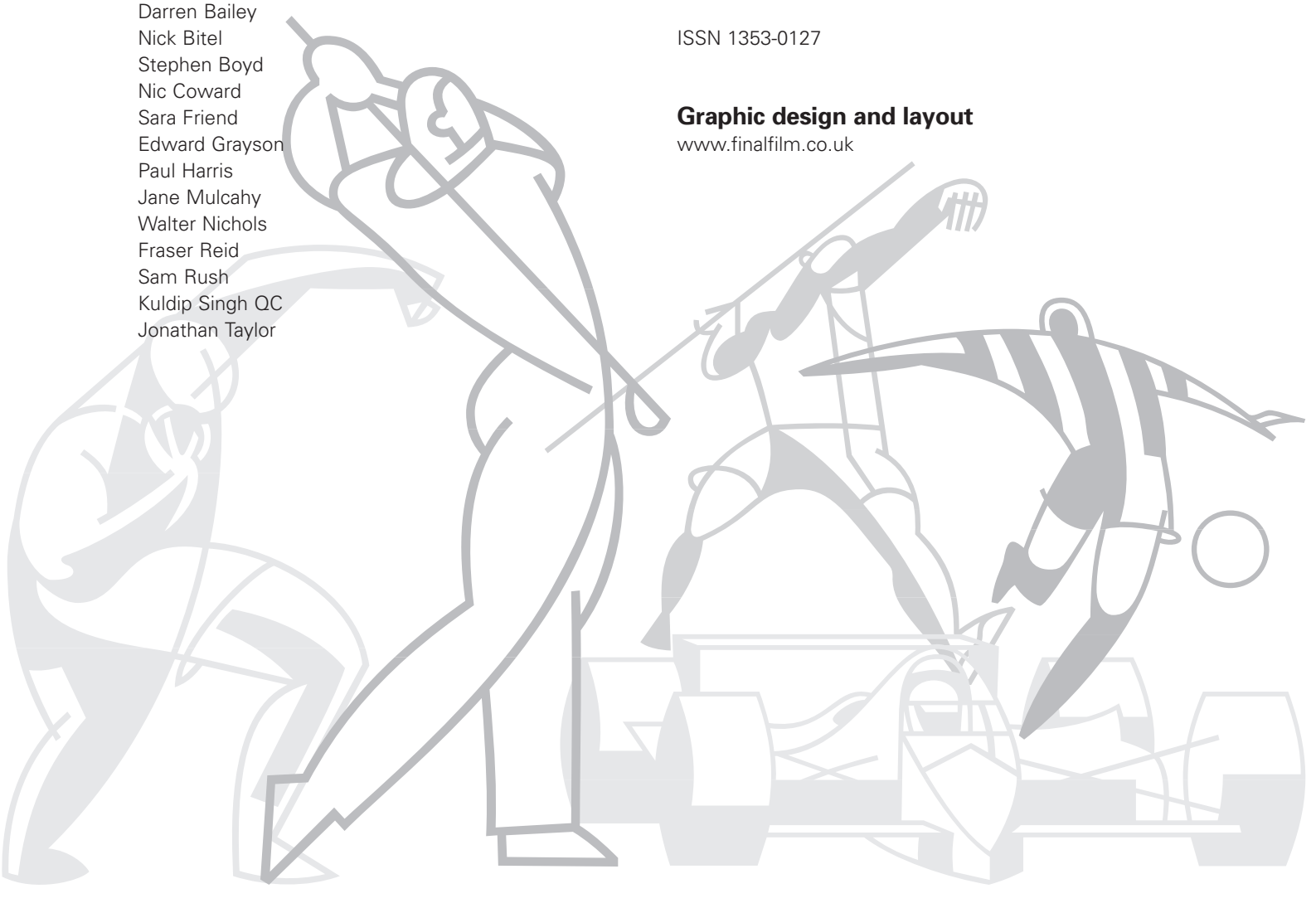

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Editorial

By Simon Gardiner, Editor

This is second issue of the Journal produced in electronic form. You will find the now established format of a number of different sections. The Opinion and Practice Section has two fairly lengthy articles. Firstly, there is a focus on the legal issues and financial implications when elite sports athletes divorce by Kevin Harris-James and David Burles. Secondly, there are extracts from the 2005 Deloitte Annual Review of Football Finances which provides the latest snap-shot of the health of the British national game.

The Analysis Section provides a specific focus on the Annual Conference of BASL held at Lord's cricket ground in November 2005. There were three main themes of the day: Athletes Behaving Badly' has a focus on issues arising over how clubs should deal with players banned for doping offences and also how potential criminal liability should be constructed for on-field acts of violence; 'Commercial Developments in Sport: Legal Issues Arising; with a particular focus on the recent tribulations of the British Horse Racing Board; and 'International Exploitation of Sports Rights' with a focus on Legal Issues in Ocean Racing and the regulation of ticketing for Major Sports Events. A short report and a two of the papers are published. Jonathan Taylor discusses the legal issues arising in the Mutu case. Robert Datnow focuses on the Transnational Legal Issues Arising in Ocean Racing.

The Key note presentation was given by David Morgan, Chief Executive of the England and Wales Cricket Board. One matter he touched upon was the selling of exclusive live rights for home Test Matches to BSkyB. The new contract, which runs for four seasons from 2006 to 2009, is worth £220m, but means live international cricket including home Test Matches and all domestic cricket will not be available live on terrestrial free to air TV for at least four years. This has led to calls for a review of the current UK system of 'Listed Events' that are protected to be only shown live on free-to-air television. The Listed Events system is empowered by the European Union's 'Television without Frontiers Directive', with each Member State able to determine which sporting events are culturally significant to that country and therefore subject to protection. There are those in the sports industry who see these provisions a restrictive practice that is untenable in the market place. In the UK, the Independent Television Commission (ITC) is the body that ensures that the listed events procedure works. The Communications Act 2003, section 299, which modified Part IV of the Broadcasting Act 1996, gives the Secretary of State for Culture, Media and Sport the power to maintain a list of sporting and other events of national interest divided into two categories: Group A and Group B. The listing of an event does not mean that it must automatically be shown on television. Listing merely ensures that rights to these events, if they are offered at all, must be offered to the main free-to-air terrestrial broadcasters on "fair and reasonable terms". Group A events must be shown either fully live on free to air terrestrial television channels which at least 95% of viewers can receive (the BBC, ITV or C4) or in highlights form by one of those broadcasters.

The Category A list of events which must be screened live by one of those three broadcasters includes: the Olympic Games; the FIFA World Cup Finals Tournament; the FA Cup Final; the Scottish FA Cup Final (in Scotland); the Grand National; the Derby; the Wimbledon Tennis Finals; the European Football Championship Finals Tournament; the Rugby League Challenge Cup Final; and the Rugby World Cup Final.

The Category B list of events that those broadcasters must be allowed to show highlights of include: Test cricket matches played in England; Non-finals play in the Wimbledon Tournament. All other matches in the Rugby World Cup finals tournament; Six Nations Rugby Tournament matches involving home countries; the Commonwealth Games; the World Athletics Championship; the Cricket World Cup - the final, semi-finals, and matches involving home nations' teams; the Ryder Cup; and the Open Golf Championship.

As far as cricket was concerned, in 1998, the Department for Culture, Media and Sport (DCMS), following strong lobbying from the ECB for cricket to be removed from the listed events, instructed an advisory group, chaired by Lord Gordon of Strathblane, to look at

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the issues surrounding listed events and to make recommendations to the Secretary of State. According to the criteria used by the Lord Gordon review a listed event is one which is generally felt to have special national resonance. It should contain an element which "serves to unite the nation", be "a shared point on the national calendar", "not solely of interest to those who follow the sport in question". An event which satisfies this main criterion is not listed automatically; it should also command a large television audience and have a history of being broadcast live on free-to-air services. Even then the Secretary of State must have regard to other factors affecting the likely costs and benefits to the sport concerned, to the broadcasting industry and to viewers such as: the practicality of full live coverage on a general channel, the impact of listing in reducing income for the sport and the likely impact of listing on the broadcasting market. The criteria summarises as follows: "no single factor automatically commands listing as a response, nor does failure to meet an individual criterion disqualify an event from consideration".

When making its decision in March 1998, the Advisory Group recommended that cricket Test matches played in England should be placed in Group B, thereby enabling the sport's governing body to negotiate a deal with any broadcaster provided that highlights were available to free-to-air broadcasters. In making its decision the Group singled out cricket for special treatment, commenting that "the Tests are the most problematic of the events under consideration". It continued: "We consider that Test matches possess sufficient national resonance to merit some measure of protection for coverage ... However, a Test series played over 30 days cannot be said to be a shared point on the national calendar. We believe that it is difficult for generally available terrestrial broadcasters to schedule the Tests in full without being unfair to viewers who do not take an interest in cricket. We also considered the likely effect of continued listing on the finances of the sport"

The phenomenal success of the Ashes victory has clearly energised support for cricket in a section of the public beyond those who normally be seen as cricket fans. The Select Committee on Culture, Media and Sport published a Report in January this year entitled, 'Broadcasting Rights for Cricket: Ashes to Ashes - the death knell for live Test match cricket on free-to-air TV?' The Committee strongly supports the notion that a substantial proportion of Test match cricket should be available on free-to-air TV for the benefit of the whole country regardless of a fan's ability to pay. The Committee stated that the granting of the highlights package to Five, although it does not reach the 95% coverage threshold and not one of the generally available channels pursuant to the Television Broadcasting Regulations 2000, was perfectly in order as none of the other terrestrial broadcasters had submitted a bid.

Recently there has been a similar controversy in the Republic of Ireland over the exclusive rights that BSkyB have for the Ryder Cup to be played at the Kildare's K Club later this year. The Ttaoiseach, Bertie Ahern, has indicated his desire that the event should be screened on a free-to-air channel such as RTE or TV3, despite the long-standing contract between the PGA European Tour and BSkyB.

In other parts of the world, some countries have very liberal regimes and others more restrictive. Countries such as United States and New Zealand have no protectionist provisions. In comparison, in Australia, there are 40 sports events on the protected list, which should not be shown live on Pay-TV. Australia's so-called 'anti-siphoning' laws have been in place for over 10 years and were recently extended by the government to 2011. There is a long tradition of people being able to watch major sporting events on free-to-air television. However not surprisingly, a number of Australian media companies have been arguing for a more liberal regime. In April 2003, News Corp Ltd's deputy chief operating officer, Lachlan Murdoch, called on the federal government to drop the provisions, which give free-to-air channels the first chance to buy broadcast rights for the selected sports. The argument is that anti-siphoning in terms of sporting properties are a major impediment of subscriber uptake and the regulatory environment is, quoting Murdoch, 'extraordinary' considering it is still a start up sector by most accepted business criteria.

The European Commission is also currently reviewing the Listed Events practice under a general review of the Television Without Frontiers Directive first introduced in 1997. The Commission's view is that "this provision in general is working satisfactorily." In the UK, the listings policy was supported by the House of Lords in the 2001 ruling of *R V Independent Television Commission, Ex Parte Tvdanmark 1 Ltd*. It was held that the Art.3(a) under the Directive giving protection for certain designated events "was not qualified by considerations of competition, [or] market economics ... the right of the

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public to have access to listed events is paramount." Although such restrictions protecting listed events need to be able to be reconciled with competition law regimes, they have a place in controlling market forces in the sports rights market place. In the view of this Editor, it is in the interests of sport that certain events are available live on free-to-air TV. The public have a right to view the major specific national and world sporting events, which have immense cultural significance and a notion of common ownership. Media giants may want to gain near-exclusive rights and allow the market to operate unfettered, but their claims need to be vigorously deterred.

As far as the rest of the Journal, the regular contributions of Walter Cairn's Sports Law Current Survey and Sport and the Law Journal Reports can also be found together with a Book Review of a recent publication on Irish Sports Law.

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

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Opinion and practice

The footballer's divorce – A game of two halves

By Kevin Harris-James and David Burles

Sports men and women are in some ways no different from all other spouses entering the divorce process. They are subject to the same Matrimonial Causes Act 1973 that applies to all divorcing couples. Likewise the procedure governing the division of their assets is the same as that governing all other parties undergoing separation. It is the particular issues that are regularly thrown up by sporting divorces that lend them a uniquely difficult and interesting quality.

Ancillary Relief – General

In this article we refer to the athlete as a footballer but clearly the issues raised are not unique to that sport and apply to divorces involving all professional sportsmen and women. We are not concerned in this article with the formal process of divorce, because that is only rarely contentious. It is with the division of the couples' assets, and the regulation of their future income streams, that this article is particularly interested i.e. the process known as "ancillary relief". This is frequently resolved by agreement but, where agreement proves elusive, a settlement will be imposed by the court.

The landscape of ancillary relief litigation has altered beyond all recognition in recent years. Following the landmark House of Lords decision in *White v White* (2001 1 AC 596) all divorce courts must now consider whether a 50:50 division of capital assets is fair. The courts are not required to impose a 50:50 division in all cases but increasingly an equal sharing is the eventual outcome. Although the new regime applying to capital division is now reasonably well understood the principles to be applied to the sharing of future income are still developing and giving clear advice on income issues remains problematic as can be seen below.

Capital Division – Departing from Equality

The "holy grail" in capital division is the "departure from equality". Depending on which side of the divorce you are acting an adviser is either seeking to establish a basis for securing more than 50% of the assets or looking to undermine any attempt by the opposite party to do so. It is however only in certain cases that a departure from equality will be countenanced by a court and the factors that will drive an unequal sharing are limited. When advising spouses within the sporting context it is vital to consider what can, and what can not, ever support a departure from an equal sharing of capital.

Needs – Children

It is often assumed that sporting divorces involve lavish sums of money. Often this is true but by no means always. The most common reason for a court awarding one divorcing party a greater share of the available capital is because that party, almost invariably the party with the day-to-day care of the children, needs more capital, usually to buy suitable accommodation. In low-asset cases involving sportsmen and women this factor can be crucial. Treading the fine line between needs on the one hand and wish-lists on the other is the familiar territory of the divorce lawyer.

The "Stellar" Contribution

In the years following White the debate raged as to whether one spouse's exceptional contribution to the accumulation of assets could justify a departure from equality in favour of that spouse. Initially the courts were willing to allow an unequal sharing to reflect one spouse's "stellar" contribution and there is no doubt that athletes fell to be treated more favourably in the years immediately after White. Indeed superstar footballers were expressly included on the list of potential beneficiaries of this principle (*Lambert v Lambert* 2003).

At a court hearing in March 2003 Ray and Karen Parlour agreed that Mrs Parlour should receive only 37% of the overall matrimonial assets. This concession by Mrs Parlour was later justified by her counsel on a number of grounds, one of which included the fact that it was Ray Parlour's exceptional sporting skill that created the capital assets that fell for division, thus entitling him to a greater share of the assets.

More recently however the pendulum has swung decisively against such arguments.

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It is important to note that the unequal sharing in *Parlour* (Parlour v Parlour 2004) was agreed by the parties and was not imposed by the court. It is now widely considered that a 13% shift away from equality could not be justified on the basis of exceptional contribution by a footballer. Indeed there are many in the profession who consider that, insofar as that departure was said to reflect the Parlour's "stellar" contribution, it was a concession that should not have been made. Particularly in circumstances where Karen Parlour had made her own crucial contribution in removing her husband from the destructive drinking and gambling culture that then prevailed at Highbury.

There will be few divorce lawyers who would now consider moving away from an equal sharing based on the footballer's "stellar" contribution. This is even true of those sports where the athlete puts his "life on the line" to create the assets in question, such as motor racing or boxing. A recent radio report was commenting on the difficult divorce of a well-known boxer. It was suggested (and the authors of this article have no way of knowing whether this was accurate or not) that the boxer in question was seeking more than 50% of the assets because of the risks taken by him in creating the assets. It was also said that he was relying on a precedent created by the divorce of James Hunt, the F1 driver, in which the "riskiness" of the particular athlete's profession justified him taking more than 50% of the assets. We would suggest that such arguments would have a precarious life-expectancy if carefully examined in court and they must come with a major health warning. Soldiers, police officers and fire-fighters all put their lives on the line for their work for far less money and have not merited special treatment as a result. Why should well-paid athletes be allowed a different approach?

Pre-Marital Assets

Better luck is likely to be had in securing an unequal sharing where some of the assets were earned by the footballer before the marriage. The courts have proved willing to discount one parties' share of the available assets on this basis. Given the income available to some very young footballers this factor can prove highly significant although, the longer the marriage, the more this factor diminishes in importance.

What about assets created before the marriage but during a pre-marital relationship? In some cases pre-marital cohabitation is treated as an extension of the marriage and assets created during this period fall to shared equally. In other cases it is ignored and a spouse will retain those assets created by him or her during this period. It all depends on the quality of the relationship.

Length of the marriage

The shorter the marriage the less certain it is that there will be an equal division. For young footballers entering divorce during their playing careers this can be a powerful argument in pursuing an unequal division. For those who have long-since left their playing days behind them the reverse is often true. Where a marriage is short (i.e. less than about five years) but nevertheless all of the assets have been created during the married years very difficult questions arise as to how to share the assets fairly. Although the presence or absence of children is not of itself a decisive factor regarding this particular issue it can often be a powerful "hidden" factor, i.e. persuading a court that an equal division is fair notwithstanding a brief marriage, where the footballer's spouse will have an ongoing responsibility for the parties' children.

Indeed the unequal sharing in *Parlour* is probably better explained on the basis of their shortness of their marriage (3½ years) – albeit in the context of an overall relationship of seven years, rather than on the basis of Ray Parlour's exceptional contribution.

A word of caution however. Courts in the future may be unwilling to allow a spouse to rely on the shortness of the marriage if he or she has been the cause of the breakdown of the marriage. In a recent, and potentially very far-reaching decision (*Miller v Miller* 2005), the Court of Appeal refused to allow a wealthy Husband to rely on the shortness of his two-and-a-half year marriage. The Court decided that the Husband's adulterous affair was the cause of the relationship breakdown and, in those circumstances it would be unfair to limit the wife to a lump sum of £1.3 million (as the Husband had suggested) where the overall assets of the Husband were at least £20 million. The Court decided that the Husband's conduct meant that shortness of the marriage could be largely ignored and awarded the Wife £5 million. The message seems clear enough. You will only be permitted to point to the shortness of the marriage as a discounting factor where you have not caused the marriage to fail. In the light of Miller the prospect now looms of the divorce courts echoing with the complaints and recriminations of disgruntled spouses in a way that had largely become a thing of the past.

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Reckless Spending

If one party has enjoyed a wild spending binge and has reduced the available assets in the process it can be argued that he / she should receive less than half of the available assets to reflect this. However it is not every case of high-spending that will trigger this approach. In *Q .v. Q* (anonymised 2005 EWHC 402 Fam), the court was faced with the divorce of an established Premiership and international footballer. The assets were significant and both parties made allegations against the other, complaining that over-spending had substantially reduced the asset pool. Both parties' criticisms were firmly rejected. Courts recognise that high earners spend heavily.

The Quality of Assets – sharing apples and pears

The asset base of a typical sporting divorce will involve a mixture of assets. Some of these are relatively secure, such as cash, property, shares in publicly quoted companies and pension funds. Others are less secure such as tax-efficient investment structures and the like. Many footballers in (or approaching) retirement will invest their money in businesses, sports clubs, night clubs, clothing lines etc. All of these assets will have a capital value given to them, including shares held in private limited companies. However each asset is different in quality. Importantly the court recognises that some assets are less secure than others and may make allowance for this in an overall asset division. If one party to the settlement takes £500,000 of shares in a speculative private trading company that might soon be insolvent there is a powerful argument for suggesting that the other party should have substantially less than £500,000 of hard cash by way of a fair comparable share.

Pre-Nuptial Contracts "PNA's"

As recently as 1995 (F V F: Ancillary Relief: Substantial Assets, 2005) Thorpe J, then a leading High Court Judge and now a leading Judge in the Court of Appeal said that "Antenuptial contracts were of very limited significance in this jurisdiction" and that "... very limited weight would be attached to those contracts." Ten years ago this was undoubtedly the reality and PNA's were routinely ignored by the Courts notwithstanding that this position was substantially out of step with the approach to PNA's of our European and common law cousins.

Importantly before White the key factor in determining ancillary relief cases had been an assessment of the claiming party's "reasonable needs" and it was arguably consistent with this approach that ante-nuptial agreement should be ignored given that they often sought to limit the applicant's award to a lesser sum than they might actually "need". Post-White the principle of "reasonable need" has been abandoned and the new touchstone is "entitlements". Given this sea-change it was immediately predicted that a jurisdiction based on entitlements would see a renaissance for PNA's.

In part this has been true.

In a series of cases after White the existence of a PNA has been given increasing weight (M v M (Prenuptial Agreement) 2002) and in one celebrated short-marriage case the Court was persuaded to adopt without alteration a PNA and in doing so to award a Wife just £120,000 notwithstanding that the Husband was worth about £50 million (K V K (Ancillary Relief: Prenuptial Agreement) 2003).

There can be no doubt that PNA's are now increasingly attractive option for wealthy clients contemplating marriage, typically where that wealth is largely one-sided. Moreover where that wealth is likely to be increased sharply in the first few years following the marriage they hold an added lustre. It is easy to see why a successful footballer would find a PNA attractive in protecting wealth over the span of his career.

However it is important to note that courts do not simply accept all PNA's. Instead they adopt a staged approach. Firstly they ask whether the PNA was fairly negotiated? If it was then the court will go on to consider the extent to which it is still fair to hold a party to the PNA? Advising clients in respect of PNA's has now become exceptionally complex. There are no longer any hard and fast rules. For example it was often said that PNA's signed on the eve of marriage will be disregarded by a Court because of the unfair pressure on the signing party and often this is true (J V J: (Disclosure: Offshore Corporations) 2004). However the Court of Appeal has recently been prepared to uphold just such an agreement notwithstanding the timing (G V G (Financial Provision: Separation Agreement) 2004). This is an area of the law that looks to be in transition. If this is correct then there is a real chance that the law in several years time will favour PNA's even more strongly, thus adding to the incentive to make one today. For the time being however the significance of a PNA in ancillary relief will turn on a complex assessment of factors including (but not limited to) the following:

- The extent and accuracy of disclosure of means from both parties prior to signing the PNA;
- Whether both parties had independent legal advice and time enough to consider it;

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- Whether either party was placed under undue pressure to sign;
- The length of the marriage to be governed – the longer the marriage the less weight the PNA will carry;
- Whether there have been children in the marriage and the extent to which this constitutes an unexpected change of circumstances.

Dividing Capital – A Summary

Dividing capital post-White is never easy but it is often more straightforward than dividing income. Nevertheless footballing divorces invariably throw up factors that call for an unequal sharing of capital and so call for special care. Where the capital is substantial the implications of even a modest departure from an equal sharing can be measured in hundreds of thousands of pounds. The incentive to get it right is obvious.

Income provision – The Brave New World

In an era when £100,000 per week is not uncommon for a high profile footballer's salary, little wonder that us mere mortals sit in awe of the untold riches bestowed upon the chosen few. Nevertheless such high earnings are indicative of a successful career for a professional footballer, and thus require exceptional consideration when assessing income provision for the dependent spouse, where income exceeds needs.

The most recent case of significance in seeking guidance as to quantum when considering future earnings is that of *MacFarlane .v. MacFarlane* and *Parlour .v. Parlour* (2004 All ER 921).

It is in Parlour that we find judicial guidance as to the redistribution of income in the footballer's divorce. In brief Mr and Mrs Parlour had been married for 3 years, although cohabited some 8 years beforehand – such cohabitation moving seamlessly into marriage. There remained three dependent children for whom Mrs Parlour continued to be primarily responsible. Mr Parlour was acknowledged as a footballing genius with Arsenal who, at 30 years of age, was still regarded as a considerable talent. Mr Parlour's net income was agreed to average £1.2 million for the three years ending June 2005.

Before the Court of Appeal, Mrs Parlour sought 37% of Mr Parlour's income for four years (£444,000), having been awarded 37% of the capital assets. Mrs Parlour's budget (i.e. her reasonable income needs) was found to be £150,000 per annum. Such an award in her favour would thus allow Mrs Parlour to set aside £294,000 per annum during the fat years thus accumulating a fund over the period of £1.17 million plus interest and capital gain for those leaner years. In her submissions at first instance it was stated, "The Court should have little difficulty in concluding that in about four years time H will enter his twilight years and that there is a real possibility that he will not have husbanded his income responsibly so as to make proper long-term provision for his family."

The Court of Appeal accepted Mrs Parlour's submissions and made an order as sought for 37% of Mr Parlour's income for 4 years whereupon there would be a review to see whether or not a clean break could be affected or an extension of further maintenance at a lesser sum.

The thrust of the Court of Appeal judgment was to award Mrs Parlour sufficient by way of enhanced income provision to achieve self-sufficiency, thus re-enforcing the objective of achieving a clean break as soon as is practicable.

Parlour talks of a timescale for independence of about 4 years, acknowledging (a) a very short earning lifetime (i.e. Mr Parlour's playing career) and (b) the likelihood of capitalization of the remaining obligation (i.e. it was later disclosed Mr Parlour was in advanced negotiations with Middlesbrough with a view to a transfer).

The Court of Appeal found that whilst the cross-check of equality was the right approach towards the division of capital, it was not appropriate for the division of income. The Court of Appeal justified the distinction when analysing the accumulation of the fruits of past shared endeavour (i.e. capital) as compared to the fruits of the breadwinners future work (i.e. income) – the former being certain and defined, the latter being uncertain and speculative. Nevertheless the Court of Appeal did acknowledge that the overriding objective remained that of fairness when considering the income position so as to avoid the possibility of discrimination between the sexes.

Whilst Parlour clearly succeeded in advancing a wife's income claim beyond her reasonable requirements, it is perhaps slightly misleading as a determinative authority as Mrs Parlour did not advance her case by seeking to equalize division of surplus income – she conceded a 37% share.

What of the prospect of equality in division of income? The Court of Appeal rejected the application of the cross-check of equality for income, but is it such an

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unattainable goal? In the right case fairness may dictate an equal division of future income where the capital spilt suffices to meet needs.

Mrs MacFarlane does not seem to think the prospect of equality in redistribution of future income so offends the principle of fairness, hence her appeal to the House of Lords (to be heard in about Spring 2006 on the judicial grapevine).

There has been further judicial guidance in the recent (and yet to be reported) case of Q .v. Q (anonymised 2005 EWHC 402 Fam). He was a very talented professional footballer having enjoyed a successful career. The parties were married 14 years and there were 4 dependant children all of whom continued to reside with the wife. It was agreed that the capital would be divided in equal shares whereby each party received approx £1.8 million. As to income it was accepted H received £1.038 million net per annum, and that his current contract expired June 2006 although would probably be extended to June 2007 by which time H would be nearly 37 years old and approaching the end of his career. Both parties enjoyed an extravagant lifestyle, and neither party stinted themselves. Mr Justice Bennett felt that W's reasonable requirements amounted to £120,000 per annum. But what of the surplus income?

It was submitted on behalf of W that she should receive 50% of H's income for the next 4 years so as to put the parties on an equal footing during which H's earnings were expected to peak. It was said that there was nothing abhorrent in such a split which is designed to achieve a level of saving to enable clean break to come about in due course.

In his judgment Bennett J. reminded himself that the primary duty was to try and achieve a clean break as soon as practicable, and in that respect he felt by enhancing W's income beyond her mere requirements would effectively bridge the period during which W could save towards her own clean break. Of particular interest is Bennett J's remark "I agree...that a 50/50 split would be affordable", a comment illustrating the potential of Parlour given the appropriate circumstances. In this particular instance however Bennett J. allowed W 40% of H's income to help here along the road to a clean break, for a 4 year term with a review thereafter (i.e. £415,200 per annum inclusive of child maintenance).

Whatever the percentages thrown around the courtroom, the reality is that in the case of the divorcing footballer his wife's income claim is going to be generous by nature albeit limited in duration to reflect his short lived career. Whilst his career flourishes both parties will share handsomely in the income spoils, and when his career enters decline so the cloth will have to be cut to fit by both parties as they live a more frugal existence, each having made provision for those lean years out of capital and savings from surplus income.

How then can the footballer seek to address his wife's income claim?

1. Immediate capital augmentation – this may prove difficult given such loading of capital in the wife's favour requires the court to act arbitrarily in fixing future income now against unknown resources.

2. A lump sum payable by instalments – this may prove unattractive as it is capable of variation.

3. Periodical payments – this may prove unattractive given a young wife and the prospect of remarriage.

4. There is no hard and fast rule and thus each case will have to be considered on its own merit when advising.

Whereas *White v White* went some considerable way to clarifying the position when dividing capital, the same cannot be said for *MacFarlane v MacFarlane* and *Parlour v Parlour* when considering income – in this respect the law remains very much in flux, although it is hoped the MacFarlane appeal will simplify matters.

Identifying the Assets

As with any ancillary relief claim, the first stage is to identify the marital assets. These include the obvious, such as the former matrimonial home, investments properties, endowment policies, shareholdings, bank accounts and motor vehicles etc. However there are the less obvious which can be best described as "hidden wealth" over which the professional footballer retains control.

The following is a list by way of illustration of the sort of "hidden wealth" that a lawyer will come across when dealing with the professional footballer as a client:-

The signing on fee

This is negotiated on behalf of a new player upon commencement of his contract. It is a sum over and above his salary and the usual benefits in kind. The

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signing on fee tends to be paid by instalments over the lifetime of a contract, the only caveat being the player must be employed by the club at certain dates during its currency. The signing on fee is taxable as income. The more successful the player, the greater the signing on fee.

The loyalty bonus
This is a fee paid to an existing player at a club rewarding loyalty. It is a strange concept and one which is really unique to football. The loyalty bonus really rewards the player and incentivises him to complete his contract by paying him a sum at the end of the contract. The sum is taxable as income. The more successful the player, the greater the loyalty bonus.

Appearance money
It is the norm for clubs to pay a player a relatively low basic salary and then enhance the basic salary by appearance monies which can be quite generous. Appearance money is taxable as income.

The promotion/relegation clause
It is common practice for a player's contract to essentially cover all eventualities for the lifetime of the contract, endeavouring to set out the player's remuneration to reflect whatever division the club may find itself in from time to time.

Typically, if a player is in the First Division / Championship at the time of divorce, disclosure of the player's remuneration would simply reflect the player's earnings at that time. However, if the club is pushing for promotion, then it would be a reasonable and sensible enquiry to examine the contract to look at the promotion clause because it may be that the following season the player has a significantly enhanced salary, particularly in the Premiership. The same of course applies to relegation and it goes without saying that a player's income can go down as well as up.

Image rights
It is important to ascertain who owns the image rights, namely the player or the club. Close scrutiny of the player's contract will answer this question.

It is usually the club that owns the rights. However the contract between the club and player may include a clause obliging the player to contribute to the promotion of various products/services for the club, for which the player receives a payment for image rights. In this instance the club is usually burdened with the tax cost, not the player and so this can amount to a tax free payment.

As the player prospers in his career and becomes a more marketable product, very often in contract renegotiations the image rights transfer from the club to the player and in those circumstances the player then has a direct financial interest in the image rights outside the confines of the standard footballing contract. These image rights at their highest can be extremely lucrative.

The image rights will reflect the player's professional status and it may be appropriate to consider the prospects of a young up and coming player who at the time of the divorce is perhaps not quite so marketable (as a result of which the club retain the rights) but if he has a very promising career ahead of him he may soon be acquiring significant wealth from the transference of the image rights to his own name by way of a renegotiated contract. In that instance, if you were acting for the wife would you really be looking for an income clean break?

Sponsorship items
On occasion a player can negotiate sponsorship deals and these fall outside his club contract. As long as there is no conflict between the player's personal sponsorship and the club sponsorship, the club is usually fairly relaxed about the player having such financial interests. The sponsorships are therefore very often within the control of the footballer and can be very lucrative by nature. It is only to the extent that the footballer has a direct financial interest in a sponsorship deal, that the divorce court will can seek to adjust or alter the rights of a divorcing couple. It must be remembered that if there is club sponsorship, that sponsorship belongs to the club who are an innocent third party and the divorce court does not have the jurisdiction to interfere in those contractual rights.

The Testimonial
This is usually paid to a player after 10 years of his career. It is a matter entirely at the discretion of the club but very often reflects a long and reputable career. The club essentially hosts the testimonial match but all proceeds after costs are deducted are paid to the player. This can very often be a sizeable lump sum and may be tax free. You will probably not find mention of a testimonial in a player's contract because where there is such contractual provision the Inland Revenue will argue in such circumstance that it is being provided for as part of the player's income. It is for this reason the testimonial is "discretionary" and is usually treated as tax free by the Inland Revenue. The point of course is thus – disclosure of the contract will not reveal the testimonial. This can be a foreseeable realisable asset with a player approaching his twilight years, very

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generous by nature. In those circumstances you may want to consider the *Parra* (Parra v Parra 2003) style claw back?

The insurance policy
Obviously a professional footballer is a valuable commodity to a club and very often the club will therefore insure the player against career ending injury. That policy will often include a lump sum payment to the player himself in the event of such an injury. It is worth exploring the existence of such a policy and the terms.

The agent
This is perhaps the most contentious point. It has been known for clubs to pay agents a private arrangement fee at the time contracts are signed. This can in some circumstances be used to mask what is in effect a "back door" payment to the player – i.e. the agent will settle the monies back on the player at a later date. The opportunity for this to occur is now less common, given that clubs now have to declare agent's fees pursuant to FA regulations. However the payment can be "fudged" and be referred to as a miscellaneous payment appearing upon the player's P11D. It is difficult to track this sort of arrangement but nevertheless it is worth bearing in mind that such arrangements can occur, albeit on a less frequent basis.

The media career
It is common for a player upon conclusion of his footballing career to embark upon a profession in the media. This again can be a very lucrative source of revenue to the player and particular regard should be had in this respect. This may be a consideration when it comes to the clean break.

The Brief Hour Upon the Stage

In the same way that the Inland Revenue apply individual standards to the pension problems created by the time-limited careers of footballers (see below), so the courts tailor ancillary relief solutions to meet those unusual circumstances. It is not every retired sportsman or woman who finds a slot as a pundit on TV or moves into management or coaching. Even those that do move onto different careers do so in the knowledge that their incomes are unlikely to ever match their receipts during their playing days.

The impact of this problem is felt most acutely when the athlete divorces during his playing days. In this scenario the court is required to gaze into the crystal ball and attempt to predict the future. Where there is ample free capital to ensure a complete clean break on both capital and income the difficulties may not be so troubling. However, where the lack of capital demands an ongoing maintenance obligation, the courts will have to form a view between the competing "futures" presented by the parties. The adversarial quality of such arguments is inevitable. The footballer will be asserting that his career is precarious, brief and likely to be followed by "desert" years without income. His or her spouse will be asserting (just as vigorously) that his career will be far longer than is being suggested and, in any event, is likely to be followed by many years of further earning potential – whether capitalising on sporting fame or pursuing different career avenues. Most footballers have a shrewd idea about their realistic "shelf-life" both as athletes and as media figures, but there is always a temptation to present the most favourable scenario to the court. When the gloves come off in the divorce courts the positions polarise and common sense can quickly disappear.

In an attempt to introduce some realism into a sporting case it can be sensible to call on an "expert" to give some guidance on the likely future. Where the footballer's spouse is asserting that the player will have an open-ended career filled with riches (thus justifying a top-heavy maintenance order or an outright transfer of the matrimonial home) it may be sensible to call on an experienced (and probably independent) sports agent to give some cautionary advice about the reality of life after sporting retirement and the likely value (if any) of future image rights. In light of such evidence a court might be persuaded to impose a more realistic maintenance obligation on the player or consider he should retain a share of the home to be recovered in the future when the children reach independence.

Where it is the athlete who is painting a picture of excessive doom and gloom it would be wise to demand copies of all documents relating to future contract negotiations or call for copies of all communications with bankers, mortgage-lenders and the like to ensure that the footballer is consistently presenting the same doomsday scenario to other third parties. It may also be necessary to seek to include a mechanism in any settlement that allows for unexpected improvements in the athlete's career to trigger additional sums for the spouse. Such bonuses have been a common feature of playing contracts for a number of years. Ironically the same structure of awards are now appearing more frequently in divorce settlements too.

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Pensions

The football players pension is extremely complex and often challenging. It is very often misunderstood and its importance overlooked by those advising.

Many footballers are members of the Football League Players Retirement Income Scheme (FLPRIS). Footballers are within a prescribed occupation which permits retirement and uplift of pension benefits from age 35.

The Finance Act 2004 which deals with "simplifying the taxation of pensions" will continue to recognize football as a prescribed occupation and thus the uplift of benefits from age 35 although (and this is very important to note) this will be on very different terms to those currently available.

From April 2006 (A-Day) the pension benefits will be measured against the lifetime allowance. The lifetime allowance will initially be £1.5 million in 2006, rising to £1.8 million by 2010/2011. The lifetime allowance represents the maximum pension fund an individual can accrue without suffering a significant tax charge. Football players will still be permitted to uplift their benefits from age 35 onwards but in doing so their lifetime allowance will be reduced by 2.5 % for each year prior to normal retirement age.

By way of example therefore if a footballer draws down his pension at 35 he is deemed to be retiring 20 years early, and therefore a penalty of 20 years x 2.5% is applied (ie: 50%). The lifetime allowance of £1.5 million is reduced by 50% to £750,000. Any excess fund above this amount is then taxed at 55%.

It is common practice at age 35 for the football player to take his pension benefits even through in some instances the player is still under contract and receiving income.

Often the pension benefits accrued within the FLPRIS and other private arrangements are transferred to a personal pension (very often a self invested personal pension) and what is called a "draw down" arrangement commences.

The draw down arrangement works as follows.

A player may have total pension benefits of £1.5 million which he transfers at age 35 to a draw down personal pension. From this he may be entitled to receive say £375,000 (25%) as a tax free sum, which he takes. The residual fund of £1.125 million remains invested from which the player is then permitted to draw an income within certain allowances (currently between £19,687 and £56,350 per annum). Having taken his tax free lump sum, the player will never be allowed to access the residual fund other than by way of income. Nevertheless, it is still capable of being subject to a pension sharing order in favour of his wife. After April 2006 the footballer can have his tax free cash but is not required to take the income.

For some reason the footballer often sees his pension fund as sacrosanct and would much prefer to offset his wife's claims against marital assets elsewhere. This however can lead to distorted thinking.

Take the footballer who has transferred his pension to a draw down arrangement at 35 and then received his tax free lump sum of £375,000. He is left with a residual fund of £1.125 million which can only ever be a source of income – not capital.

Were he to concede a 100% sharing order over this fund of £1.125 million to his wife and by way of offset accept say £1 million of non pension assets in lieu, it will only cost him £725,000 to recreate his lost pension fund of £1.125 million assuming:

- He has earnings in the future which justify pension contributions and;
- He is a 40% tax payer;
- Thus the wife will have a pension fund of £1.125 million (which incidentally she cannot draw upon until age 50 or 55) but the husband has £1 million of other assets of which he must use only £725,000 to recreate the lost pension – i.e.: he is £275,000 better off.

However, the story does not end there. Because the husband is creating a new pension fund, he will once again be entitled at retirement to take 25% of the fund as a tax free cash lump sum. So ignoring any growth in the fund, at a cost of £725,000 he has created a fund of £1.125 million, from which the husband can then draw down a further 25% as a tax free cash sum!

It is important to ensure that the pension scheme that the footballer is a member of is written to age 35. To guard against unauthorised payment charge the scheme had to be in place before December 2003. The PFA scheme and Personal Pensions adhere to this and are protected. This is a separate issue to the Lifetime Allowance. For tax relief purposes the maximum contribution in 2006/2007 is £215,000. The husband therefore has managed to draw down two tax-free lump sums from careful financial planning. It is imperative

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however in such instances that the footballer and indeed advising lawyer take independent advice from an appropriate qualified financial advisor.

The above is but one example of just how complicated the footballers pension arrangement can be and once again illustrates the need as to why these sort of divorces should be handled by appropriately experienced specialist family lawyers. BASL

Kevin Harris-James is a partner and divorce lawyer with national law firm Irwin Mitchell based in their Birmingham Office. He recently won the Birmingham Law Society Family Lawyer of the Year Award 2005, and features regularly in the media given his high profile client base and expertise in such matters. He has particular experience in representing professional footballers. He lectures widely and regularly appears in the press commenting on such matters.

David Burles is a practising barrister at One Garden Court Chambers based in the Temple, London EC4. He was called to the Bar in 1984 and specialises in divorce cases and the financial disputes of unmarried partners. In 1998 he passed (with distinction) the Postgraduate Certificate in Sports Law (Kings College) and is a member the Bar Sports Law Group. He has particular experience of representing high-profile sportsmen in divorce. He lectures widely and is regular contributor to the legal periodicals.

Deloitte Annual Review of Football Finance 2005

By Deloitte Sports Business Group

Highlights of the 14th edition of the Deloitte Annual Review of Football Finance. Over the years we have charted and commented upon the extraordinary commercial and financial developments in modern football.

Steady state

Last year we said that we could be witnessing a new economic reality, with clubs starting properly to lock down their spending. This is a logical reaction to the continuing trend for a slowdown in the revenue growth of Europe's 'big five' leagues – with 2003/04 exhibiting the lowest growth figures in all five leagues since our European analysis began in 1995/96. But let's be clear. The picture we see now and going forward for most well run football clubs is a slowing growth in revenues, not a fall in revenues. Back in 2002, we stated clearly that football was not the 'dotcom bubble' all over again and this has been proven. We have seen a slowdown – but not meltdown. We believe English football can look forward to a period of solid, steady development and single figure revenue growth, particularly if clubs focus on developing their stadium-related revenue streams.

Maybe English – and European – football is not so unlike other 'normal' industries? After the rapid growth phase in the 1990s, hopefully we have now seen the worst of the shake-out in the market, and we are faced with a more mature and stable industry as clubs manage costs in line with the slowing revenue growth.

Blue shift

Over the life of the Premiership, the red of Manchester United and Arsenal has ruled on the field. Off it, Manchester United has dominated the Deloitte Football Money League of club revenues, and Arsenal have climbed steadily up that list over recent years.

We are now at the end of the second full season of Roman Abramovich's investment in Chelsea and their subsequent player spending spree. The on-field duopoly in the Premiership has been shattered by Chelsea. This was by no means the first sizeable personal investment in a football club but the scale and speed of it dwarfed anything previously witnessed. In 2003/04 Chelsea's revenues increased by over £50m to reach a club record £144m and by this measure the club is now the fourth richest club in the world. We estimate Mr Abramovich's investment now totals c.£300m.

What effect has this had on the market? Our analysis does not indicate that this investment has placed new inflationary pressure on wages and transfers. Other clubs appear to be following their own business plans and not trying to compete in an un-winnable financial contest. That makes sense.

Furthermore we don't expect the Glazer takeover at Manchester United to change that picture, although it will be fascinating to watch the impact of American and Russian ownership – and the competition between the two – on and off the field over the coming seasons.

However, the fact that it has taken some £300m to break 'the red duopoly' begs questions about the competitive balance within English – and European – football. Is there an increasing level of certainty in football, with a series of mini 'leagues within leagues' developing?

The higher up football's pyramid you go, the harder it seems to be to climb the next step and leapfrog the club above. As we discuss in Bridging the gap – mission impossible? (within the Club profitability section), the financial gap from the Championship to the Premiership appears bridgeable. It is more a matter of ascending the learning curve on how to be a Premiership club and assembling a Premiership quality squad over an increasingly short closed season, with a limited window for tweaking the squad in January. We have seen a number of promoted clubs consolidate impressively in the Premiership – for example, Birmingham City, Bolton Wanderers, Charlton Athletic and Fulham. The question remains if it is possible for these clubs to break into the top four or five. The step up is a big one and financially unforgiving of football failure. If a club spends and achieves promotion to the Premiership it can spend again – to a sensible degree – knowing it has two years of parachute payments to soften the fall if its performance falters on the field. The Champions League offers no such protection. In similar fashion, this year saw Manchester City break into the top 20 global clubs in the Deloitte Football Money League, but how feasible will it be for them to enter the top ten?

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Collectively, the challenge for clubs, leagues and governing bodies over the coming years will be to continue to ensure competitive balance and uncertainty of outcome in domestic and European competitions over the long term. This is essential to maintain the interest and funding of supporters, media and commercial partners whilst satisfying the demands of individual clubs that they are receiving their full worth from league distributions. The collective selling of media rights has a fundamental role to play in that. This promotes solidarity and helps keep the Premiership closer to the National Football League in the USA (an oft-quoted model of competitive balance and economic strength) than the polarised and predictable football leagues in some other European markets.

Highlights

Europe's premier leagues

- Overall revenue for the 'big five' European Leagues totalled €5.8 billion in 2003/04, up 2% on the previous year. This is the lowest growth rate since our analysis began in 1995/96.

- The German Bundesliga and French Ligue 1 experienced a decrease in revenue in 2003/04 to €1,058m and €655m respectively, a 5% drop in each case, the result of declining broadcast revenues. Italian Serie A revenues were static for the third successive year with revenues totalling €1,153m.

- The French will reverse this trend soon. The Ligue 1 clubs' revenues will be boosted significantly from 2005/06 when a €600m a season domestic television rights deal with Pay-TV broadcaster Canal Plus commences. The c.50% increase on current deals, will put it on a par with the English Premiership as the most lucrative domestic football league broadcast contract in the world.

- The English Premiership generated revenues of nearly €2 billion, the most of any 'big five' league. This widens the gap between itself and the Italian Serie A, the second highest earning league, by €128m to €823m.

- The Spanish Primera Liga, led by Barcelona and Real Madrid, achieved the most impressive revenue growth of 13%, a €106m rise to €953m. This combined with static wages and salaries costs meant that the league's wages/turnover ratio decreased from 72% to 64%.

- Matchday revenues grew in each of the five leagues analysed, except Italy. The Spanish Primera Liga and French Ligue 1 showed the largest growth at 14% and 13% respectively. However, absolute performance between leagues in this area varies greatly with the English Premiership total of €588m in 2003/04, higher than the matchday revenues of all the French Ligue 1, German Bundesliga and Italian Serie A clubs combined.

- The French Ligue 1 and Italian Serie A each reduced wages and salaries costs by 4%, whilst the German Bundesliga clubs cut their bill by 2%. The English Premiership clubs continue to have the highest wage bill at €1.2 billion.

- The 'big five' leagues differ widely in their operating performance with only the English Premiership and German Bundesliga clubs recording profits in 2003/04. The French Ligue 1 clubs recorded operating losses of €102m, their largest losses since our analysis began. Italian Serie A clubs' operating losses totalled €341m in 2003/04, making cumulative losses of €1.5 billion since 1995/96.

Club profitability

- In 2003/04 England's top 92 professional clubs generated total revenue of £1,766m, up 7% from 2002/03.

- The total revenue of Premiership clubs was £1,326m, up 6% on 2002/03 (£1,246m) – the lowest rate of growth since the Premiership's formation, but still comfortably maintaining the league's position as the 'World champions' in terms of revenue generation.

- Overall, Football League clubs' revenue increased by 7% to £440m for 2003/04, with total attendances across the three divisions also up 7% to 15.9m.

- Premiership clubs' revenue growth was driven by broadcasting and matchday revenue. The last (stepped) year of the 2001/02 to 2003/04 BSkyB domestic TV deal contributed to increased broadcasting revenues of £593m – up 9% from 2002/03. Broadcasting remains the largest revenue source at 45% of total revenue and, given its '100% profit margin' status, is arguably the most important.

- Premiership matchday revenues grew impressively by 9% to £395m (from £363m in 2002/03) despite average league attendances falling by 1% to 35,008. Thus increased ticket yields were the key driver of higher revenues.

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- Manchester United headed the Premiership revenue league table (and Deloitte's global Football Money League) at £172m, followed by Chelsea (£144m and fourth globally) who had substantially narrowed the gap, then Arsenal (£114m and sixth globally).

- Premiership clubs reported overall operating profits of £149m – another record high (up £25m on the previous record) since the formation of the Premier League and a healthy 11% margin. Only four clubs made losses at the operating level.

- The reduction in domestic broadcasting revenues in 2004/05 presents a new challenge to the Premiership clubs and has led us to predict a modest, but temporary, reduction in total estimated revenues for 2004/05. Continuation of the improved cost control at many clubs should enable them to adjust relatively painlessly to any revenue shortfalls.

- Pre-tax losses (i.e. after player transfer costs) also reduced from £153m to £128m and, excluding Chelsea, improved by £86m.
  Ten Premiership clubs returned a pre-tax profit (five in 2002/03).

- The revenue gap between the 'big five' and the remaining Premiership clubs has stayed steady in relative terms over the last five years, but has increased in absolute terms from £44m in 1999/2000 to £74m in 2003/04.

- In 2003/04, the average Premiership club generated revenue of £66m, compared to £12m for a Championship club (a gap of £54m, compared to £52m in 2002/03).

- The battle for the title of 'the richest game on earth' – a contest between the Football League Championship Play-off Final and the chase for the UEFA Champions League fourth qualifying spot – has narrowed; but, at a minimum of £35m versus an average £19m respectively, the Championship Play-off Final remains firmly on top.

- Manchester United was again, by far, the most profitable club at an operating level. Their operating profit of £51.7m was not only the first time any club in the world broke the £50m barrier, but increased again their Premiership record (previously £47.8m in 2002/03). Given the new broadcasting deal for 2004/05 and the club's interim results and on-field performance, it is unlikely this record will be bettered in 2004/05.

Player costs – wages and transfers

- Overall Premiership clubs' total wages grew by 7% in 2003/04, to reach £811m compared to £761m in 2002/03. This was the lowest growth rate since the formation of the Premier League in 1992 and well below the astonishing compound annual growth rate of 23% seen in the previous decade.

- Stripping out the total wages figure for Chelsea (up £60m), total wage bills for the other clubs fell from £706m (2002/03) to £696m (2003/04). If a 1% reduction could ever be described as highly significant – then this is it.

- 2003/04 was a significant year for Championship clubs, as the total spent on wages and salaries decreased by 9%, from £228m in 2002/03 to £208m in 2003/04. This is the first fall seen in that division since the 1998/99 season.

- The Premiership average wages/turnover ratio has remained constant at the 2002/03 season's level of 61%, but excluding Chelsea it declined from 61% to 59%. Manchester United and Bolton Wanderers are the only two Premiership clubs with ratios below 50%. A further five clubs had ratios between 50 and 55% – all very commendable figures.

- The Championship has seen a large overall improvement in its wages/turnover ratio from 89% to 72%. That is an average mark which is still above the comfort level and leaves work to be done.

- Chelsea has a published total wages and salaries cost of £115m, £38m higher than the second placed club, Manchester United, and almost certainly the highest football club wages bill in the world.

- While the Premiership was the only division to show a rise in players' earnings (up 6%), as opposed to total wages, we estimate a fall of £15-20m (3-4%) if Chelsea's player wages are excluded.

- A welcome fall of 7% in players' earnings saw the Championship total player wage bill drop to £138m (from £149m in 2002/03) – a significant reversal of the CAGR of 15% over the past ten years. Player wages also declined in League 1 and 2, by £8m (17%) and £1m (4%) respectively.

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- Deloitte calculate that the average Premiership player costs his club (including NIC) around £0.9m a year (or £17,000 a week). Due to tax differences it would cost a French club, for example, 44% more 'gross' to pay a player the same net wage. Relative to other big European leagues, this is a significant structural advantage that Premiership clubs enjoy.

- 2003/04 gross transfer expenditure bounced up again to £414m, after a substantial fall in 2002/03 (from £407m to £203m). The resurgence is largely, but not entirely, due to the Chelsea phenomenon with the club's 2003/04 transfer spending of £175m.

- The January 2005 transfer window saw an estimated gross transfer spending by Premiership clubs of about £50m, which is similar to the level seen in the January 2004 window. The bulk of annual spending is in the summer transfer window.

- Net transfer fees payable by English clubs (i.e. excess of cost of players bought over proceeds of players sold) increased by 225% from £81m in 2002/03 to £263m. This shows a huge rise in the balance of payments deficit in player transfers with cash flowing to non-English clubs.

- The top 92 clubs' total player costs (including wages and net transfers) exceeded £1 billion for the first time, despite the limited increase in players' wages, and represented 59% of total turnover – a substantial increase from 2002/03, but still below 2000/01's high of 62%.

- The net amount of transfer expenditure re-distributed by Premiership clubs to the Football League has increased by £8m from £32m in 2002/03 to £40m. Player disposals by clubs relegated from the Premiership, in particular West Ham United, accounted for the largest part of this 'redistribution' of monies.

- In total, the Premiership has provided Football League clubs with approximately £245m in transfer fees over its 13 year life.

Stadium development

- Total spending by English clubs on stadia and facilities in 2003/04 was above £200m for the first time, taking total investment in the post Taylor era to over £1.8 billion.

- Spending by Premiership clubs on stadia and facilities was £178m in 2003/04. This was the seventh successive season when their investment exceeded £100m and brings total spending to over £1.3 billion since the start of the Premier League in 1992/93.

- In the two years to summer 2004, Arsenal had invested £170m – primarily in relation to their new Emirates Stadium – accounting for over 50% of all Premiership spend in that period.

- Looking ahead, there will continue to be significant investment in stadia and facilities in the short term, with Arsenal being the main contributor. We expect the total level of investment by English clubs in the post Taylor era to top £2 billion by the end of summer 2006. By that stage, the new Wembley (total project costs over £750m) will also be in operation. In the medium term the position is less clear and will depend on the progression of planning and funding arrangements for some key projects by other clubs.

- In 2003/04 Premiership average attendance remained above 35,000 and capacity utilisation stood at 94.7% – the highest level since our analysis began. In 2004/05, average attendance levels were around 33,900. The fall can be substantially attributed to the changing composition of the Premiership as clubs coming up has smaller stadia than those who went down. This resulted in c.10,000 fewer seats per matchday being available.

- However, clubs should not rest on their laurels as, in the 2004/05 season, we estimate that around 800,000 seats were unused at Premiership matches. This represents lost income of around £24m to the Premiership clubs as a whole.

- In 2004/05 Football League attendances continued to grow and reached 16.4m – a 40 year high and proclaimed as the best attended sporting competition in Europe. The Championship has seen attendances growing strongly in recent years and a further 10% increase in 2004/05 means that the average Championship fixture attracted over 17,000 fans.

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- In the World Cup year of 2006, we can expect to see the highest capacity and attendance levels ever seen in the Premiership; Football League attendances at levels not seen since the 1960s; plus Cup Finals and England matches being played in front of 90,000 crowds at the new Wembley.

Club financing

- The financing trend among Premiership clubs is positive. Capital employed increased to over £1.1 billion by the end of the 2003/04 season. Total borrowings by Premiership clubs only increased by 2% to £720m, and the overall gearing ratio improved to 189%.

- Reported net bank borrowings fell to £146m at summer 2004. A record ten Premiership clubs had positive net cash balances at that time.

- Arsenal's financing arrangements for their new Emirates Stadium have significantly increased the club's overall level of debt, but it is financing a huge asset. At the end of the 2003/04 season, Chelsea (£137m) were just behind Arsenal (£141m) in the level of debt carried.

- Chelsea have received an unprecedented level of cash injection since Roman Abramovich arrived in summer 2003. By the time Chelsea lifted the 2004/05 Premiership trophy, in the space of just two years, we estimate that the club has benefitted by approximately £300m. The new money has been introduced to the business as both equity and loans. Furthermore, Chelsea's elevated status has attracted other new commercial money to the club and therefore into the English game.

- Net interest charges from finance providers stood at £36m, whilst interest cover (operating profits: interest costs) improved to 4.1 times.

- Four Premiership clubs finished the 2003/04 season with net funds rather than net debt – Aston Villa, Birmingham City, Manchester United and Portsmouth. Manchester United and Birmingham City were the only clubs to receive more interest than they paid out in the year.

- Cash generation from Premiership clubs' operational activities continues to be strong, with £191m of cash generation before player transfer dealings. After all other transfer, investment and financing cash flows, the overall net cash inflow for Premiership clubs was £46m for 2003/04.

- At summer 2004, Manchester United (£173m) topped the table for net assets, more than double that of their nearest rival, Arsenal (£84m). Overall net assets for Premiership clubs were £382m.

- In the summer of 2004 the financing of Championship clubs was the healthiest for many years. Capital employed had increased to around £300m and gearing was reduced. Bank borrowings for Championship clubs had increased to £163m. This was largely due to the promotion/relegation change in the mix of clubs.

- In 2004 and 2005, better financial management has helped avoid the rash of insolvencies that plagued the previous couple of years. This has been encouraged and supported by structural changes, such as sporting sanctions for insolvency, the Football League's Salary Cost Management Protocol and division-dependent pay levels for players.

Football and tax

- English professional football continues to pay substantial amounts of tax to Government. In 2003/04, clubs in the top four divisions paid a record c.£600m in various forms of tax.

- The tax burden is increasing – by 6% in 2003/04.

- The compound annual growth rate ('CAGR') of the overall tax take – from 1995/96 to 2003/04 – was 19%, in line with the CAGR for football turnover of 18%.

- The Premiership clubs are estimated to have paid around £430m in tax (PAYE/income tax; National Insurance Contributions (NIC); VAT and corporation tax) in 2003/04. This is a £40m increase on 2002/03.

- By the end of the 2004/05 season we estimate the clubs in the top four divisions will have paid Government £4.3 billion in tax over the last 13 years. Premiership clubs account for £3 billion of this total.

- Football League clubs have, we estimate, paid £153m in total tax in 2003/04. Between 1992/93 and 2004/05 we estimate that, despite aggregate operating losses of £705m, Football League clubs have suffered a total tax burden of £1.3 billion.

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Football and tax

There are not many certain things in life but taxes are one. Other than at election time, taxes may not capture the imagination as much as, for example, players' wages, but football pays to Government in tax around three quarters of what it pays to players in wages. A very significant sum indeed.

So, despite the reported financial difficulties faced by some elements of English professional football and the continued losses experienced over recent years at the pre-tax level, nevertheless, the tax contributed by professional football to Government coffers continues to grow to record amounts. In 2003/04 football paid out around £600m in taxation.

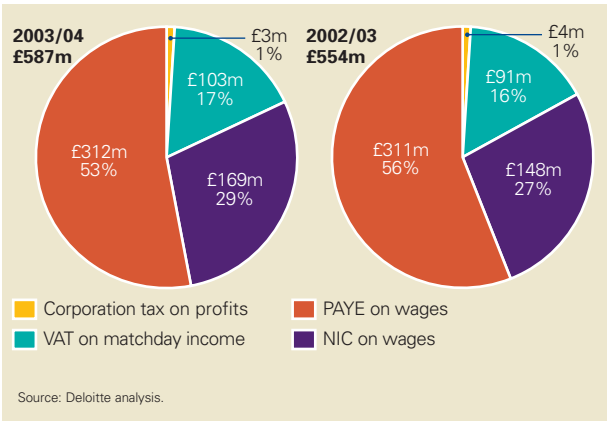
Highlights

- English professional football continues to pay substantial amounts of tax to Government. In 2003/04, clubs in the top four divisions paid a record c.£600m in various forms of tax.
- The tax burden is increasing – by 6% in 2003/04.
- The compound annual growth rate ('CAGR') of the overall tax take – from 1995/96 to 2003/04 – was 19%, in line with the CAGR for football turnover of 18%.
- The Premiership clubs are estimated to have paid around £430m in tax (PAYE/income tax; National Insurance Contributions (NIC); VAT and corporation tax) in 2003/04. This is a £40m increase on 2002/03.
- By the end of the 2004/05 season we estimate the clubs in the top four divisions will have paid Government £4.3 billion in tax over the last 13 years. Premiership clubs account for £3 billion of this total.
- Football League clubs have, we estimate, paid £153m in total tax in 2003/04. Between 1992/93 and 2004/05 we estimate that, despite aggregate operating losses of £705m, Football League clubs have suffered a total tax burden of £1.3 billion.

The tax take – how it gets to c.£600m

Chart 1 shows our estimated split of tax paid by English professional football for 2003/04 and, for comparison, 2002/03.

Chart 1: The estimated tax generated for Government by English professional football clubs



Source: Deloitte analysis.

Comment

- We estimate total income and corporation tax, NIC and VAT to be £587m in 2003/04 compared with £554m in 2002/03, an increase of £33m (6%).
- PAYE on football club total wages bills continues to account for the largest share at 53% (2002/03 – 56%), albeit that this is reducing because of the increased rates of other taxes. Provided clubs continue to control more firmly the salaries paid to their players, then we expect that share to remain around 53% or even fall over the medium term. A combination of the current Government policy to increase other taxes – rather than income tax – and an unwinding of the current player contract cycle should ensure this happens.
- Increasingly, sophisticated clubs are seeking to tie the length of a player's contract to the term of its major broadcasting and commercial contracts. 2004/05 is the first year of the new deal with BSkyB and clubs' domestic broadcasting income will decline compared to 2003/04. If Premiership clubs have been successful in tying-in wage cost to broadcasting income, we expect the rate of growth in players' wages and, hence, PAYE to reduce.
- The increasing share of NIC within the total tax take is largely the result of the increased NIC rates applicable in 2003/04 and, in particular, the 1% additional charge on earnings in excess of £30,940 introduced by the Chancellor of the Exchequer from

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April 2003. We estimate this added at least £8m to the NIC bill in the year. Barring a further increase in NIC rates, we expect NIC as a proportion of the total tax take to remain constant and, in absolute terms, to follow the trend in PAYE.

- VAT continues to increase year on year, up to £103m in 2003/04. This is an increase of 13% on the previous year. Our survey of taxes paid focuses on VAT arising on matchday income. We have stated, earlier in this review, how we expect clubs to focus on further growing matchday revenue and therefore we expect football's future VAT bill to increase in both absolute terms and as a share of the total tax take.

- Corporation tax continues to be a small (and falling) part of the overall tax liability. Many clubs are operating (and indeed have always operated) at a pre tax loss or have significant tax losses brought forward from earlier years that they can set against profits that might arise in the future. We do not expect this to change significantly in the medium term.

- Very few of the Football League clubs ever show a corporation tax charge and even in the Premiership, the same three or four clubs usually make up the majority of the total tax liability for the division – and have done for many years. Clubs who showed a tax bill over £1m for 2003/04 were Manchester United, Arsenal, Southampton and West Ham United (2002/03 – Manchester United, Arsenal, Liverpool and Portsmouth).

- Some clubs show, in a specific year, a tax credit rather than a charge. That may arise either from clubs currently making losses reclaiming some of the tax paid on profits in earlier years; or, from surrendering their losses to other, profitable, group companies (where the football club is part of a wider group of companies); or, from recognising in the current year the value of tax losses which they expect to set against future profits. An example of the latter situation is Norwich City who recognised tax losses in their 2003/04 accounts on the basis of a forecast profit of £5m for their 2004/05 season in the Premiership.

Who pays what?

Table 1 opposite summarises the respective contributions of PAYE, NIC and VAT by the Premiership and Football League clubs.

Table 1: PAYE, NIC, VAT and corporation tax contributed by clubs by division: 2003/04 and 2002/03

Tax Year/ Season		Premiership	Football League	Total	Increase/ (decrease)	
		£m	£m	£m	£m	%
PAYE	2003/04	248	64	312	1	–
	2002/03	234	77	311		
NIC	2003/04	113	56	169	21	14
	2002/03	94	54	148		
VAT	2003/04	69	34	103	12	13
	2002/03	63	28	91		
Corp. tax	2003/04	4	(1)	3	(1)	(25)
	2002/03	3	1	4		
Total	**2003/04**	**434**	**153**	**587**	**33**	**6**
	2002/03	**394**	**160**	**554**		

Source: Deloitte analysis.

Comment

- Of the total tax of £587m in 2003/04, we estimate that Premiership clubs have contributed £434m or 74% (£394m & 71% in 2002/03). The total tax take has gone up by £33m, of which £40m has, per our estimates, fallen on Premiership clubs, with Football League clubs paying £7m less due to lower wages.

- Within these totals the Premiership clubs contribute 79% of the PAYE (£248m) but only 67% of the NIC (£113m). This demonstrates the disproportionate impact of NIC, as opposed to PAYE on the lower incomes of players and employees in the Football League (PAYE of £64m and NIC of £56m).

- We estimate the employees of football clubs in the Premiership paid £361m in employment taxes in 2003/04. This represents an increase of 10% on 2002/03, reflecting the increase in wages (including Chelsea) and the additional NIC referred to elsewhere. The Football League paid £120m of such taxes in the period, a decrease compared to £131m in 2002/03, reflecting the increasing control of wages and salaries by the Football League clubs. Interestingly, that decrease masks a rise in NIC compared to 2002/03 whilst PAYE went down reflecting the disproportionate hit of the increase of NIC on Football League players.

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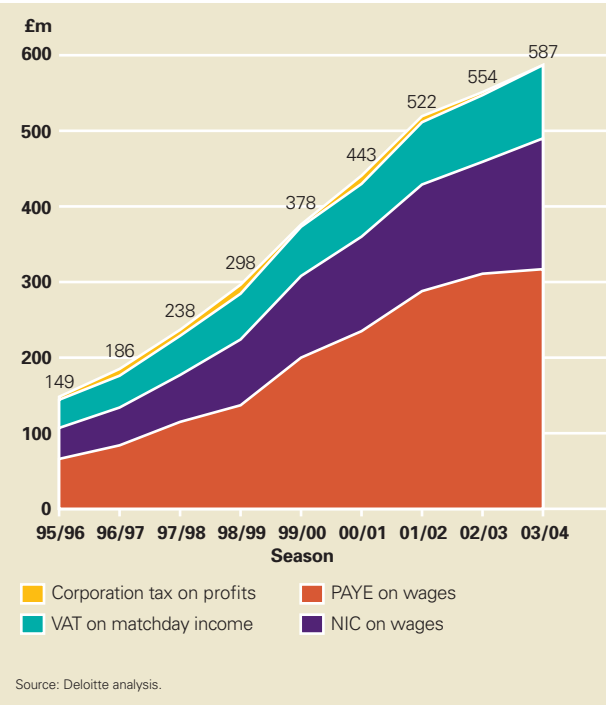
- Given the improved control over wages and salaries we do not expect the Football League's share of English football's total PAYE and NIC bill to increase over the short term.

- VAT in 2003/04 increased 13% on 2002/03. We expect football's VAT liability to increase over the short and medium term, in line with matchday income.

How the tax take has grown

In Chart 2 we show the growth in the tax contribution to the Treasury since 1995/96.

Chart 2: Growth in the tax contribution since 1995/96



Source: Deloitte analysis.

Comment

- The total tax paid to Government by English professional clubs continues to grow year on year. Whilst it has not reached the growth rates shown between 1995/96 and 2001/02, rises of 6% in 2002/03 (up £32m) and 6% in 2003/04 (up £33m to a record £587m) show a continuing and increasing source of taxation revenue for Government.

- The PAYE paid has increased by 373% since the 1995/96 season from £66m to £312m – almost mirroring the level of underlying growth in wages. NIC increased by 312% over the same period from £41m to £169m.

- In contrast, VAT for 1995/96 amounted to £38m and has increased by 171% to £103m in line with matchday income, which has increased strongly over the period.

- The Chancellor has taken £4.3 billion from English professional football in the period from 1992/93 when our survey of football's tax burden (and also the Premiership) began to 2004/05.

Conclusion

English professional league football continues to contribute significant amounts of tax to the Chancellor's coffers with around £600m in 2003/04 alone. Even with the slowdown of growth (and, in some cases, even a reduction) in wages amongst Premiership and Football League clubs, we do not expect the total tax take to decrease in the medium term, especially if, as predicted by many, the tax burden on the wider population increases. It is, of course, right and proper that professional football and, in particular, well paid players pay their share of tax. At the same time, the overall benefit to the economy of the taxes generated from our national game should be recognised. In addition, there are the wider social benefits that football delivers to the country. We have said this before and do not apologise for saying it again – we believe the taxes raised from English football and the wider sports industry should be re-invested at a strategic level to support grass roots sport. This would increase participation and help deal with many of Government's policy objectives on health, crime, education and social inclusion.

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Supporting sport

Professional football makes an annual tax contribution to the Exchequer of nearly £600m and also makes direct investment into community activities. For example, the Premier League and its clubs invested almost £70m in community activities in 2001/02, in direct funding and in-kind contributions such as staff time and office space. Adding in the Football League and its clubs' contribution, we estimate an annual direct investment of over £100m.

These investments reflect sport's community contribution in general. Indeed, it is estimated that total revenue to Central Government from sports related activities exceeded £5.5 billion in 2000 (comprising mainly income tax and VAT). This is compared to direct investment in sport of £661m[1]. This means that for every £1 Government invests in sport, it takes out nearly £9. The four major sports of cricket, football, lawn tennis and rugby union alone contributed £120m to grass roots development in 2002. These figures ignore contributions-in-kind from volunteers in those sports.

This investment is not appropriately recognised or encouraged by Government. For example, at local club level the tax system acts as a disincentive to the improvement of football facilities, since VAT paid on construction costs is generally not recoverable. This adds 17.5% to their cost. Despite Government's admission of the benefits that sport brings to health, social inclusion and crime reduction, it does little to help. Football is more likely to be criticised for greed and inappropriate governing structures than it is to receive tangible help.

What could Government do to help develop the grass roots? There is no shortage of ideas. Last May suggestions for tax incentives were put to Government for consideration. Unfortunately, nothing was included in the Budget Statement. National Lottery contributions mask the low level of Exchequer funding to sport. Only £200m of Exchequer funding is provided annually to the whole of sport[2].

In our opinion, direct funding should be substantially increased. For example, into two existing highly regarded schemes:

- The Football Foundation and Football Stadia Improvement Fund, which fund facilities initiatives at grass roots and league levels (current Government contribution is £15m per annum).
- The SportsMatch matching scheme for grass roots sponsorship in all sports (current Government contribution c.£3m per annum).

Government could also provide a number of tax incentives:

- Corporation tax exemptions for sport's National Governing Bodies;
- Tax relief or tax credits on investment in new facilities;
- A Sports Development Allowance to encourage investment into community schemes incorporating a tax credit mechanism; and
- Reimbursement of non-recoverable VAT costs in relation to facilities improvement schemes at grass roots level.

There is a strong case for reinvestment in sport. Government should help meet the significant funding gap that exists for improving and updating facilities. The Chief Executive of the Football Association estimated it would cost around £2 billion to bring grass roots football pitches, changing rooms and accommodation up to scratch to keep them level and usable[3]. It will be interesting to see whether the new Government is prepared to increase their £200m investment and allocate cash to back initiatives that will increase participation and redress the balance of what sport contributes to Government and society, and what it receives in return. BASL

Notes:
1 The Value of the Sports Economy in England 2000 (Cambridge Econometrics June 2003)
2 Review of National Sport Effort & Resources (Patrick Carter, March 2005).
3 Evidence to Culture, Media and Sport Committee on Community Sport, Tuesday 5 April 2005.

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Conference special

BASL 2005 Annual conference

By the Editor

The 2005 Annual conference of BASL took place on 3rd November 2005 at Lords' Cricket Ground. Highlights included the Keynote Speaker, David Morgan, Chief Executive, England & Wales Cricket Board, who as well as basking in the reflected glory of the Ashes victory during last summer, charted the on-going challenges faced in international cricket – see editorial on discussion of issues around BSkyB's purchase of exclusive live rights to home Test matches.

The first Session of the day was entitled, 'Athletes Behaving Badly'. Speakers Steve Barrow & Jonathan Hall of the FA discussed criminal liability for participators on the sportsfield. This issue is topical in the context of the recent Crown Prosecution Service concerns over a lack of clarity in current prosecutorial policy on this matter. The speakers highlighted the internal disciplinary mechanisms that exist within English football and some of the problems of criminal law intervention. Jonathan Taylor of Hammonds Solicitors discussed 'Issues Arising in the Mutu Litigation', informed by his role of having acted for Chelsea FC in this action before CAS (see article below). Darrell Hair, Test Match Umpire, provided a sporting adjudicator perspective on the problems surrounding enforcing the 'Spirit of Cricket' provisions in international cricket. He deployed a number of interesting video clips in his presentation.

The two other sessions provided analysis on recent commercial issues in sport. The second Session – 'Commercial Developments in Sport: Legal Issues Arising' focussed on David Zeffman of Olswang Solicitors, discussing recent regulatory issues concerning British Horse Racing' informed by his role on the Levy review group. Session Three entitled 'International Exploitation of Sports Rights' included Robert Datnow of Farrer & Co discussing 'Transnational Legal Issues in Ocean Racing' (see article below) and Nic Coward of AS Bliss & Co, highlighting the problems concerning 'Ticketing for Major Sports Events', with the selling of tickets on the internet and by ticket touts.

Finally to round off the day, Session Four provided a 'Synopsis of Recent Sporting Case Law' provided by Ben Lask (Monckton Chambers); Serena Hedley-Dent (Farrer & Co Solicitors.) Alan Watts (Herbert Smith Solicitors). As usual the day was a stimulating and informative experience and the opportunity to network with sports law colleagues. BASL

Players behaving badly – Legal issues highlighted by the Mutu case

By Jonathan Taylor, Hammonds Solicitors

Introduction

At last year's BASL conference, Lord Brennan QC noted the possibility of sportsmen and women being sued for damages when they breach their contracts. In remarks subsequently reported in World Sports Law Reports *(Vol 2 Issue 11, November 2004)*, he continued:

> ***But what of the athlete who ruins himself through drugs or drink or any other combination of vice? There is clearly a breach of the implied term to co-operate and not prevent performance of his contract. There seems no reason why the club shouldn't sue him, or his previous club if they had knowledge of the addiction and concealed it at the time of the transfer. But in addition why shouldn't an advertiser sue the athlete where the athlete is rich enough to meet a judgment? A carefully prepared and long term advertising project which bites the dust because of the athlete's misconduct involves an obvious loss in respect of liability and with which liability should arise.***
>
> ***These contractual and negligence allegations may not have figured in years gone by because of the lesser earnings of athletes in the past. But these days where some of them are earning millions the use of the law of contract falls to be applied especially in respect of implied terms, or express terms in the future, so as to protect those who pay or invest money in such athletes. Damages in the event of breach may introduce a new and unexpected discipline to the lives of modern athletes. The extent to which they now benefit commercially carries the corresponding risk of claims against them for breach of contract if they fail to perform the contract by breach of express or implied terms...***
>
> ***All this may seem radical. But the harsh reality of commercial life is that breach of contract usually leads to a responsibility to pay damages. There is no financial justification for sport regarding itself as an exception.***

Lord Brennan was responding to press speculation that Chelsea, having sacked striker Adrian Mutu for using cocaine, was considering suing him for damages to compensate for the losses flowing from his misconduct (use of cocaine).

As is public knowledge, Chelsea did file such a claim, and Hammonds is acting for the club in relation to that claim, along with Ian Mill QC and Adam Lewis of Blackstone Chambers. Confidentiality obligations prohibit a detailed analysis of the claim, but it is possible to make some general points, and to identify the novel and interesting legal, procedural and practical issues that they raise.

The Facts

CFC signed Adrian Mutu in August 2003 on a five-year contract, from Parma in Italy. After early success in the FA Premier League, his performances trailed off towards the end of 2003/04 and he missed several games through injury.

The summer of 2004 brought a new manager and speculation about a move for Mutu back to Italy, to Juventus, but the August transfer window closed with no transfer agreed and Mutu left to fight for his place in the Chelsea first XI. In the first few weeks of the season, he managed only a handful of substitute appearances.

On Friday 1 October 2004, UK Sport DCOs acting on behalf of The FA took a urine sample from Mutu that subsequently tested positive for metabolites of cocaine. (As an aside, although it was during the season, and Chelsea had an FAPL match that Sunday, the test was classified under the FA rules [and therefore under the World Anti-Doping Code] as an "out of competition" test. Cocaine is a short-acting stimulant, not a long-acting steroid, and therefore is not banned "out of competition" under the Code, although it is under The FA's rules. The potential for anomalous results is obvious).

The player waived analysis of the B sample and admitted using cocaine. He was immediately charged by The FA with a breach of its Doping Control Regulations. He was subsequently banned until at least May 2005.

Breach of playing contract

The key provisions of the (standard form) FAPL playing contract are as follows:

1. Definitions and Interpretation

1.1 The words and phrases below shall have the following meanings:

"Gross Misconduct" shall mean serious or persistent conduct behaviour activity or omission by the Player involving one or more of the following:

Players behaving badly – Legal issues highlighted by the Mutu case

(c) use or possession of or trafficking in a Prohibited Substance;

(e) breach of or failure to comply with of any of the terms of this contract

or such other similar or equivalent serious or persistent conduct behaviour activity or omission by the Player which the Board reasonably considers to amount to gross misconduct.

"the Rules" shall mean the statutes and regulations of FIFA and UEFA the FA Rules the League Rules the Code of Practice and the Club Rules.

2. Appointment and duration

The Club engages the Player as a professional footballer on the terms and conditions of this contract and subject to the Rules.

3. Duties and Obligations of the Player

3.1 The Player agrees:

3.1.2 to play to the best of his skill and ability at all times;

3.1.3 Except to the extent prevented by injury or illness to maintain a high standard of physical fitness at all times and not to indulge in any activity sport or practice which might endanger such fitness or inhibit his mental or physical ability to play practise or train;

3.1.9 to observe the Rules ...;

3.2 The Player agrees that he shall not:

3.2.5 Knowingly or recklessly do write or say anything or omit to do anything which is likely to bring the Club or the game of football into disrepute cause the Player or the Club to be in breach of the Rules or cause damage to the Club or its officers or employees or any match official.

10 Termination by the Club

10.1 The Club shall be entitled to terminate the employment of the Player by fourteen days' notice in writing to the Player if the Player:

10.1.1 shall be guilty of Gross Misconduct; ...

3.2 There was no dispute that the player's drug use was a breach not only of The FA's rules but also of the player's contract with the club.[1] In addition, there can be no real dispute that a player's drug use amounts to "Gross Misconduct" under the contract.

3.3 As to the remedies for such breach, the basic proposition would seem straightforward enough. See eg McGregor on Damages, 2-002: Contracts are concerned with the mutual rendering of benefits. If one party makes default in performing his side of the contract, then the basic loss to the other party is the market value of the benefit of which he has been deprived through the breach. Put shortly, the claimant is entitled to compensation for the loss of his bargain. This is what may best be called the normal measure of damages in contract.

3.4 As a matter of principle, then, a club has a straightforward cause of action against a player for the damage that flows from his breach of the contract of employment. In practice, however, some interesting issues of law, procedure and enforcement arise.

Election of remedies

4.1 "Gross Misconduct" is effectively a breach of a condition under the FAPL standard playing contract, i.e. its commission is a breach that gives a club the express contractual right, under clause 10, to terminate the contract. It is also possible to argue that a player's conduct amounts to a repudiatory breach of contract, giving rise to a contractual right of termination at common law.

It is hornbook law (see e.g. Chitty 24-001) that an innocent party that is the victim of a breach of condition and/or a common law repudiatory breach has a choice:

(a) he can affirm the contract, thereby waiving his right to terminate and confining himself to claiming damages as a remedy for the counterparty's breach (in which case he has to

1 The two are related but separate, i.e. the club's rights and remedies under its contract are entirely independent of The FA's disciplinary proceedings against the player.

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continue to perform and he can continue to demand performance from the counterparty); or

(b) he can accept the repudiation as terminating the contract, thereby treat the contract as at an end (so that neither party has to continue to perform) and sue the other for damages to compensate him for the losses flowing from the breach.

In the case of the FAPL standard playing contract, that choice is brought into sharp relief by the following provisions of clause 10:

10.2 If the Club terminates the Player's employment for any reason under clause 10.1 the Club shall within seven days thereafter notify the Player in writing of the full reasons for the action taken.

10.3 The Player may by notice in writing served on the Club and the League at any time from the date of termination up to fourteen days after receipt by the Player of written notification under clause 10.2 give notice of appeal against the decision of the Club to the League and such appeal shall be determined in accordance with the procedures applicable pursuant to the League Rules.

10.4 If the Player exercises his right of appeal the termination of this contract by the Club shall not become effective unless and until it shall have been determined that the Club was entitled to terminate this contract pursuant to clause 10.1 but so that if it is so determined then subject only to clause 10.5.3 the Player shall cease to be entitled to any remuneration or benefits with effect from the expiration of the period of notice referred to in clause 10.3 and any payment made by the Club in respect thereof shall forthwith become due from the Player to the Club. ...

10.6 Upon any termination of this contract by the Club becoming operative the Club shall forthwith release the Player's registration.

In other words, if the club terminates the contract, even if on grounds of the player's Gross Misconduct, the effect is that the club loses the player's registration, i.e. the player becomes a free agent. (An effective piece of collective bargaining by the PFA, one might say!). That allows another club to sign him without having to pay a fee, which means the player benefits from a larger signing-bonus/salary. The phrase "profiting from one's own wrong" comes to mind.

The club's alternative is to affirm the contract, in which case it retains the registration (and so can negotiate a transfer fee with any club interested in acquiring the player's services), but in the meantime it has waived its right to termination and affirmed its own obligation to continue to pay full salary to a player who has shown contempt for his own (few) contractual obligations. At least during the period of any suspension by The FA, the club should be able to avoid paying the player's salary (although even that appears to be disputed by the PFA). But if a deal cannot be struck to transfer the player, the club is stuck with him, notwithstanding the breakdown in trust and confidence between them.

This takes us back to the option to terminate, and to pursue the claim for damages that arises. See Chitty 24-052:

> ***"Upon discharge, for [the defaulting party's primary obligation of performance] there is substituted by operation of law a secondary obligation to pay to the other party a sum of money to compensate him for the loss he has sustained as a result of the failure to perform the unperformed primary obligations."***

The key question becomes, does this provide a viable way of compensating the club for the loss it has incurred (including stopping the player, and his new club, from profiting from his wrong)?

One threshold point is whether the club has compromised its ability to pursue that claim for damages by exercising its election between remedies:

(a) Where a player has walked out and refuses to return, as in the Ortega case *(Ortega v Fenerbahce and FIFA, CAS 2003/O/482)*, then under English law the club would still in theory have a choice whether to accept the repudiation, treat the contract as at and end, and sue for damages (reportedly c.$11m in Ortega's case), or else affirm the contract and call for performance. Obviously, however, in practice that "choice" would be illusory: if the player does not want to play, he cannot be forced to do so.

(b) In a case of drug abuse, however (or indeed other gross misconduct such as attacking fellow players, or fans, or being imprisoned for drunk driving), the club does have a real choice as to whether to affirm the contract or not, and there are numerous examples of clubs choosing to retain the player's services. See e.g. *Ferdinand, Ferguson, Cantona, Pennant*.

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That fact has led some to suggest that a club that decides to terminate, thereby automatically losing the player's registration and so forfeiting the possibility of a transfer fee, is "the author of its own misfortune." Legally, this argument could be put one of several ways, eg the club's decision was the true legal cause of the loss, or the club's decision was a breach of its duty to mitigate its loss.

The response is that, while a claimant's voluntary act or omission following the defendant's breach might in theory break the chain of causation, or be a breach of the duty to mitigate, or even amount to contributory negligence (Chitty 26-034), that cannot be the case where the voluntary act is the mere election of remedies that is required of the claimant as a result of the defendant's breach. The club's election to terminate was a foreseeable consequence of the player's breach and does not break the chain of causation between the player's breach and the club's loss. Or else, the duty to mitigate does not arise until the innocent party has elected between its remedies: the duty to mitigate does not impair or limit that choice in any way. See Chitty 26-106:

> ***"The rules of mitigation do not apply to the innocent party's choice between different remedies open to him following the other party's breach of contract: he is not bound to act 'reasonably' in exercising his choice."***

That brings us to questions of (a) quantification of damages and (b) enforcement. Several interesting issues arise. For example:

(a) On the issue of quantification, the club can be expected to seek "loss of bargain" damages (i.e. compensation in the amount of the gains or benefits that he expected to receive from the completion of the promised performance of the other's obligation but that were prevented by the other's breach), subject to the standard remoteness formulation from Hadley v Baxendale (1854) 9 Exch 341 (innocent party should receive damages *"such as may fairly and reasonably be considered either as arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."*).

    A key head of damage here is one of lost opportunity to profit. See *Chaplin v Hicks* [1911] 2 KB 786 (CA). In principle, where a breach of contract has led to the player's registration being released, when it would not have been had the breach not occurred, then any loss that foreseeably flows from the release of the registration ought to be recoverable. If it could be evidenced that the player would have been sold for a specified amount, and that amount has not now been received, then it would in theory be recoverable.

On the other hand, John Hewison of George Davies, Mutu's solicitors, responding to the comments of Lord Brennan QC noted above, has written eloquently about why, in his view, players should not be forced to compensate clubs for lost transfer fees *(WSLR, Vol 2 Issue 12, December 2004)*:

> Regrettably there remains a "chattel" mentality about buying and selling players. But, consider the implications of providing the medical treatment to such a player who is on a seven figure salary and whose club have just paid £10 million to another club for his services. If the player is injured and requires an operation then contractually the club are obliged to engage a surgeon and pay that surgeon. Does the surgeon therefore have a liability to the club for the transfer value as well as to the player for loss of future earnings? And even if the club and player have insurance against such an eventuality (which they normally would) do the insurers have subrogation rights against the surgeon?
>
> Coming back to the investment of say £10 million in buying a player, should that impact on him in any way at all? I would suggest not. He has no control over the sum being paid by one club to another for his services (save of course that the better he plays, the more valuable he is likely to become). Equally, when the transfer market bubble bursts as it did in 2001/02 and the market dies, what then? Should this have the slightest effect on the players? They have done nothing different. The reality is that it will of course affect wages when contracts come to be renewed, but my point is that factors way beyond the control of the players dictate whether clubs spend money on transfer fees and how much they spend: share value on the stock market; a sugar daddy chairman; an overheated financial market where every lender on the planet wants to get into football (as happened in the late 1990's). Why should any of this generate damaging claims against players?
>
> The FAPL standard contract imposes obligations on players. They must not engage in activities

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which will void the life and medical insurance which their club maintains on them, for example by going hang gliding. They must observe all the Rules of the game, which of course means the FA and FIFA Rules. So, when Eric Cantona drop kicked a spectator in the stands and when Robbie Fowler ran along the goal line pretending to "snort" the white line they broke the Rules and thereby broke their contracts. They were punished by the FA for bringing the game into disrepute. But can one really suggest that if their clubs had chosen to terminate their contracts for breach they would then have been able to sue the players for the transfer value which they might otherwise have obtained and which is not only so utterly outside the control of the players, but is also entirely unpredictable almost from month to month let alone year to year? Every time a player gets shown a red card it is because he has broken the Rules and thereby his contract, but the fact that he may now be getting paid high wages and that he has a considerable value on the transfer market should not impose upon him any greater liability than was on his counterparts 30 years ago. Lawyers sit at their desks and paw over contracts and consider responsibilities and after much deliberation seek to say who is right and who is wrong. Football is a physical and emotional game. When a player swears at a referee be assured that he has not done so after mature reflection about which Rules he might be breaking and what the long term implications might be as regards any image right contracts he has signed, or for that matter sponsorship deals which his club have entered.

...What we must never forget is that it is the players and athletes that the public pay to see, and not those who choose to fund them. Of course the players and athletes must endeavour to act responsibly, but in assessing that responsibility we shall not pile onto them the commercial and financial liabilities which are totally outside their control.

(b) Even if the club was to win a substantial award, that would be an award of a football arbitration panel (see FAPL contract clause 17; FA Rule K), and there could be tricky issues of enforcement against a player who may have left to ply his trade abroad.

Note in this regard the dispute resolution provisions of the FAPL standard playing contract:

17. Any dispute between the Club and the Player not provided for in clauses 9, 10, 11, 12 and Schedule 1 hereof shall be referred to arbitration in accordance with the League Rules or (but only if mutually agreed by the Club and the Player) in accordance with the FA Rules.

18. The parties hereto confirm and acknowledge that this contract the rights and obligations undertaken by the parties hereto and the fixed term period thereof reflect the special relationship and characteristics involved in the employment of football players and the participation by the players in the game of football pursuant to the Rules and the parties accordingly agree that all matters of dispute in relation to the rights and obligations of the parties hereto and otherwise pursuant to the Rules including as to termination of this contract and any compensation payable in respect of termination or breach thereof shall be submitted to and the parties hereto accept the jurisdiction and all appropriate determinations of such tribunal panel or other body (including pursuant to any appeal therefrom) pursuant to the provisions of and in accordance with the procedures and practices under this contract and the Rules.

That brings us to the FIFA Regulations for the Status and Transfer of Players (the "FIFA Status Regulations").

The FIFA status regulations

As noted above, the standard FAPL playing contract incorporates by reference the FIFA rules, which include the FIFA Status Regulations and their accompanying Application Regulations. The key provisions, for present purposes, are in Chapter VIII, which is entitled "Maintenance of Contractual Stability":

Art.21

1(a) In the case of all contracts signed up to the player's 28th birthday: if there is unilateral breach without just cause or sporting just cause during the first 3 years, sports sanctions shall be applied and compensation payable.

(b) In the case of contracts signed after the 28th

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birthday, the same principles shall apply but only during the first 2 years.

(c) In the cases cited in the preceding two paragraphs, unilateral breach of contract without just cause is prohibited during the season.

2(a) Unilateral breach without just cause or sporting just cause after the first 3 years or 2 years respectively will not result in sanctions. However, sports sanctions may be pronounced on a club and/or a players' agent for inducing a breach of contract. Compensation shall be payable.

(b) A breach of contract as defined in the preceding paragraph is prohibited during the season. ...

Art.22
Unless specifically provided for in the contract, and without prejudice to the provisions on training compensation laid down in Art.13 ff, compensation for breach of contract (whether by the player or the club), shall be calculated with due respect to the national law applicable, the specificity of sport, and all objective criteria which may be relevant to the case, such as:

(1) Remuneration and other benefits under the existing contract and/or the new contract,

(2) Length of time remaining on the existing contract (up to a maximum of 5 years),

(3) Amount of any fee or expense paid or incurred by the former club, amortised over the length of the contract,

(4) Whether the breach occurs during the periods defined in Art.21.1.

Chapter XIV provides the mechanism for resolution of disputes arising under the FIFA Status Regulations:
Art.42

1 Without prejudice to the right of any player or club to seek redress before a civil court in disputes between clubs and players, a dispute resolution and arbitration system shall be established, which shall consist of the following elements:

(a) Conciliation facilities, through which a low-cost, speedy, confidential and informal resolution of any dispute will be explored with the parties at their request by an independent mediator. Such mediation will not be a precondition to, nor suspend the resolution of the dispute according to formal mechanisms described in (b).

(b) (i) The triggering elements of the dispute (i.e. whether a contract was breached, with or without just cause, or sporting just cause), will be decided by the Dispute Resolution Chamber of the FIFA Players' Status Committee or, if the parties have expressed a preference in a written agreement, or it is provided for by collective bargain agreement, by a national sports arbitration tribunal composed of members chosen in equal numbers by players and clubs, as well as an independent chairman. This part of the dispute must be decided within 30 days after the date on which the dispute has been submitted to the parties' tribunal of choice.

(ii) If the decision reached pursuant to (i) is that a contract has been breached without just cause or sporting just cause, the Dispute Resolution Chamber shall decide within 30 days whether the sports sanctions or disciplinary measures which it may impose pursuant to Art.23 shall be imposed. This decision shall be reasoned, also in respect of the findings made pursuant to (b)(i), and can be appealed against pursuant to (c).

(iii) Within the period specified in (ii),or in complex cases within 60 days, the Dispute Resolution Chamber shall decide any other issues related to a contractual breach (in particular, financial compensation). This decision shall be reasoned, and can be appealed against pursuant to (c).

2 The conciliation facilities envisaged under 1(a) above shall be supplied by FIFA. The Dispute Resolution Chamber provided for under 1 (b) above shall be instituted in the FIFA Players' Status Committee. The rules of procedure of the Dispute Resolution Chamber are set out in the Application Regulations and may be reviewed from time to time by the FIFA Players' Status Committee. ...

Thus, Article 42(1)(b) of the FIFA Status Regulations distinguishes between:

(c) on the one hand, decisions determining "the triggering elements of the dispute (i.e. whether a contract was breached, with or without just cause, or sporting just cause)" (see Article 42(1)(b)(i)); and

(d) on the other hand, decisions determining the sporting sanctions or disciplinary measures to be imposed as a result of such breach (Article 42(1)(b)(ii)), and "any other issues related to a contractual breach (in particular, financial compensation)" (Article 42(1)(b)(iii)).

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Article 42 (1)(b) provides that decisions in the first category can be decided either by the Dispute Resolution Chamber of the FIFA Players' Status Committee or (if agreed by the parties) by a national sports arbitration tribunal. In contrast, however, decisions in the second category are to be decided by the Dispute Resolution Chamber of the FIFA Players' Status Committee. See FIFA Circular 769, dated 24 August 2001, which accompanied the issue of the FIFA Status Regulations (at p 19/21):

If a party chooses to have its dispute resolved through football arbitration, the triggering, contract-related elements of the dispute will be handled by FIFA's Dispute Resolution Chamber at the request of this party, unless both parties have agreed in writing or it is provided in a collective bargaining agreement not to submit this part of the dispute to FIFA's Chamber but rather to a national sportive arbitration tribunal. ...

Whenever a dispute between a player and a club is put to football arbitration, and an unjustified contractual breach is found, FIFA's Dispute Resolution Chamber is exclusively competent to establish the consequences of this finding (notably, sportive sanctions, financial compensation) ...

The relevant FAPL Rules are as follows:

K.30 The triggering elements of a dispute between a Club and a Player of the description set out in Article 42 of the FIFA Regulations for the Status and Transfer of Players may be determined in accordance with the procedures set out in Section T of these Rules provided the parties agree in writing to that effect."

T.1 The F.A. Premier League Appeals Committee ... shall determine the following matters: ...

1.5 the determination under the provisions of Rule K.30 of the triggering elements of a dispute between a Club and a Player of the description set out in Article 42 of the FIFA Regulations for the Status and Transfer of Players; ...

Importantly, Article 14.3 of the Application Regulations provides that, where an award of compensation is made against a player and in favour of a club, if the player does not satisfy the award within one month he will be subject to disciplinary sanction, and if he has signed for another club, then that new club shall become jointly and severally liable for the judgment debt. If it does not satisfy the award, it too can be subject to sanction under the FIFA Status Regulations:

Chapter VI.
Enforcement of compensation awards

Art.14

1 The party responsible for a breach of contract is obliged to pay the sum of compensation determined pursuant to Art.42 of the FIFA Regulations for the Status and Transfer of Players within one month of notification of the relevant decision of the Dispute Resolution Chamber.

2 If the party responsible for the breach has not paid the sum of compensation within one month, disciplinary measures may be imposed by the FIFA Players' Status Committee, pursuant to Art.34 of the FIFA Statutes. Appeals against these measures may be lodged to the Arbitration Tribunal for Football (TAF).

3 If a player is registered for a new club and has not paid a sum of compensation within the one month time limit referred to above, the new club shall be deemed jointly responsible for payment of the amount of compensation.

4 If the new club has not paid the sum of compensation within one month of having become jointly responsible with the player pursuant to the previous paragraph, disciplinary measures may be imposed by the FIFA Players' Status Committee, pursuant to Art.34 of the FIFA Statutes. Appeals against these measures may be lodged to the Arbitration Tribunal for Football (TAF).

Indeed, if the new club does not satisfy its debt to the old club, then it is in default of its debts to a "football creditor", which is a breach of the conditions for a licence to participate in the UEFA Champions League or UEFA Cup, as well as (in certain jurisdictions) domestic competition.

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Mutu: What next?

As noted above, Chelsea did file a claim for damages against Adrian Mutu. It did so pursuant to Chapter VIII of the FIFA Status Regulations. The issue of whether Mutu's conduct amounted to "unilateral breach without just cause" within the meaning of those regulations was heard not by the Dispute Resolution Chamber of FIFA's Player Status Committee but rather by the FAPL Appeals Committee, sitting in its place.

In March 2005, the FAPLAC ruled that the player's conduct in taking cocaine did amount to "unilateral breach of contract without just cause" within the meaning of the FIFA Player Status Regulations. In so ruling, it rejected the player's contention that that phrase only encompassed unilateral breach in the form of a walk-out by the player from the club, ruling instead that it encompassed any kind of breach that could be properly be regarded as destabilising the contractual relationship (ie those breaches of sufficient seriousness as to entitle the innocent party to treat the contract as at an end). In so doing, it also rejected the player's contention that the FIFA Status Regulations did not cover situations where it was the club that had terminated the contract, albeit in response to the player's repudiatory breach. It therefore ruled that the club was free to pursue its claim for compensation before the Dispute Resolution Chamber, pursuant to Article 22 of the FIFA Status Regulations.

Before the club could pursue such claim, the player filed an interim appeal to the Court of Arbitration for Sport. That appeal was heard earlier this month, and a ruling is expected shortly.

If the player prevails on appeal, the club will be left to its domestic rights and remedies, subject to the player's arguments on causation/mitigation/etc.

If the club prevails on appeal, the club will be able to pursue its claim for compensation under the FIFA Status Regulations before the DRC, subject again to the player's arguments on causation/mitigation/etc. BASL

Editors Note: it was reported in mid-December 2005 that Mutu had lost his appeal to CAS – see case report at www.tas-cas.org/en/juris/frmjur.htm

International exploitation of sports rights – Transnational legal issues arising in ocean racing

By Robert Datnow, Partner, Farrer & Co.

1. Introduction

International yacht racing is big business: for event organisers, sponsors, boat builders, the media and the syndicates taking part. The sums invested in cutting edge boat design and project management are significant. It is not uncommon for entries in the America's Cup to spend in excess of €100 million on boat design and build, project management, marketing, advertising and the overall campaign. Volvo's spend on organising the 2001-2002 and 2005-2006 Volvo Round the World Ocean Races is reported to have exceeded US$100 million. Each syndicate in the Volvo spends around €15-20 million on their overall campaign.

The calendar is full of international yacht races including the America's Cup, the Volvo Round the World Ocean Race, the Single Handed Transatlantic Race, the Admiral's Cup, the Clipper Round the World Ocean Race, Cowes Week, Antigua Sailing Week and the Transat Jacques Vabre which starts on 5 November to highlight a few examples. Indeed, Ellen MacArthur announced last week the creation by the Offshore Group, run by her and business partner Mark Turner, of the Barcelona World Race, a two-handed non-stop circumnavigation.

The Volvo Round the World Ocean Race 2005-2006 on which I and the firm have advised continuously for the past three years sets sail from Vigo in Northwest Spain on Saturday 12 November. The start is preceded by the first in a series of 'in-shore' races on 5 November.

The Volvo comprises ten ports, nine months and over 31,000 nautical miles of ocean racing, from Vigo in Spain to Georgetown, Melbourne, Wellington, Rio, Baltimore, New York, Portsmouth, Rotterdam and the finish in Gottenburg, Sweden, the historic home of Volvo cars.

Media exposure for the last race included a cumulative TV audience of over 800 million, 15,000 press articles in 11 territories, an estimated 686 million unique readers, 3 million unique visitors to the website and over a billion radio listeners. The Race Rule, requires syndicates to build a new Volvo Open 70 class yacht. The seven participants are ABN Amro (with two yachts), Brasil 1, Ericsson, Movistar (Spain) and Disney's Pirates of the Caribbean entry, Premier Challenge (Australia).

Participants

The key organisations and individuals involved in international yacht racing include:

- the Event organiser
- the Ports
- the Syndicates
- the Sponsors (race, yacht, broadcast and other race programme sponsors)
- Boat designers and builders
- Project managers
- the skipper, crew, shore team and HQ staff
- the Media – TV, press, internet, mobile, satellite and terrestrial airtime providers
- Equipment, kit and logistics suppliers.

The commercial and contentious issues for lawyers involved in international yacht racing are complex, multi-layered and multi-party and because of this hugely challenging and intellectually rewarding. The range of legal issues include intellectual property development and protection, limiting liabilities, spreading risk, the creation of new media, yacht design and ownership, employment, force majeure, postponement and cancellation.

Success in creating, marketing and staging international yacht races is built on a sound platform of key contractual relationships. The lawyer therefore is at the very heart of this process.

The remainder of this talk highlights a selection of key challenges faced by lawyers acting for several of the major organisations involved in international yacht racing: the Event organiser, participants (syndicates and crews), sponsors, those involved in boat building and project management, and briefly, the media.

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2. The Event Organiser

The key legal points for event organisers include:

(a) **Packaging Intellectual Property**

There is no property in the concept of an international sailing event or indeed its general format. This begs the obvious question as to what rights of value the event owner possesses, to licence to sponsors, the media and others. Normally the event organiser sells intellectual property assets to the sponsors, broadcasters and the media by granting non-exclusive licences to use its intellectual property. For example the right to use the event's trade mark, the event name, or copyright in visual, audio or written material.

In order to license valuable rights, the event owner must create and protect its intellectual property assets. Volvo for example has the benefit of 32 world trade marks and 12 device trade marks in a range of relevant categories around the world.

The creation, acquisition, registration and protection of the event's intellectual property enables the event owner to sub-license its assets. This is principally done by the registration of trade marks, the assignment of copyrights in written, audio and visual material, the acquisition of licences (to use other trade marks, names and images) and the waiver of moral rights in photographs. Without a package of controllable rights and the ability of the organiser to prevent unauthorised and unlicensed use, sponsors will not wish to sponsor and broadcasters will not want to broadcast. Without the statutory and contractual protection of the event owner's intellectual property the sub-licensing of those assets by contract would be impossible.

The legal aspects of intellectual property packaging for sailing events include:

(i) **Protecting the event name and event logo**. Normally (and if capable of registration) these should be registered as trademarks worldwide, ideally in each territory in which the race has a port and indeed in each category in which sponsors, the media and any other parties whom the event owner intends to license intend to exploit the rights granted.

(ii) **Acquiring copyright in audio, visual and written race materials**. It is critical for the event owner to receive assignments of copyright for all audio and visual material including photographs, film, data and other intellectual property created by participants, sponsors and others during the race whether on board, on shore, in or out of the Race Village during or between legs. During the Volvo, each syndicate guarantees a certain amount of video footage, photographic and written coverage of the team per day will be sent to Volvo race HQ.

Uniquely, crews are each required to record and transmit to Volvo at least 20 minutes of live footage on board each week while racing; 15 still pictures per week; take part in one radio interview per week; and provide a minimum of 50 words per day. This gives the event organiser a breadth and quality of assets that it would not otherwise be able economically or practically to obtain independently.

The event owner requires this intellectual property to be assigned to it to enable it to grant further sub-licences to media outlets, particularly to producers and broadcasters, but also to video game creators, race simulator providers and the hosts of virtual reality coverage. The event owner also requires assignment and therefore ownership of these materials principally to control their use consistently throughout the Race and afterwards and so as to avoid the need to seek consent from every creator of this material, which occasionally may not be granted on each occasion the event organiser wishes to use or sub-licence the material. The event owner will ordinarily license back to the originator the material they have created on controlled terms limited to the duration of the event.

(iii) **Reserving sub-branding rights**. In acquiring equipment services or facilities from a third party (for example simulators, software, corporate hospitality venues) the event owner must reserve the right to sub-license, (without unreasonable control) in order to grant branding rights to sponsors.

(iv) **Sub-dividing sponsorship layers**. The carefully drafted subdivision of sponsorship layers with different rights in each layer for example to create partner, title, sponsor level and supplier level, programme level or VIK sponsor categories, dove-tailing category exclusivity, enables the event owner to attract more, and more compatible sponsors, and ultimately increase the overall sponsorship revenue.

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(vi) **Sponsorship Category Extension**. The current sponsorship market has partly led to a re-examination of existing sponsorship categories and an exploration of new sponsorship opportunities. The pharmaceuticals and film sectors are cases in point.

Pharmaceuticals

In the United Kingdom, the advertising of prescription-only medicines directly to the general public is prohibited by the Medicine (Advertising) Regulations 1994. In the remainder of the European Union and in the majority of other Commonwealth countries, similar restrictions apply to prevent the advertising of prescription only medicines directly to the public in line with the International Federation of Pharmaceutical Manufacturers Association's Code of Practice for the Promotion of Medicines and the World Health Organisation Ethical Criteria for Medicinal Drug Promotion (November 1985).

However, the legal position in New Zealand (and similarly in the US) allow direct to consumer advertising of prescription-only medicines. In New Zealand, the amount spent on this advertising alone has increased over the last five years by an estimated 42%.

In the sports context, examples of prescription only medicine brand sponsors include:

(a) Cialis' sponsorship of the America's Cup 2003 and the PGA Tour;

(b) Viagra's sponsorship of major league baseball; and

(c) Levitra's sponsorship of the national football league.

The legal position in New Zealand is partly encapsulated by a judgment of the New Zealand Courts (25 February 2003) referring to an earlier decision relating to Viagra allowing television advertising direct to the public on the basis of favouring other public interests including "that men had a right to be informed about a product which could assist them with a very distressing condition and this advertisement achieved this objective in a socially responsible manner".

Obviously, those jurisdictions which allow direct to consumer advertising of prescription only medicines offer opportunities to sponsors and event organisers which are not available in the jurisdictions where such advertising is prohibited. There are opportunities in global and touring events such as Formula 1, the ATP Tennis Tour and of course in international sailing events where valuable rights could still be offered globally to pharmaceutical product sponsors to advertise prescription-only products directly to the public in permitted jurisdictions subsequently altering branding in controlled jurisdictions, to publicise the manufacturer whilst advertising the product to permitted individuals within the regulations. There is of course also the potential for offering such sponsors a range of other sponsorship benefits including ticketing and corporate hospitality opportunities in controlled jurisdictions.

We have also seen aspects of pharmaceutical product sponsorships moulded into quasi-public service announcements in printed and visual media, inviting sufferers of a particular condition to call a particular number giving generic advice. This of course has the marketing advantage of developing a positive association between the consumer and the company manufacturing the controlled product, with obvious consequent benefits.

Film

'The Pirates of the Caribbean' entry in the Volvo Round the World Ocean Race 2005-2006 is an example of creative thinking to extend the normal sponsorship categories into the film sector, and achieve a range of benefits for the parties involved. The Volvo Ocean Race wished to attract a US entry to its round the world event and Disney/Buena Vista International wanted to promote its forthcoming Pirates of the Caribbean II sequel. The solution was to negotiate a sponsorship collaboration, project management and participation arrangements to brand a newly built Volvo 70 Yacht in the race with Pirates of the Caribbean film imagery, to name the yacht "the Black Pearl" (as in the film) and to have it skippered by a well known American (Paul Cayard). The branded boat will sail around the world, stopping in ports at the time the film will be launched in those territories, consequently creating publicity both for the film and the race.

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Additional benefits include rights to its syndicate sponsors to attend film premieres and launch events and to receive other marketing partner rights associated with the film, thus making the package more attractive to raise further sponsorship revenues to fund the campaign.

(b) **Liability and Risk**
The scale and complexity of major international yacht racing makes it fundamental for event owners to limit their liability and reduce and spread risks. Key in achieving this are:

(i) **Corporate status** (whether limited by guarantee or shares or otherwise) in order to ring-fence the potential liabilities of the event owner. Note however residual directors' liabilities (for example for corporate manslaughter and breach of directors' duties which I touch on later).

(ii) **Value in kind and other suppliers of technical equipment**. The event owner should engineer that title and risk in particular products which it has secured to be provided to syndicates or participants should pass on delivery to the participant. (The event owner should not act wherever possible as a distributor or agent or if they do, they do not accept risk). Further, event owners should ensure that they are indemnified by suppliers and that end users (in other words participants and crews) have the benefit of the supplier's standard terms and conditions. If possible the supplier should be required to provide its ordinary maintenance obligations direct to the participant.

(iii) **The prevention of ambush marketing**. In order to preserve the value of rights granted to sponsors, sponsors will require the event owner to protect the rights granted, to prevent unauthorised third parties from using those rights without paying for them. Event owners should establish a means of spotting infringements, an escalation procedure for dealing with ambushes (for example a desired time-scale seeking the removal of ambushing material) and a policy to seek damages if appropriate at a later date.

Acquiring exclusive advertising, marketing and promotional rights (with the right to sub-license) in the village, in port and at other locations during the race is highly desirable and hugely effective at preventing ambush-marketing.

(iv) **Duties and standards of care**. Aside from its contractual liabilities, the event organiser is of course exposed to significant risks in negligence for falling below the standard reasonably required of a sailing event organiser of its type.

Event organisers owe a common law duty to take reasonable care to avoid acts or omissions which they can reasonably foresee would be likely to cause injury to a person or property.

Volvo for example, as an event organiser, is required to exercise reasonable care in organising the event and to take steps to minimise risks where in all the circumstances it is reasonably practicable, by the provision of reasonable safety measures. The nature and extent of the measures required to be taken will depend upon all of the circumstances because the duty is simply to take such care that is reasonable to avoid foreseeable accidents and injury. What amounts to reasonable care in each case will depend on the context. The duty is owned by Volvo to all those who ought reasonably to be in contemplation as being effected by any act in question. In other words, and for example, if Volvo were to accept a type 2 diabetic as a participant and not put in place reasonable safety measures, Volvo may find itself liable in negligence not only to the type 2 diabetic if injured, but also to other participants, spectators and volunteers who may equally be affected. The duty therefore is to ensure the safety of all those involved in the Race.

There are two elements to which this duty of care extends:

a) in assessing whether or not to accept the participant's application to take part in the Race; and

b) in assessing the necessary measures to put in place during and in relation to the Race to avoid a finding of negligence.

(v) **Death and personal injury**. A clause in a contract or notice of race purporting to exclude the event owner's liability for death or personal injury caused by its negligence, whether or not signed by the participants or a condition of entry into the race, and whether or not express or implied as is more often the case will be unlawful (under the Unfair Contract Terms Act 1977). Similarly, standard terms (not relating to

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the purported exclusion of liability for death or personal injury) in a standard participation agreement or notice of race if unreasonable, may be unlawful.

(vi) **Insurance**. Event owners must consider and where appropriate take out and maintain at adequate levels the appropriate insurance including cancellation, postponement, property, product, third party, public liability, medical, travel, health, employers', directors and officers and if possible terrorism insurance.

In practice, event owners should also insist that its suppliers of goods and services take out and maintain their own adequate insurance to cover their liabilities.

It is more common nowadays for sailing event owners to insist on participants insuring not only against their own risks but also paying for or ensuring that their persons-in-charge, crew and shore members are also fully insured.

(vii) **Dispute Resolution Procedure**. This needs to be established for all aspects of the event including differentiating between race rule and race specific disputes, disciplinary matters, commercial disputes and those involving third parties. All race parties need to be contractually bound to the agreed dispute resolution mechanism and its findings so as to avoid disputes during the race as to where and how contractual disputes are to be decided. Event owners should consider having a standing panel briefed on the intellectual property and other legal issues and the relevant law ready to react and hear disputes expeditiously, privately and cheaply if the parties agree. There are independent sports specific dispute resolution agencies established to hear and decide such disputes.

(c) **Employment**

Of course, ordinary employment considerations apply for the staff of the event organiser. However, certain other peculiarities arise in particular for major international sailing event organisers (and others) including:

(i) **Place of Work**. Making express contractual provision for the employer (i.e. the event organiser) to alter the place of work of its employees, to enable arrangements to be made for extended periods in other jurisdictions or for secondment.

(ii) **Hours of Work**. The event organisers should also provide expressly by contract for increased normal hours of work for short foreseeable busy periods, for example in the immediate run up to a start or during a leg to the maximum allowable extent (bearing in mind and complying with the provisions of the Working Time Directive which amongst other things sets maximum limits on working hours averaged over a prescribed period).

In each of the two previous examples, the requirements must be reasonable and reasonably implemented, maintaining the necessary trust and confidence between employer and employee.

(iii) **Discipline, Suspension and Dismissal**. Because of the short timescales involved in race organisation and the high profile of sailing events plus the requirement for a full effective operative staff, the procedures for disciplinary action, suspension and dismissal for a variety of causes including incapability need to be explicit, detailed and above all speedy in so far as is allowable.

(d) **Force Majeure, Postponement and Cancellation**

In these times of global terrorism and conflict and with experiences of global communicable disease (for example SARS and potentially avian flu), sailing event organisers need to plan for these events. They need not only to seek to limit their liability by contract to the level of any cancellation and postponement insurance obtained, not only to allow for postponement and cancellation in all of their contractual arrangements, but also to extend the usual terms of their ordinary termination provisions to include any decision taken by the event organiser to postpone or cancel as a result of a force majeure event or indeed the substantial threat of what would ordinarily be considered a force majeure event. In this way they enable the legitimate removal of obligations without liability and without the force majeure event having to take place.

(e) **Contracting Parties**

Significant care needs to be taken in ensuring that the event organiser contracts with the appropriate and correct party in each of its arrangements.

(i) Determining who should be the participant is often complex. Should it be the owners of the yacht, the funders of the yacht, the project managers or a combination of some or all of these? There are arguments both for and against the event organiser contracting with a race specific SPV.

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(ii) Clearly also, the event organiser will need to obtain the appropriate performance and financial guarantees from its contracting parties in relation to those, such as crew and shore members and the person in charge who are responsible for performing certain participant obligations. In the larger sailing events, it may be an option for the event organiser to contract individually with each person in charge and crew member in addition to each participant. This is certainly the case in the Volvo.

3. Participants

Participants in this analysis are the syndicates, the funders, owners, and/or sponsors of the yacht and the campaign. In the Volvo scenario: Ericsson, ABN Amro, Disney etc. The key legal points for participants are:

(a) **Intellectual Property**

(i) In terms of the audio, visual and written material created by it or on its behalf by its crew during the race and assigned to the event organiser, the participant must obtain a licence back of the intellectual property for its own marketing, advertising and merchandising.

(ii) Participants will ordinarily require the event organiser to guarantee, by way of a series of contractual warranties:

(a) the organiser's owner's ownership of the licensed trademark in the relevant product and service categories, and in the relevant international jurisdictions (either locally, as a community trademark and/or internationally);

(b) that immediate steps will be taken by the event organiser to prevent unauthorised use, perhaps also demanding removal and delivery up of offending material and the payment of any damages (steps are often taken in collaboration with the sponsor);

(c) that the name and logo will not be licensed to any other entity within the sponsor's product or service category and to no more than a specified number of licensees. Unusually, in the Volvo there was a requirement for Volvo to guarantee a minimum number of commercial participants; and

(d) that use of the trademark by the sponsor in accordance with the contract will not in itself infringe the rights of any third party.

Sponsors will usually demand an indemnity from the event organiser for breach of any of these warranties or other obligations.

(b) **Contractual Relationships**

The participant must ensure it has contractual relationships with each funder of the boat, the owners and sponsors of the yacht, the person in charge, crew and shore team members. The participant must consider and, where appropriate, obtain counter-indemnities from each of these contracting parties to support any indemnity it is required to give to the event organiser. Care must be taken if any crew members are under 18 as parental consent may be required.

(c) **Suppliers of Technical Equipment**

The participant should ensure, whether it is supplied technical equipment by the event organiser or by a third party, that in addition to its other rights and remedies, it obtains the benefit of all quality, ownership, and maintenance obligations and the ability to sue the supplier directly for any damage it suffers. This is particularly important where as a benefit of participation, the event organiser guarantees that items of kit will be supplied.

(d) **Liability and Risk**

(i) The participant is wise to consider the same insurance and corporate status factors as the event organiser.

(ii) Further, participants should ensure that all those coming on board (for example media and corporate hospitality guests) are required to contract directly with the participant, not only to take and follow instructions directly from the person in charge but also to reduce the participant's risk to the maximum extent permitted by law by way of release, waivers and indemnities. The same Unfair Contract Terms Act rules apply including any attempt made by a participant or person in charge to disclaim liability for personal injury and death caused by negligence.

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4. Sponsors

Sponsors in this analysis are the entities which either sponsor the Race or aspects of the race or sponsor a yacht and campaign. In addition to the matters relevant to sponsors touched on in relation to participants, additional key legal issues for sponsors are:

(a) **Acquisition of rights**
(i) ensuring product/service category exclusivity;

(ii) equivalent rights and benefits as others at the same sponsorship level;

(iii) that there is contractually enforceable duty on the event organiser to use its best endeavours to protect against ambush marketing and protect category exclusivity.

(b) **Warranties in relation to intellectual property**
The sponsor would also wish to obtain the same type of express warranties from the event organiser as to its ownership of the intellectual property licensed to the sponsor.

(c) **Race exposure**
Sponsors should also seek an express contractual provision to require the event organiser to maximise the sponsor's exposure by ensuring maximum exposure for the race and that the race is organised to the highest possible standards.

(d) **Return of sponsorship fee**
Sponsors are wise to seek and should do their best to obtain guarantees for the pro-rated return of the sponsorship fee on the occurrence of specified events, such as cancellation or disrepute as an ultimate sanction if all other forms of negotiated resolution break down.

(e) **Off-shore opportunities**
Sponsors should also carry out their own due diligence of any offshore sponsorship opportunities offered by the event organiser for example in the highly regulated pharmaceuticals and tobacco categories.

5. Boat building and project management

Key legal topics:

(a) **The legal structure of the funding, design, build and operation of the boat**. Occasionally a boat will be designed specifically for a particular race (as in the Volvo) and as such will need an entry funding strategy plus an exit or sale strategy at the end of the race. Possible structures include:

(i) venture capital or investment funding repayable contingent on obtaining sponsorship and with a percentage stake in third party sponsorship revenue;

(ii) third party funding requiring the build of the yacht and the retention of ownership by the funder should sponsorship funding not be obtained;

(iii) boat put or call options, requiring the boat to be bought or transferred at a particular price to a particular party on a particular date in specific circumstances (for example if third party project management funding is not obtained at a required level or at the end of the Race (when the value is significantly reduced);

(iv) the yacht syndicate could simply put up the funding for the design, build and management of the challenge. However, the likely scenario is that funding does not come in all at once, from initially identified sources or at the required levels and secured bridging finance is therefore required. Where third party finance is required, it is likely that the funder will insist on a charge over key components as the boat is built (such as the female mould, hull, mast and sail) and some control over the budget for each of the above in order to protect its investment and to ensure that it has tangible assets at given points in the process of the build of value to sell on if required. Where separate parts of the yacht are separately funded in stages, the funders will also require more often than not termination rights on the non-completion of any stage.

(b) Confidentiality of proprietary design features. This is key, so that participants cannot sell the boat builder's commercial know-how to its competitors in the particular race or after the Event. Copyright in the design is often retained by the designer and licensed for a fee to the boat builder for the particular yacht and is not assigned to the funder as might happen in the other commercial circumstances.

International exploitation of sports rights – Transnational legal issues arising in ocean racing

For interest, the average spend on boat design and build in the Volvo is in the region of ¤4 million and syndicates will spend a further ¤12-15 million per campaign on project management.

6. Media

(a) **Producers, Distributors and broadcasters**

The key legal issue for producers, distributors and broadcasters is:

Obtaining the licensed right to use the material they create. This will be a matter for negotiation. The event owner will of course seek an assignment of all copyright created by producers and has a strong case for doing so, particularly where it is funding the producer of the news, documentary or race footage. Equally the event organiser needs to control use of footage not only to protect the value of the event, by proscribing the type of distribution and broadcast, but also by securing the right to sub-license to other media outlets without seeking consent from the originator. Often the event owner will license intellectual property back to the originator for use during and perhaps after the race for archive purposes on a case by case basis as approved by the event owner.

(b) **New media**

In terms of new media, sailing event organisers are required to be innovative to bring the event to a terrestrial audience. Sailing is a minority sport and not naturally an easy spectator experience. The Volvo Ocean Race has commissioned software for the production of a virtual spectator experience on its race website which allows viewers to watch the progress of the race using recorded footage and satellite positioning information. There is also a fantasy league game, and a highly designed website using software specifically commissioned for the race.

(c) **Software and IT**

In its deals with software providers, satellite and terrestrial airtime providers and line rental agreements, Volvo insisted on highly developed service level agreements and a system of service credits to ensure as best it can a continual spectator experience and a mechanism for front-loading compensation as a pre-estimate of loss in the event of any breakdown of service. Of course, as with other software deals of this type, there is a requirement for the software source codes to be transferred to Volvo from escrow on certain termination and other events, which is essential for the continued functioning of the software and end product throughout the race. It is the quality of this experience for the estimated billion or so viewers upon which a great part of the value of the race is based.

7. Conclusion

The international yacht racing calendar is already crowded, but is still growing. As this continues, race organisers will find it harder to attract sponsors, participants, syndicates and the media. As such, even more emphasis will be placed on the need to have professional and workable participation agreements, sponsorship and media packages, fair dispute resolution procedures, internationally compliant regulations, set out clearly by contract including in the notice of race. International yacht racing and its continued growth is dependent upon clarifying the nature of rights and liabilities between the various contracting parties, of identifying the risks and fairly spreading them at the outset, of nurturing and servicing relationships in order to benefit from the economies of scale brought about by renewal and involvement in future editions of a particular race. Lawyers are and will therefore increasingly be integral to the continued growth and success of international yacht racing. BASL

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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

Conferences, meetings, lectures, courses, etc.

Sportel Convention of broadcasters and producers (Monte Carlo)

This annual event has become a focal point for influential thinking in the world of sport, particularly its regulation. One of the highlights of this event was the seminar on the influence exercised by television on sport. One of the prominent speakers at this seminar was Michel Platini, the former St. Etienne, Juventus and France footballer, who has become a respected and influential figure when it comes to the future development of football. At this seminar, he surprisingly took a stand against electronic gadgetry and meddling. In his view, referees had to be accepted as human and prone to error. It would therefore be foolish to supplement their authority by introducing video techniques. Instead, he advocated the introduction of five referees, including two goal judges.

Several speakers at the same event, led by Dr. Jacques Rogge, the President of the International Olympic Committee (IOC), and David Neal, an executive with the US broadcasting company NBC, had predictably enough favoured the commercial marriage between television and sport, emphasising the competitive benefits which derived from the adjustment to various regulations in order to accommodate television requirements in skating, gymnastics, volleyball, skiing, etc.

Mr. Platini later elaborated his views to a British newspaper in the following terms:

> ***"We have a major problem. You can have 17 cameras at a match to see what sometimes the ref can't see, and still not always be sure. Video is very dangerous for the referee. I've thought for a long time that three referees at the top level is not enough. My solution is to have another two assistants by the goals, to judge over-the-line incidents" (The Daily Telegraph of 27/10/2005, p. S9).***

Mr. Platini added that goal-judge assistants would be well positioned to assist the referee, where necessary, on penalty decisions, six-yard area fouls, and tackles inside or outside the 18-yard line. His opinion is important, because apart from being an executive committee member of both world governing body FIFA and the European regulatory body UEFA, he is also Chairman of FIFA's technical and development commission *(Ibid)*.

As was reported in a previous issue of this Journal *([2005] 1 Sport and the Law Journal p. 103)*, FIFA tested a system of balls containing microchips during the World Under-17 Championships in Peru for over-the-line decisions – although in the event no such decisions were required – and did so again at the World Club Championship in Tokyo. A decision will be taken in March 2006 as to whether this device should be introduced at the 2006 World Cup.

On the topic of off-side decisions, Mr. Platini was equally emphatic that the current "not-involved-in-play" mentality is unsatisfactory, in spite of the fact that the recent adjustment to the rules was allegedly done in order to make life easier for referees. He commented:

> ***"This is not a good philosophy. It's easier for the referee to judge on the second action rather than the first – on the pass from a colleague to Van Nistelrooy, say, who split seconds earlier has been in an offside position, but not in the action involving play. All the players are against this interpretation. In the beginning football belonged to the players. Now it belongs to everyone else – to the public, referees, the coaches, the agents" (Ibid).***

He added that it was the responsibility of FIFA to propose a further change to the International Board (the joint body of FIFA and the four British associations who govern the laws) but, as he stresses, such a recommendation first has to pass through the referees' commission.

Obituaries

Colette Besson

At the too early age of 59, this scion of French athletics departed this life in August 2005. As a 22-year-old PE teacher from Bordeaux, she was practically unknown when she arrived as part of the French team to take part in the Mexico Olympics of 1968. Few had expected her to survive beyond the qualifying heats, but she did have the benefit of three months' training at high altitude as a result of the three-month strike caused by the student riots of May 1968. This was one of the factors which enabled her to pip Britain's Lilian Board for the 400 metre title She was a prominent voice in the campaign against drug-taking in athletics, and four years ago was appointed President of the Administrative Council of France's new anti-doping laboratory *(The Daily Telegraph of 11/8/2005, p. 25)*.

Ted Radcliffe

Few of us can imagine today how racialist the world of sport was even within living memory. It took exceptional men and women to challenge this state of affairs, and one of those who assisted in this process

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world of baseball – which at the time was perhaps more segregated than was the case with sport under South African apartheid – died recently at the grand old age of 103. His name is Ted Radcliffe. He had made quite a name for himself in the "Negro Leagues" when, in 1934, he was able to join a white semi-professional team in Bismarck, North Dakota. Other black stars were subsequently added, and the following season they won the National Baseball Congress championship in Wichita. Following his playing career, he went into management and, when in charge of American Giants, he also attempted to promote racial harmony in baseball by signing three white players in an effort to bolster the "Negro Leagues" *(The Guardian of 31/8/2005, p. 20)*.

Lawyers in sport

[None]

Digest of other sports law journals

[None]

Sport and international relations

Sporting relations with Zimbabwe continue to cause problems

New Zealand tour cancelled

The flagrant and frequent human rights abuses committed by the regime of Robert Mugabe has caused many a breakdown in international sporting relations, particularly cricket – as has been extensively documented in these pages over the past three years. The latest cricketing nation to become embroiled in this controversy was New Zealand. It will be recalled from the last issue *([2005] 2 Sport and the Law Journal p. 44)* that the tour which the Zimbabwean cricket team were scheduled to perform in New Zealand in the winter of 2005 was to go ahead in principle, but that Zimbabwean dissident exile Henry Olonga was to organise, together with some prominent opposition politicians, a campaign aimed at preventing the tour from going ahead.

Whether it was Mr. Olonga's campaign or some other development which turned the scales will probably never be known, but the fact is that, in mid-August 2005, it was dramatically announced that the tour was to be cancelled after the host country refused to issue visas to any member of the touring party. Nor was it actually clear whether it was New Zealand or Zimbabwe who cancelled the tour. However, whatever the cause of the cancellation may have been, it would make little difference as to the long-term implications because, at the time of writing, the International Cricket Council (ICC) was unlikely to take any punitive action *(The Independent of 12/8/2005, p. 62)*.

It is interesting to note that this decision by the New Zealand government not to grant any visas took the matter beyond the stage where the England and Wales Cricket Board (EWCB) found itself the previous autumn. It will be recalled that during the period in question *(1 [2005] Sport and the Law Journal p. 49 et seq.)* the EWCB wished to call off its Zimbabwe tour but were threatened with a severe fine by the ICC should the tour not proceed. Appeals to the UK Government to intervene and order the EWCB not to visit the Southern African country produced no response. Yet the ICC, following the New Zealand government's decision, issued the following statement:

> ***"Where a government makes a political decision that prevents a cricket tour taking place then the ICC would not take any action against the member governing body" (Ibid)***

As yet, no-one, inside or outside the ICC, has provided an explanation for this apparent anomaly – which becomes even more baffling in the light of the events and developments described in the following section.

"No Zimbabwe boycott" decrees ICC

The vacillating and sometimes contradictory attitude displayed by the British public authorities on the issue of sporting relations with Zimbabwe has been extensively documented in this organ and elsewhere. However, by late August 2005 even Mr. Blair's government seemed prepared to adopt a tough stance on this issue, when it was announced that two of its ministers, Foreign Secretary Jack Straw and Culture Secretary Tessa Jowell, had issued a joint memorandum to the ICC requesting that Zimbabwe be banned from international cricket because its worsening record on human rights abuses. The Mugabe regime was facing increasing international condemnation because of his "Drive Out Rubbish" campaign in which 700,000 people were reported to have lost their homes. Opponents claimed that this programme is designed to penalise urban residents who voted against Mr. Mugabe in the recent elections *(The Independent of 22/8/2005, p. 67)*.

However, the ICC appears to have been entirely unmoved by this plea. The Chief Executives of the Test-playing countries met in Dubai a few days later to discuss the ICC's future tours programme, and

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confirmed that they would not bow to the pressure exercised by the UK government – who had also attracted support from governments of other Test-playing nations. However, ICC Chief Executive Malcolm Speed stated that the cricket authorities would continue to disregard national politics when setting the international schedule, in the following terms:

> ***"For the past three years at least we've been asked that players be allowed not to comply with their agreements with Zimbabwe or that cricket not be played in Zimbabwe. The ICC position has always been consistent: we say to governments that we won't take decisions based on national politics. We expect governments to do that" (The Guardian of 26/8/2005, p. 37).***

At that same meeting, the ICC Chief Executives ratified a future tours programme on the basis of a six-year cycle, which would commit all Test-playing nations to playing Zimbabwe home and away at least once by the year 2012.

The reaction by Zimbabwean opposition politicians was contemptuous in the extreme. Thus Roy Bennett, an opposition MP representing the Movement for Democratic Change (MDC) expressed his disgust with the ICC decision in the following terms:

> ***"Sport can help and it's long overdue. Just 500 metres from the ground people are being beaten to death and crippled while a game is going on. The ICC is disgusting in the way it has handled cricket issues in Zimbabwe – the way top-class sportsmen who have been victimised by politicians have been brushed aside and told to get on with your lives. The ICC, while there is media and broadcasting rights and there's money to be made out of screening Zimbabwe and from Zimbabwe being in the cricket loop, they will do anything to sweep these issues under the table and will never ever expose them or speak out about them" (Ibid).***

In addition, the ICC may find it hard to reconcile their fundamentalist stance on this issue with their failure to take any action against New Zealand who, as is reported above, consciously and deliberately discontinued a commitment involving the Zimbabwe national team.

Meanwhile, back in Harare...

The controversy aroused wherever and whenever Zimbabwean cricket enters into any international relations whatsoever is mirrored by the troubled state of the country's domestic game. Initially, the signs were hopeful in this regard, in that a measure which previously would, almost certainly, have been followed by player action seemed to be accepted without so much as a whimper by the Zimbabwean international players. In early September 2005, the managing Director of Zimbabwe Cricket, Osvias Bvute, suddenly withdrew relatively fresh contractual offers from four of the country's international representatives – i..e. Stuart Carlisle, Craig Wishart, Barney Rogers and Neil Ferreira. The official reason for this decision was that the four players involved had demanded more money than their performance warranted *(The Daily Telegraph of 5/9/2005, p. S13)*. However, the Zimbabwe Professional Cricketers' Association (ZPCA) decided against industrial action on this subject *(The Daily Telegraph of 6/9/2005, p. S9)*. It has to be conceded that the four in question were members of the team which lost both tests against New Zealand the previous month.

However, it soon appeared that the tensions eating away at Zimbabwean cricket ran much more deeply than was evident from this single episode. In mid-November, the national squad, including national captain Tatenda Taibu, stated that they would not represent their country again unless the chairman of Zimbabwe Cricket (ZC), Peter Chingoka, and its managing director, Ozias Bvute, resigned. They all signed a statement which amounted to a set of demands and included player safety (following the violence which marred one of the touring party's provincial games the previous month), the absence of any contracts, and concerns that the national coach, former West Indies test batsman Phil Simmons, had been dismissed *(The Daily Telegraph of 11/11/2005, p. S17)*. However, a few days later it appeared that the players' concerns regarding their contractual status had been allayed, since they settled this aspect of the dispute after a total of 37 players were awarded contracts. ZC also agreed to pay outstanding match fees for fixtures which included Tests and one-day internationals against New Zealand and India *(The Daily Telegraph of 16/11/2005, p. S3)*.

However, any illusions that this heralded a new era of consensus and co-operation between Zimbabwe's players and cricketing (and other!) authorities proved to be a short-lived illusion. Only weeks after the settlement referred to above, Zimbabwean cricket suffered yet another major setback when it was learned that Mr. Taibu had retired from the international game, claiming that he had been threatened after complaining about the manner in which the sport was being operated in his country. This announcement was all the more significant because Taibu had been portrayed as an icon for "new Zimbabwe" when he assumed the national captaincy. He gave as the main reason for his retirement the new contract offer which had been made to him, as well as the methods adopted by ZC *(The Daily Telegraph of 25/11/2005, p. S22)*.

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Although this was not apparent at the time, there seemed to be an additional reason for the lack of respect and confidence in which the top brass of Zimbabwean cricket were held by their leading players. Shortly after Mr. Taibu's resignation, the news broke that Zimbabwe's senior players were preparing to boycott the national team whilst their chief administrators were being investigated over alleged financial irregularities *(The Guardian of 29/11/2005, p. S6)*. This came in the wake of the news that Zimbabwe's provincial associations were also demanding the resignation of Messrs. Chingoka and Bvute, on the grounds of fomenting discord, playing the race card and drawing vast salaries and perquisites to which they were not entitled. In addition, the pair were alleged to have dismissed their request for replies to 80 questions concerning the Board's finances *(The Guardian of 11/11/2005, p. S2)*.

Shortly afterwards, there appeared to be at least some substance to these allegations, as Messrs. Chingoka and Bvute were to appear in court on charges under the Exchange Control Act *(The Guardian of 7/12/2005, p. S2.)*. However, the lack of a quorum at a meeting of ZC, held the next day, saved Mr. Chingoka from being ousted as its Chairman. Instead, the meeting requested the Government to order a full forensic audit, and that a committee should manage the daily operation of ZC *(The Guardian of 8/12/2005, p. S2)*. Both administrators were released from police custody after two days in detention. It emerged that they had been asked some 80 searching questions – such as whether Mr. Bvute had purchased a house worth over £31,000 using a cheque issued by the sponsor of the one-day series against New Zealand. It was also revealed that ZC were owed around £89,000, but without a record as to whom should pay. Secretarial salaries and other expenses had also risen from £8,000 a year ago to over £64,000 *(The Daily Telegraph of 8/12/2005, p. S14)*.

The day of the pair's release, Chief Superintendent Oliver Mandipaka stated that they would soon be charged with contravening the said Exchange Control Act. This was immediately contradicted by Mr. Bvute, who claimed that the Attorney-General would not be pressing charges. It also emerged that the cash received from selling the television rights of the home series against India and England had been banked abroad, and that the Zimbabwean government demanded to know what ZC had done with some £12.6 million which they were estimated to have received since January 2005 *(Ibid.)*. Earlier, two Zimbabwe Test players – Vusi Sibanda and Waddington Mwayenga – had also spent the weekend in jail on charges linked to the infringement of foreign exchange laws, before being released *(The Guardian of 6/12/2005, p. S2)*.

In the meantime, some controversy also attached to the Zimbabwean national football team – once again linked to "Operation Drive Out Rubbish". It emerged that members of the national football team were being rewarded for winning a regional tournament with plots of land which had been cleared of township homes as part of the operation. Ironically, several members of the team had lost their homes or jobs as a result of the operation. In addition, Jonathan Mashingaidze, the Chief Executive of the Zimbabwe Football Association (ZFA), stated that he hoped more land would made available for other team members should the squad qualify for this year's African Nations Cup finals in Egypt *(The Guardian of 20/8/2005, p. 14)*.

Golf makes a comeback in Afghanistan

For many decades now, Afghanistan has been the focal point of international tension – first after the Russian invasion of 1979, and now as a result of the occupation by allied troops of the country on account of the country having harboured the presumed orchestrators of the 9/11 attacks. Sport has been a medium for bringing occasional relief to this impoverished and devastated nation, and in mid-September the only golf course in the country held the first Kabul Desert Open golf tournament since the Russian invasion. Twenty teams competed on the nine-hole course, and the tournament ultimately saw the victory of US citizens Sam Hendricks and Jeff Bourguignon, two UN workers *(The Daily Telegraph of 24/9/2005, p. 18)*.

The players had been told clearly that the entrants were playing at their own risk. However, despite a distant burst of gunfire halfway through the tournament, the only casualty was a stray goat hit by a drive from the fourth tee by Mr. Hendricks. He was allowed to retake the shot *(Ibid)*. However, the history of the golf club itself is a cameo of the unremitting violence suffered by the Afghan people during the previous 30 years. Shortly after the Russian invasion, the occupiers closed down the club and imprisoned the club professional, Mohammad Afzal Abdul. The latter was later arrested and held for two months by the Taliban after they discovered his collection of tournament trophies and accused him of operating for foreigners. In the course of this imprisonment, they beat Mr. Abdul with cables. He went into exile in Pakistan, but returned two years ago and organised the rebuilding of the course, which had been left in a sorry state *(The Guardian of 24//9/2005, p. 19)*.

1. General

Turkish protests over Cyprus and Kurdish language

Turkey is also a country which has been to the forefront of international struggles in recent years – particularly in relation to Cyprus, whose northern part it invaded in 1974 in order to protect the minority Turkish Cypriots from alleged inhuman treatment. The UN intervened in order to guarantee some form of peaceful coexistence with the Greek-speaking Cypriots, and decreed a number of conditions which have also affected the world of sport. Thus Northern Cyprus is subject to a 50-year ban on international matches and tournaments, and its inhabitants are excluded from the various Cyprus national teams. A group of Turkish Cypriot footballers have decided to stage various types of protest action against the continued application of these measures – some in more dubious taste than others. Thus they chose a campaign launch in London to strip off on UN Human Rights Day in order to draw attention to the allegedly iniquitous nature of these bans. In an even more refined mode, a dozen players featured naked on a number of "Balls to Embargoes" posters a month later. Turkish players in local London leagues also wore protest armbands in matches on Hackney Marshes during that Human Rights weekend *(The Independent of 11/12/2005, p. 69)*.

Another aspect of Turkey's position of international controversy is the manner in which it treats its Kurdish minority. The Turkish authorities have always been extremely sensitive on this issue, and recently FIFA, the world governing body in football, seems to have incurred the displeasure of the Turkish Football Federation because the latter listed Kurdish as an official language in Turkey in the Almanack of World Football 2006. However, Guy Oliver, the author of the book published by FIFA, replied by stating that Kurdish was only listed as a language spoken in Turkey *(The Independent of 29/11/2005)*.

Sport continues to heal wounds in Middle East

Few areas are more contentious internationally than the Middle East, particularly in the Israel/Palestine region. The role which, actually and potentially, is played by sport in attempting to heal the many wounds of this conflict has already been documented in previous issues of this Journal. Recent developments in this sphere have given the sporting world further perspectives in this regard.

In mid-October 2005, it was learned that Qatar, the Gulf state which hosts the Al-Jazeera television channel, had made a multi-million pound donation towards the construction of a sports complex in Israel. This gift, which is unprecedented for an Arab nation, will fund a football stadium in the Northern Israeli-Arab town of Sakhnin. The local team is the only club in top Israeli football to have Arab players on its books. This move mirrors improving relations between Israel and Qatar, as witness the latter's Minister of Foreign Affairs praising Israel's withdrawal from the Gaza strip and urging Arab countries to respond with new overtures *(The Guardian of 12/10/2005, p. 24)*. Qatar was an essential ally of the US on the occasion of the Iraq invasion, yet hosts the Al-Jazeera television channel, funded by its head of state, which broadcast reports of the war which were condemned by the US administration *(Ibid)*.

In a separate – yet strangely related – development, Betar Jerusalem, the Israeli Premiership football club whose fans have the unenviable reputation of being the most racialist in the country, took the sporting world by surprise by announcing that it was about to sign its first Arab player. In one of the more politically-significant transfer deals in recent memory, Betar is attempting to lure Abbas Suan, an international player, from Bnei Sakhnin – precisely the club which stands to benefit from the donation made by the Qatar government which is referred to in the previous section. The previous season, Sakhnin became the first Arab club in Israel's history to win the country's official Cup competition *(The Independent of 19/11/2005, p. 31)*.

If the move proves to be successful, Mr. Suan would be joining a club whose fans abused and jeered him only days after he had spectacularly kept alive Israel's bid to qualify for the final stages of the World Cup with a goal against the Republic of Ireland. Unlike Betar Jerusalem, Sakhnin has Arab and Jewish players in its team. The club, warmly congratulated by the Israeli Prime Minister when it reaped its Cup success, has become a symbol of reconciliation, including as it does Jews in Galilee, as well as Arabs, amongst its fans *(Ibid)*.

Two Koreas to unite at forthcoming Olympics

Most of the symbols and manifestations of the Cold War have disappeared from the political landscape, but there remains one highly visible expression of this period of 20th-century history, to wit the divided state of Korea, split along ideological and military lines into North and South as a result of the Korean war of the early 1950s. Both sides have not even signed a peace treaty since that horrific episode. On the sporting field they have also been fierce rivals, and when South Korea hosted the 1988 Olympics the latter were coldly boycotted by the northern part of the great divide.

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However, there have been some signs of a thaw in relations between the two sides since a summit held between them in 2000. As a result, teams from the two countries marched together at the Sydney and Athens Olympics and at the opening ceremony of the recently-held East Asia Games. Now the authorities from both countries are planning another step forward by fielding a joint team, first at the next Asian Games, then at the 2008 Olympics to be held in Beijing *(The Guardian of 2/11/2005)*. Combining the two teams, however, will require approval from the relevant sporting bodies, and this may prove difficult to achieve. Prominent commentators have also warned that agreements made with North Korea often fail because of the country's isolated political situation and secretive internal machinations. Its government is particularly sensitive to international pressure over its nuclear weapons programme *(The Independent 2/11/2005 p. 31)*.

Sporting officials from both sides, represented by a Vice-Chairman of both national Olympic committees, intend to meet soon in order to negotiate the specifics for a united team. This will take place in the North Korean border town of Kaesong, which has come to symbolise South Korean economic engagement with the North through various joint ventures in the area *(Ibid)*. This column will continue to monitor further developments with the keenest of interest.

Bosnian sporting project hailed as "example to the world"

Yet another area of this globe which has seen a good deal of international military and political strife is the Balkans region, particularly during the 1990s when the Yugoslav wars were waged with a ferocity and barbarity which shocked the world. Particularly the Bosnian city of Sarajevo suffered unimaginable horrors during this infamous period. However, in the decade which has passed since the siege of this city, which lasted three years and caused 10,500 people to lose their lives, sport has once again taken a substantial part in trying to rebuild this devastated society. On a recent visit to the city, former England football legend Sir Bobby Charlton and the former No. 1 tennis player Ilie Nastase, representatives of the Laureus Sport for Good Foundation – who themselves have sporting projects in some of this globe's most afflicted areas – found themselves inspired by a local football project named Spirit of Soccer. Sir Bobby went as far as describing it as an "eye-opening experience" *(The Daily Telegraph of 12/8/2005, p. S5)*.

As a result, Laureus – who have in their ranks a large number of iconic sporting figures – and Spirit of Soccer (SOS), a locally-operated project which has received financial backing from the International Trust Fund, have joined forces. SOS was established by Scotty Lee, a British former aid relief officer, and has forged a new kinship in a part of the world which is gradually returning to the tolerance once enjoyed by its distinct ethnic and religious communities. In fact, many people claim that projects such as SOS have initiated cross-community dialogue where politics failed after the conflict. It has already educated and trained over 11,000 young footballers throughout the Bosnia/Herzegovina region. There remain over 500,000 unexploded land mines in the area, and it was the death of three young boys aged under 10 whilst playing football in a Sarajevo sports field which convinced Mr. Lee, a qualified football coach from North London who had spent years driving aid convoys as a civilian, that his work had not been completed when the war ended. Each of the 11,000 children in question has received instruction on land mines and how to react if they find them. In addition, to this obvious benefit, the project has also brought together trainers and players from the three main ethnic groups in the country *(Ibid)*.

Rival Brazilian tribes compete on the sporting rather than the military field

When the Portuguese colonists landed in Brazil in the early 16th century, Brazil had between three and five million Indians. Disease and systematic destruction over the next few centuries, however, have depleted their numbers to such an extent that there are only around 350,000 them left. These are divided into 220 tribes, who have often taken up arms against each other. However, these warring factions have recently found a more peaceful outlet for their differences, i.e. an annual sports and cultural jamboree where they test each other not only in events such as swimming, football and sprinting, but also archery, spear-throwing and a contest in which relay teams carry a tree trunk for three miles. This year sees the tenth anniversary of this event, which has grown in stature since its humble beginnings. Indians now come from neighbouring countries such as French Guyana and Bolivia – and even from as far afield as Canada – to compete in these events *(The Daily Telegraph of 17/8/2005, p. S13)*.

Thais turn to English Premier League football to quell rebellion

Thailand is a country which is riven with religious differences, which has recently assumed an extremely violent form. Over 800 people have been killed since rebellion erupted 18 months ago in the South of the country, which has a Muslim majority and was once an independent Sultanate. At first, the Government applied

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strict controls and made promises of aid. Later it assumed emergency powers authorising detention for 30 days, search and arrest without warrants, and telephone tapping. It even organised air-drops of millions of origami birds as a gesture of peace. In spite of all this, the killings continued.

It is then that the Government announced that it was about to distribute up to 1,000 television sets, complete with cable subscriptions. Football is very popular in Thailand, and the English Premiership is the most popular item on subscription channels. The sets will be allocated to venues such as village tea shops, enabling the less wealthy inhabitants to watch games together. According to Kongsak Wantana, the Minister of the Interior:

> ***"Television and sports will help liven up the region. Most children love watching sports on TV but they can't afford that at home. So we are giving them what they love, hoping that it can help solve the problem" (The Daily Telegraph of 17/8/2005, p. 13).***

This move has met with the full approval of the English Premiership *(Ibid).*

Other issues

[None]

2. Criminal Law

Corruption in sport

Football's international governing bodies prepare to take action on corruption

It would be seeing the world through sepia-tinted lenses to claim that sport in general, and football in particular, has been a corruption-free zone until recently. Scandals have erupted on a regular basis and sent shockwaves through the sport in question. However, there are some recent developments which appear to have given a new dimension to allegations of corruption, i.e. the growing fear that criminals may be using football clubs as a vehicle for money laundering, and increasing evidence that club matches are victims of betting fraud orchestrated by Far Eastern syndicates. The most newsworthy of these scandals, which occurred in Germany, is dealt with extensively below (p.53). However, these alarming developments have not eluded the attention of the game's international authorities.

At a recent meeting held at their Swiss headquarters, officials from European governing body UEFA – including Chief Executive Lars-Christer Olsson – conferred with a group of MPs from the European Parliament known as "Friends of Football" to consider these concerns. More specifically, UEFA urged the EU's Financial Action Task Force on Money Laundering to investigate the sources of the vast sums being invested in football. They stressed that it was not only the large amounts being invested which have caused suspicion, but also (a) the fact that a good deal of this cash is crossing borders, (b) that some investors are businessmen without records in the country in question, and (c) other backers succeed in maintaining their anonymity. Unlawful money can apparently be laundered through football clubs after initially going through an offshore investment house. In this way, the origins of the cash would not have to be disclosed before being invested in a football club. In the words of William Galliard, the UEFA director of communications:

> ***"We are concerned and we are vigilant. We have had a number of reports about this but in this matter we as football authorities cannot do much. It is up to the national governments and authorities and the European Task Force to look into this situation"***
> ***(The Daily Telegraph of 25/8/2005, p. S5)***

As to the reports that illegal betting coups may affect European club matches, the officials' attention focused on some well-documented cases such as the German betting scandal and the affair involving the fixture between Dinamo Tbilisi and Panionos, reported in a previous issue of this Journal *([2005] 1 Sport and the Law Journal p. 55)*. The case of FC Alliansi, a Finnish football club, also aroused concern. A foreign business group purchased 90 per cent of the club in June 2005, and promised to transform Alliansi into a top club. Initially, the Finnish authorities thought that this group was Belgian, but it has since emerged that the club is owned by Zheyun Ye, a Chinese businessman reported to be connected with Asian polls companies. He has not been seen at the club, and in July 2005 Alleansi were beaten 8-0 by Haka Valkeosken, which gave rise to complaints to UEFA *(Ibid.)*

The world governing body of football FIFA, has also been showing signs of alarm at certain developments in the financial sphere which could cause lasting harm to the game. At its annual Congress, held in Africa in mid-September 2005, it voted to establish a task force designed to investigate corruption, betting and multiple ownership of football clubs. Particularly the last-named issue had given rise to concern.

Fears over the multiple ownership of football clubs increased during the previous season's Champions league group stages, when Chelsea, owned by Roman Abramovich, played CSKA Moscow, the Russian club sponsored by Mr. Abramovich's oil company Sibneft. The Russian oil magnate's spokespeople consistently denied that he had any influence over CSKA, and a summary investigation by UEFA yielded no direct links. However, concerns were renewed when it emerged that the Media Sports Investment consortium, which already owns the Brazilian team Corinthians, were contemplating a take-over of English Premiership side West Ham. As a result, FIFA has moved to establish a body which has genuine investigative powers. The 198-1 vote which sanctioned this measure constitutes overwhelming support for a body which will report directly to the FIFA Executive Committee *(The Guardian of 13/9/2005, p. S8)*.

German refereeing corruption scandal – an update

It will be recalled from the previous issue *([2005] 2 Sport and the Law Journal p. 47)* that Robert Hoyzer, the referee at the centre of Germany's greatest football corruption scandal in years, had incurred a life ban at the hands of the German Football Association. However, this is not the end of the road for Mr. Hoyzer, as the criminal authorities inevitably took an interest in the matter and brought a prosecution against the disgraced referee. In fact, prosecutions were also initiated against Dominik Marks, a colleague of Mr. Hoyzer, footballer Steffen Karl, and three alleged members of a Croatian betting ring *(The Guardian of 18/10/2006 p. S4)*. (Earlier, the case

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against another referee, Jürgen Jansen, also initially suspected of having received cash in order to fix two matches as part of the same ring, had to be abandoned by Berlin prosecutors for lack of evidence *(The Independent of 30/7/2005, p. 77)*.

The resulting collective trial commenced in mid-October, and was still proceeding when officials assembled in Leipzig for the 2006 World Cup draw. It therefore constituted a major embarrassment for the host nation. State prosecutors listed a total of 23 matches in the German Bundesliga as well as a number of Turkish league matches. Mr. Hoyzer had initially denied the charges against him, but later confessed whilst in police custody *(The Independent of 19/10/2005, p. 68)*. In the course of the trial, it emerged that Hoyzer was driven to his deeds not only by a love of money, but also by the sense of power which he derived from them. The total amount which the accused were alleged to have defrauded betting agencies amounted to more than £1,400,000 *(The Daily Telegraph of 26/10/2005, p. S5)*.

At the conclusion of his trial, Mr. Hoyzer was issued with a two-year jail sentence after being found guilty of fraud. His lawyers expressed dismay at the verdict, and announced their attention to appeal. It has to be admitted that the jail sentence was unexpected, since the prosecutors had merely sought a suspended sentence. However, the judge, Gerti Kramer, disagreed, holding that Mr. Hoyzer's was not a "youthful misdemeanour" but a serious crime. She highlighted the fact that he had also recruited other officials, and said that he had violated his important duty of neutrality *(The Independent of 18/11/2005, p. 77)*. Dominik Marks was given a suspended sentence of 18 months. Of the Croatian gang members, Ante Sapina received a 35-month jail sentence, whereas his brothers Filip and Milan had suspended sentences of 12 and 16 months respectively. The trial also heard vivid details of the manner in which the betting syndicate communicated with Hoyzer by telephoning him at half time in his dressing room. Once, Sapina even sent him a text message, offering him €50,000 if he could contrive the correct result *(The Guardian of 18/11/2005, p. S4)*.

However, the criminal proceedings arising from this tawdry affair were not yet completed because, on the one hand, Steffen Karl – a former UEFA Cup finalist with Borussia Dortmund – was being tried separately, and a further 19 players and officials continue to be investigated as prosecutors continue their inquiries into the scandal *(The Independent op. cit.)*. This column will naturally continue to monitor developments in this affair with the keenest of interest.

Corruption in Italian football

Italian football, which has been reeling under the nefarious activities of some of its less civilised followers (see below, p.57), has recently had to face up to another cancer eating away at its foundations, to wit corruption. Thus one of the major stories to do the rounds of the sports columns in the Italian media has been an inquiry into alleged match-fixing by Giuseppe Sculli, a forward playing for Sicilian club Messina. Mr. Sculli is not only a former Juventus and Italy under-21 player, but also the grandson of an infamous mafia boss called Giuseppe Morabito, who was captured in 2004 after being in hiding for 12 years. The Italian police monitored Mr. Sculli's private telephone conversations in order to discover where his grandfather was hiding, but in the process they discovered a good deal more.

Prior to the last match-day of the 2001-2 Second Division (Serie B) season, Mr. Sculli – who at the time was playing for Crotone – was overheard in several conversations apparently agreeing to receive cash from Messina, his current club, in order to lose a game and help their opponents avoid relegation. Oddly enough, Sculli himself scored in the first half of that fixture, but explained why this was in a telephone conversation with his cousin – which was reproduced in the weekly news magazine Espresso:

> ***"Our president wanted all the money for himself, but I told him that we had to share the bread in equal parts. So I scored and scared everyone to death. At half-time, they were all mad with me. They even told me that I was not a man of honour. Finally, they understood they had to pay me if they want to win. And they did it"***
> ***(The Guardian of 22/11/2005, p. S4).***

Alongside Mr. Sculli, the football clubs of Cosenza and Raffaele Vrenna, the Crotone president, are also under investigation by the Italian Football Federation. No action is being undertaken against Messina, whose management has changed in the meantime *(Ibid)*.

Another Italian scandal concerned the oddly-named Genoa Cricket and Football Club, Italy's oldest team. They were promoted to the Italian Premier League (Serie A) following a play-off with Venezia, but were subsequently relegated to the third Division for allegedly fixing that game. Police stopped a Venezia official leaving the Genoa president's factory carrying £170,000 in a suitcase, and intercepted telephone calls which allegedly featured the same president, Enrico Preziosi, waxing indignant when Venezia scored a goal. Both clubs insisted that the cash was part of a transfer payment *(The Independent of 27/8/2005)*. However, the Italian League's Disciplinary Committee was unmoved

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by this plea, and decided that the telephone taps showed that the payment was aimed at guaranteeing a victory for Genoa *(The Independent of 28/7/2005, p. 69)*.

Finally, in late August 2005, it was learned that Pierluigi Collina, the match official who took charge of the 2002 World Cup final between Brazil and Germany, had called time on his refereeing career after resigning from the Italian Association of Referees. Mr. Collina had been accused by the Association of harbouring a conflict of interests after he had accepted a sponsorship deal worth £546,000 from car manufacturers Opel, who are also the backers of AC Milan *(The Independent of 30/8/2005, p. 60)*.

Other match-fixing cases in football

Brazil. The Brazilian football season has had its share of corruption scandals this current season. In one case, FIFA referee Edilson Pereira de Carvalho admitted to accepting cash from a gambling ring in order to fix matches. Mr. Carvalho, famous for kissing his yellow cards, looking towards the sky and praying before matches, was attacked by one fan as he left court. As a result of this affair, the outcomes of 11 matches have been annulled – which has in turn led to widespread disturbances. Another official, Paulo Jose Danelon, has confessed to fixing three more matches at £3,000 each *(Daily Mai of 22/10/2005, p. 73)*.

Czech Republic. More than 24 referees and officials have been charged, suspended or are awaiting trial in a major match-fixing scandal. Five clubs have had points deducted, and one referee has received an eight-month suspended jail sentence. The Czech football authorities have expressed concern that there were insufficient numbers of honest top-flight referees left in order to commence the League programme *(Daily Mail, op. cit.)*.

Portugal. Portuguese football received a major shock when the authorities staged "Operation Golden Whistle", which involved no fewer than 171 people – 27 club directors, 110 referees, 28 Portuguese FA officials, two mayors and four businessmen. Among the names of those under suspicion is that of Jorge Nuno Pinto da Costa, the President of 2004 European Champions League winners Porto *(Ibid)*.

Cricket corruption scandal – an update

As was reported in the previous issue *([2005] 2 Sport and the Law Journal p. 48)*, it would seem that the various cricket authorities' measures to stamp out the evil of corruption affecting the game is bearing fruit. However, there remain a few cases which demand the attention of the guardians of the game. Thus it was announced earlier last year that the International Cricket Council (ICC) was to hold a formal hearing into allegations that Maurice Odumbe, the Kenya international, had inappropriate contact with a bookmaker and influenced the result of fixtures. Mr. Odumbe captured the headlines the previous season when he achieved a batting average of 42 and took nine wickets as Kenya reached the World Cup semi-finals. The former Zimbabwean Supreme Court judge, Ahmed Ebrahim, will conduct the hearing *(The Guardian of 13/3/2005, p. S15)*. No further details were available at the time of writing.

Meanwhile the Mohammad Azharuddin affair continues to produce side-effects in the world of criminality. It will be recalled from a previous issue of this Journal *([2001} 1 Sport and the Law Journal p. 14)* that the former Indian captain had been banned for life from the game following match-fixing allegations. He was one of five Indian cricketers to be penalised in the scandal which rocked the game to its foundations in the course of 2000. This affair has been linked to recent death threats from the criminal underworld in Mumbai, the financial capital of India. As a result, four armed guards have been posted outside Mr. Azharuddin's home in the Southern city of Hyderabad *(The Daily Telegraph of 1/9/2005, p. S7)*. No further details were available at the time of writing.

FIFA president demands suspension of agent after French conviction

In May 2005, Fabien Piveteau, a Monaco-based football agent who has among his clients Chelsea's Michael Essien, was convicted by a French court for being an accessory to the diversion of funds during the move of the Chelsea star from Corsican club Bastia to Lyon in the course of 2003. The Court held that Mr. Piveteau had taken a commission from the transfer intended as a payment intended to be used in order to promote acts of terrorism – regardless of whether this terrorism had actually materialised or not. Court documents recorded a series of actions which enables funds to be removed from Bastia's coffers and paid to two of its employees, Gerard Luiggi and Noel Geronimi. This, and Mr. Essien's 2003 transfer, became the subject of an investigation by the French fraud squad into the terrorist activities of a Corsican separatist, Charles Pieri. The court found that, ahead of the contracted schedule of payments on their commission, Mr. Piveteau's sporting agency received €137,000 from Bastia on 12 August; 15 days later the sum of 4 103,000 was placed, in 4500 notes, in envelopes and handed to Luiggi, who had a close link with Pieri *(The Guardian of 21/9/2005, p. S1)*.

In spite of this conviction, Mr. Piveteau remained a licensed agent accredited by the French Football

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Federation (FFF). Sepp Blatter, the FIFA President, has requested the French football authorities to suspend his licence. His demands were reinforced by the fact that the court decision held that Mr. Piveteau contravened FIFA regulations as well as the code of professional conduct by apparently acting for both the selling and purchasing clubs in the Essien transfer. Having signed an agreement with bastia to effect Mr. Essien's transfer from the club on 15/5/2003, Mr. Piveteau's agency agreed to a second mandate with Lyon, the purchasing club, ten days later. Article 14d of FIFA's regulations on players' agents clearly states that a licensed players' agent is allowed to represent only one party when negotiating a transfer. However, it is understood that Piveteau and his partner repaid the second commission to Lyon, annulling the contract after having conceded that signing the mandate had been a mistake (Ibid).

No further details are available at the time of writing.

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

Cycling. In late September, the International Olympic Committee's Ethics Commission absolved the leadership of the world governing body in cycling of any wrongdoing, a day before the organisation's disputed presidential election. The panel ruled that it could not be proved that the Union Cycliste Internationale or its President had been guilty of any malpractice *(The Daily Telegraph of 24/9/2005, p. S11)*. (On the outcome of the presidential election, see below p.92.)

Guy Drut. In the previous issue *([2005] 2 Sport and the Law Journal p. 48)* it was reported that former Olympic sprinter and Minister for Sport Guy Drut was being charged by the French criminal authorities with accepting payments from various firms associated with building contracts for the renovation of French schools. In late October, a Paris court issued Mr. Drut with a 15-month suspended sentence and a €50,000 fine. He now faces expulsion from the International Olympic Committee *(The Guardian of 27/10/2005, p. S2)*.

Hooliganism and related issues

Scars of Balkan conflict reopened by terrace clashes (Serbia)

In an earlier section, we highlighted the role which sport can play in healing the wounds of armed conflicts past – particularly in the Balkans region. However, George Orwell's dictum about football being "war minus the shooting" is also capable of applying, particularly in this area. This was certainly the case when the 2006 World Cup draw placed Serbia and Bosnia-Herzegovina in the same group. The Serbian leg of the fixture certainly provided sufficiently grim echoes of the past. The game was played at the home of Red Star Belgrade, built by Arkan, the notorious militia leader and a Red Star supporter who was said to have recruited from among his most extreme fellow-supporters for membership of his Serbian Volunteer Guard, who performed some of the most horrific aspects of the "ethnic cleansing" operation in Bosnia *(The Times of 13/10/2005, p. 89)*.

The attendance at the stadium that evening was also a heady mix, consisting not only of home Serbian fans, but also of two sets of Bosnians – the largest of which had actually travelled to Belgrade in order to support the Serbian team. The two groups were given access to the stadium under heavy police guard. However, the ethnic Serbian Bosnians were allowed to travel straight across the mutual frontier, whilst the coaches carrying the other Bosnians were directed along a roundabout route via Croatia, accompanied by a helicopter. Despite precautions aimed at segregating the fans, altercations were inevitable. Flares were thrown even as the national anthems were being played and continued to be exchanged after the start of play. Ripped-up seats were also thrown around *(Ibid)*. The clashes continued after the match, and at least 19 people were injured, including 17 fans and two police officers *(The Independent of 14/10/2005, p. 27)*. Oh, and the result: Serbia won by the odd goal, but the shooting on both sides was lamentably lacking. Perhaps Orwell was right after all.

"Collapse of stout party" department – Home Office questions Belgian anti-hooligan measures

In the previous issue *([2005] 2 Sport and the Law Journal p. 50)* readers were issued with a reminder – as if they needed reminding – of the terrible events which took place 20 years ago in Brussels, when as a result of a stampede by Liverpool fans 39 people, mostly Italians, lost their lives. Any impartial observer would therefore tend to be understanding – if not actually laudatory – of any precautions taken by the Belgian authorities

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whenever Liverpool FC are drawn against a side from their country, with all that this entails in terms of potential disturbances caused by Merseyside's finest. Not so, however, the peerless mandarins of the UK Home Office, who appear to regard such precautions as the highest form of provocation.

Thus when Liverpool were due to play a European Champions League group fixture against Anderlecht, the Belgian police formed a five-mile exclusion zone around the home side's ground, which led to the detention of 74 Liverpool "fans" on the night of the fixture. This prompted a request for an explanation from puce-complexioned Home Office mandarins, who were "interested to know the legal basis behind (sic) the tactics deployed". The Belgian police deftly responded by invoking laws introduced for the European Championship in 2000, which were jointly hosted by Belgium (and which once again featured plenty of instances of English hooliganism). A spokesman added:

> ***"The football law, which has been in application for some time, dictates that a supporter who is not in possession of a valid ticket is committing an offence to be in the vicinity of the ground" (The Guardian of 21/10/2005, p. S1).***

He added that the Belgian authorities did not intend to relax their policing policy for the visit by Chelsea, who were due to play Anderlecht later that season. This was no doubt inspired by the incidents which occurred in 1995 when Chelsea visited FC Bruges in the Cup-Winners Cup competition, and during which approximately 1,000 fans without valid match tickets were deported. Accordingly, Chelsea advised their supporters not to travel to the Anderlecht match unless they were in possession of a valid ticket *(The Guardian of 23/11/2005, p. S1)*. The match in question yielded no hooligan trouble – which may prompt even Home Office staff to ask the question whether Belgium's zero-tolerance approach is that ill-advised after all.

British police liaise and prepare for trouble during 2006 World Cup finals

Fortunately for this country, its authorities contain elements which are considerably more level-headed than the Home Office mandarinate when it comes to dealing with English football supporters. Ever since Sven-Göran Eriksson's team qualified for the final stages of the World Cup, UK police and football authorities have been preparing for the influx of over 100,000 English football fans to Germany, where the tournament is to be held in the summer of 2006. Plans include the issuing of banning orders against potential troublemakers and the deployment of British police officers in Germany *(The Guardian of 11/10/2005, p. S1)*.

The British authorities are no doubt aware that they are faced with a totally different challenge from that which confronted them during the last World Cup. The latter was played in the Far-East, which deterred many supporters from travelling such distances – eventually there were no more than 8,000 of them. Germany's geographical proximity, as well as the explosion in cheap airline tickets which seem to offer some return ticket for a few pence, raise the prospect of tens of thousands of fans finding their way to the various World Cup venues. In addition, the disgraceful scenes attending the 1988 European Championships, for which English fans were largely responsible, will awaken a desire among the Neanderthal element of the English supporters to "settle a few scores". As a result, the vigilance and forward planning on the part of the British authorities appears to be perfectly justified.

Safeguards already in place include 3,100 banning orders, which will prevent known troublemakers from travelling to Germany, as well as 29 specialist football units which are assembling intelligence on 943 identified targets. Vigilance at parts and airports will also be increased. However, the authorities also are keen to build on the experience of the Euro 2004 tournament by adopting an inclusive approach towards the fans *(Ibid)*.

Italian authorities act on hooliganism – but attendances suffer

The informed reader of this Journal will not need to be reminded of the plague of hooliganism which has affected the Italian game in recent years. This has prompted a number of measures on the part of the Italian authorities aimed at curbing this evil. It will be recalled from the previous issue *([2005] 2 Sport and the Law Journal p. 50)* that incidents such as the riots which attended the Milan derby between AC and Internazionale have caused the authorities to take a number of unprecedented measures. Thus it was that Internazionale were compelled to play their Champions League fixture against Glasgow Rangers behind closed doors. Such is the concern at the rise in Italian football hooliganism, that Italian FA executives invited a squad of English FA, police and anti-racism experts to provide them with advice on the manner in which they are tackling similar problems in this country *(The Sunday Telegraph of 2/10/2005, p. S4)*. The full extent of the problem was highlighted by a report that Italy now numbers no fewer than 74,000 recognised members of 445 groups of "Ultras" *(Ibid)*.

However, it is a sad fact that these draconian measures are leading to a considerable reduction in attendances in the Italian Premier League (Serie A). Average gates this season have been falling steadily to a low of 21,000 earlier this year – a drop of 18 per cent compared with

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the same period the previous year. Although the price of match tickets, the increase in live television broadcasts and the relegation the previous year of Bologna, Atalanta and Brescia – all clubs with large stadiums – no doubt are partly to blame, by far the most damaging factor is the restriction placed on the purchase of tickets. For many years, Italians have been accustomed to presenting themselves on the day of the match and purchasing a ticket at the stadium. However, since the start of this season spectators have been obliged to buy their ticket at least 90 minutes prior to kick-off – after showing their identity card. The data obtained from the latter are then fed into the club's offices, and the "personalised" ticket may then be collected from the point of sale *(The Observer of 23/10/2005, p. S9)*.

These measures have given rise to uproar among the country's fans, with some even staging boycotts of matches – as supporters did for the first half of AC Milan's fixture with Reggiana at San Siro in early October 2005. Thousands of disgruntled travelling supporters have been detained by traffic jams on journeys sometimes exceeding 200 miles, only to arrive at the stadium and not be allowed to buy a ticket. In addition, under the new rules, season ticket holders are not allowed to transfer their tickets to relatives or friends without having to contend with more bureaucracy. They are obliged to inform the authorities of their intentions and the recipient's details at least 48 hours prior to kick-off – failing which they will be refused entry *(Ibid)*.

In the meantime, the nefarious activities of some of the nation's notorious hooligans have continued unabated. Particularly the "ultras" of AS Roma seem to have left their mark once more on their club's already sullied reputation. In late October, the club were fined €25,000 by the Italian league after a referee was hit by a coin thrown during the local derby with Lazio. The incident occurred when Lazio won a free kick close to the Roma area. As the referee Paparesta positioned the ball, he came under a hail of plastic bottles and coins, one of which hit him on the side of the head. However, he suffered only one minor cut and the match resumed, finishing in a 1-1 draw *(The Guardian of 26/10/2005, p. S6)*. This club is now acquiring an unenviable reputation for this kind of behaviour. It will be recalled from a previous issue of this Journal *([2005] 1 Sport and the Law Journal p. 57)* that Swedish referee Anders Frisk had to leave the same pitch at half time after being hit by a coin during Roma's Champions league fixture with Dynamo Kiev. The Ukrainian club were awarded the match and Roma were forced to play their next two European games behind closed doors. The reader may also recall *([2004] 2 Sport and the Law Journal p. 56)* that the Rome derby had to be abandoned in March 2004, rioting having broken out after a rumour had spread that a boy had been killed by a police car outside the ground.

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

Zakynthos, Greece. In early September, a Greek-American man was arrested after an Albanian citizen had been stabbed to death after a World Cup qualifying match. The man was held on the island of Zakynthos on the day after Albania beat Greece 2-1 in Tirana *(The Guardian of 6/9/2005, p. 13)*. No further details were available at the time of writing.

Moscow. In early November, over 70 fans of CSKA Moscow were arrested following clashes with riot police after the current UEFA Cup holders beat local rivals 2-1 to clinch the national title *(The Daily Telegraph of 7/11/2005, p. S11)*.

Yaoundé, Cameroon. In mid-October, the players representing Cameroon on the football field were trapped in the stadium for more than two hours following their failure to qualify for the final stages of the World Cup *(Daily Mail of 10/10/2005 p. 81)*.

Sarajevo, Bosnia. In late August, 19 people, including 11 police, were injured in clashes which followed a football fixture between Celik and Zeljeznicar. One Zeljeznicar supporter died, although the cause of his death was not known at the time of writing. The clash commenced when police attempted to clear Zeljeznicar fans from the stadium. Rioting fans destroyed cars, street signs and traffic lights in the process *(The Independent of 22/8/2005, p. 18)*.

Bahrain. There were calls for a FIFA enquiry after Bahrain supporters rained missiles onto Trinidad players towards the end of their match in Manama, won by Trinidad and Tobago 1-0. Some of the trouble was sparked off by an incident where the referee was pushed and shoved in an injury-time melee sparked off by a disallowed goal *(The Guardian of 18/11/2005, p. 78)*.

Germany. The first weekend of December was a turbulent one for German football. The Hamburg v. Cologne match was marred when midfielder Alexander Laas was cut in the face after being struck with a drumstick thrown from the Cologne section of the crowd. In addition, Nuremberg player Stefan Kiessling was hit by objects thrown from the spectators in the course of the fixture against Moenchengladbach, although he was unhurt *(The Independent of 5/12/2005, p. 76)*.

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"On-field" crime

Turkey v Switzerland fixtures take violent turn

Football fixtures involving Turkey have led to the odd disturbance – but this has hitherto been restricted to the more hotheaded of supporters on both sides. However, matters took on a new dimension in mid-November 2005 during a fixture between Turkey and Switzerland in a World Cup qualifying match.

The trouble apparently started during the first fixture in Berne, which Switzerland won 2-0. The Turkish football authorities complained that Swiss fans jeered their national anthem and that their players were abused after the game. This did not bode well for the return fixture, and the Swiss side received a less than friendly reception after they landed at Istanbul. The players were kept waiting for over two hours at passport control and baggage reclaim. At the same time, Turkish police were struggling to hold back protesters who shouted abuse as the players passed through the airport, whilst other groups pelted the team bus with eggs when it alighted at the hotel *(Daily Mail of 16/11/2005, p. 77)*.

Unfortunately, matters took on an even uglier turn following the return match, which was won by Turkey 4-2 but lost them the overall fixture on away goals. After the referee blew the final whistle, it appears that fighting broke out in the tunnel between players and support staff, as a result of which one Swiss player was taken to hospital *(The Daily Telegraph of 18/11/2005, p. S5)*. World governing body FIFA immediately announced an inquiry into the incident, with President Sepp Blatter even threatening expulsion from the 2010 World Cup *(The Guardian of 18/11/2005, p. 78)*.

Analysis of television and other pictures taken during the incident appeared to show that Swiss midfielder Benjamin Huggel was seen to kick a member of the Turkish coaching staff as he ran off the pitch, before Turkish defender Alpay aimed a kick at opponent Marco Streller. Television footage also revealed a melee involving several players breaking out in the tunnel. Swiss defender Stéphane Grichting needed a catheter inserting in hospital after having been kicked in the groin. His colleague, Johann Lonfat, claimed that local police had joined in attacks on his team-mates *(The Daily Telegraph of 18/11/2005, p. S5)*. Turkey have already received fines for crowd disturbances, as well as two warnings during their ill-fated qualifying campaign.

The outcome of this affair was as yet unknown at the time of writing.

Former Wembley chief jailed for three years (US)

The trials and tribulations of the Wembley gaming group have been extensively documented in previous issues of this Journal *([2005] 1 Sport and the Law Journal p. 86)*. However, until recently the legal aspects of this affair had remained within the sphere. Matters have, however, taken on a more sinister turn in recent months when Nigel Potter, the former chief of the gaming group, was accused of attempting to bribe a US official. During the trial, the court heard that Mr. Potter, as well as Dan Bucci, the former manager of Wembley's Lincoln Park racetrack, sought to bribe John B Harwood, the former speaker of the Rhode Island House of Representatives, with up to $4 million, via his lawyer Daniel McKinnon. In exchange, the Wembley executives wanted Mr. Harwood to allow the company to install a further 1,000 slot machines at Lincoln Park, Rhode Island, as well as blocking plans by Harrahs' Entertainment to build a casino on the neighbouring Narrangasset Indian reserve. No payment was ever made, and the case for the prosecution was largely built on a series of fax messages which passed between the two Wembley executives. Mr. Potter was convicted on three counts of "wire fraud" over the faxes sent, whereas Mr. Bucci was found guilty on four counts *(The Daily Telegraph of 6/8/2005, p. 27)*.

The two executives were found guilty in August *(The Independent of 10/8/2005)*. Sentencing was deferred until October, when Mr. Potter was sentenced to a three-year term of imprisonment. He was also fined $75,000 and ordered to serve three years of "supervised release" following completion of his sentence. As a foreign national, he was refused permission to serve his sentence in an open prison *(The Times of 26/11/2005, p. 70)*. At the time of writing, it was not yet known whether he would appeal against his sentence.

Anti-abortionist Olympic nail bomber jailed for life (US)

It is an unfortunate fact that major sporting events tend nowadays to attract the attentions of the terrorist community, and one particularly horrifying example of this was the nail bomb which exploded during the 1996 Atlanta Olympics, killing one person and injuring more than 100 others. It was reported in the previous issue of this Journal *([2005] 2 Sport and the Law Journal p. 54)* that a Right-wing extremist, Eric Rudolph, had admitted to the bombing, after having pleaded guilty to the planting of a bomb in an abortion clinic.

In court, Mr. Rudolph claimed that he merely sought to embarrass the US Government in relation to its abortion legislation when he planted the bomb in Centennial

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Olympic Park on 27/7/1996. Facing the victims and their relatives, he expressed regret at his actions. He was given a life sentence. He had agreed to plead guilty for the outrage as part of a plea bargain with federal prosecutors, who had agreed to drop demands for the death penalty *(The Independent of 23/8/2005, p. 21)*.

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

Mike Tyson. Violence broke out on the first date of the British tour by former heavyweight champion Mike Tyson. The latter had already left the building when, during the final part of the evening's proceedings at the Heritage Hotel in Derby – a charity auction – fighting broke out. Around 20 police officers were summoned to quell the disturbance *(Daily Mail of 16/11/2005, p. 79)*.

Martin Sanchez. There remain some lingering questions about the death of this Mexican boxer after a bout in Las Vegas which took place in July, which have prompted the World Boxing Council (WBC) to launch an investigation. WBC President claims that Mr. Sanchez's life could have been saved, and that it would be dishonest of him to remain silent. Mr. Sanchez died in a Las Vegas hospital the day after he was knocked out in the ninth round of a super-lightweight bout against the Russian Rustam Nugaev *(The Daily Telegraph of 25/8/2005, p. S6)*.

"Off-field" crime

Roscoe Tanner's problems with the criminal law continue... (US)

The brushes previously encountered by this former Wimbledon Men's Singles finalist have been well documented in this Journal and elsewhere *(see e.g. [2003] 3 Sport and the Law Journal p. 28)*. It will be recalled that he was sentenced to 10 years' probation in 2003 for fraud, after having signed a sizeable cheque for a boat without sufficient funds in the relevant account. The next year, he was arrested in California on a warrant from New Jersey, charged with failing to pay child support, and was sentenced to a further year's probation *(The Guardian of 19/10/2005, p. S2)*. In mid-October 2005, he was arrested in Tennessee and spent the night in jail after being accused of violating his probation conditions *(The Daily Telegraph of 19/10/2005, p. S22)*.

Abramovich accused of fraud by City mayor

Roman Abramovich, the Russian oil magnate and owner of English Premiership champions Chelsea, has frequently been involved in controversy, but has not thus far been connected with, or officially accused of, any criminal offence. This may be about to change in the light of recent developments. In late July 2005, Yuri Luzhkov, the Mayor of Moscow, threatened to bring charges against Mr. Abramovich for allegedly stealing the city's share in an oil joint venture. More particularly he accused the Chelsea owner – who controls the major Russian oil company Sibneft – of fraudulently acquiring a 49 per cent stake in Sibneft-Yugra. Earlier, Sibir Energy, a UK-based company which has links with the Moscow government, brought a $2 billion lawsuit against Abramovich and Sibneft in the British Virgin Islands. Sibir accused them of unlawfully diluting its 49 per cent stake in Sibneft-Yugra to one per cent. Sibneft and Mr. Abramovich have firmly denied all these charges *(The Times of 1/8/2005, p. 30)*.

This suit is one of many being brought against Mr. Abramovich, who is thought to maintain good relations with the Kremlin – which have thus far enabled him to avoid the fate of Mikhail Khodorkovsky, the oil magnate who was jailed for nine years earlier that year. However, the Moscow mayor is one of several senior officials to have levelled criticism at Abramovich for his business practices, thus giving rise to talk that he has fallen out of favour. Mr. Abramovich is also being pursued by the European Bank for Reconstruction and Development (EBRD) concerning a £9 million loan made in 1997 to SBS Agro, a Russian bank (Ibid).

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

Former boxing champion killed for mobile phone (South Africa)

In mid-September 2005, Mzukisi Sikali,, the former world champion boxer, was killed during an armed robbery near his home in KwaNobuhle, South Africa. He was walking with a friend shortly after midnight when they were accosted by two men wielding knives who demanded his mobile phone. Mr. Sikhali apparently fought them off, but was stabbed several times in the chest. His friend succeeded in escaping. South Africa remains one of the top five countries as regards its murder rate *(The Guardian of 19/9/2005, p. 14)*.

2. Criminal Law

Italian football facing up to Mafia menace

That Italian football has a definite criminal element to it is evident from the earlier pages of this issue, as well as from its previous editions. However, thus far there is another – and perhaps even more sinister – element which has crept into the Italian game – the organised crime networks which have plagued the country for many years now. Prominent amongst these is, naturally, the Mafia. However, there are signs that Italian football is fighting back. Thus when, in mid-October 2005, two bullets were fired at his car, Pino Morinello was in no doubt about its significance, or indeed its provenance. As president of the Sicilian Serie C1 club Gela, Mr. Morinello had been waging a prominent anti-mafia campaign. Thus he interpreted the shots fired as a warning. Earlier, the club had been nursed back to financial health by the town's mayor, Rosario Crocetto, who found new investors for the club, including transport entrepreneur Morinello. Mr. Crocetta has to move around the town with bodyguards, and is extremely active in the battle against the mafia.

During this season, the players of Gela have taken the field bearing the message "Io non pago il pizzo" (I am not paying any protection money). It is an unfortunate fact that many Sicilian businesses make such a forced payment to the mafia. However, the T-shirt initiative has been followed by all the visiting teams – even the one from Naples, which has its own problems with organised crime. This was naturally not to the taste of the mafia, who responded in their own distinctive manner, as described above.

However, the situation in Southern Italy is even more complex from this point of view. This is particularly the case when it comes to amateur football, The anti-mafia brigade commenced an investigation into this aspect in 2003 in Calabria, where the local mafia rejoices in the name of 'Ndrangheta. Association with the local team is capable of boosting the prestige of the mafia boss. In fact, there is a long list of club directors who have been arrested for association with the mafia or killed in the mafia wars. One particular priest who represents the Libera organisation – which opposes the Calabrian mafia – informed an Italian daily newspaper that:

> ***"many presidents of football clubs are mafia bosses. They know that sooner or later many young footballers will end up working for them" (The Guardian of 22/11/2005, p. S4).***

There appears to be plenty of anecdotal evidence to support this contention. Ten years ago, some 800 youngsters aged between six and 14 competed in a football tournament in memory of Maurizio Audino. The latter was a convicted drug dealer suspected of being a mafia boss who was killed by a car bomb. Two years ago, Paolo Zimmaro, a referee, was suspended by the Italian football authorities after having ordered a one-minute silence before the fixture between Strongoli and Isola Capo Rizzuto because he had been informed that the cousin of the Capo Rizzuto president had died. He was unaware that the man in question was Carmine Arena, who met his end with a bazooka in a war between the mafia families. In this kind of environment, it seems that the Morinellos of this world are facing quite a struggle *(Ibid)*.

Promising French striker jailed for participation in petrol bombing (France)

In the course of November 2005, French urban centres were rocked by a series of riots unprecedented since the student protests of 1968 when hundreds of youths, mainly Muslims, created a series of disturbances which involved causing a good deal of criminal damage. Unfortunately, some sporting figures appear to have involved themselves in these disturbances. One such person was a promising young footballer called Ferhat Samat, who was jailed as a petrol bomber a week after scoring a dramatic winning goal in a cup tie *(The Daily Telegraph of 15/11/2005, p. 17)*.

Mr. Samat admitted burning cars after having bought petrol for six Molotov cocktails. He offered no explanation and, under the fast-track system which applied in this case, was issued with the same sentence as the friends with whom he was rioting – i.e. a one-year sentence, eight months of it suspended. Strangely, his profile was at odds with the image usually painted of the average rioters, i.e. unemployed sons of immigrants resorting to violence in order to protest at lives of discrimination and poverty. Being a bright young prospect, he was said to be earning a comfortable salary – in view of the wages earned for work found for him by the club, as well as part-time work in his uncle's kebab restaurant. His family originated in Turkey but settled in the centre of France and became a "model of integration" *(Ibid)*.

Former boxing champion dies in bar-room fight (Santo Domingo)

In mid-November, it was learned that Agapito Sanchez, the former world duper-bantamweight champion, died after having been shot in a bar quarrel in Santo Domingo, according to Domenican police. Mr. Sanchez was apparently shot twice by a sergeant of the Dominican armed forces after the boxer refused to let him dance with his partner. At the time, the ex-champion had been playing dominoes. He was operated on but died shortly afterwards *(The Guardian of 16/11/2005, p. S2)*.

2. Criminal Law

Fischella loses driving licence for speeding (Italy)

In mid-November 2005, it was learned that Giancarlo Fischella, the F1 driver who rides for Renault alongside champion driver Fernando Alonso and won this season's Australian Grand Prix, had his driving licence seized for speeding. He was stopped by police in Rome after driving at 148 kph in a 60 kph zone on the outskirts of the capital. Consumer group Codacons commented that Mr. Fischella's motoring offence was a "bad example" for the motor racer's many young admirers. What was particularly ironic about his offence was that, only the previous week, he had written a front-page article in the nation's leading sports newspaper, Gazzetto dello Sport, warning youngsters against taking part in street racing after a 16-year old died in a high-speed crash in the nation's capital *(The Guardian of 22/11/2005, p. S9)*.

Lokomotiv Plovdiv president murdered in gangland-style killing (Bulgaria)

When Bulgarian football club Lokomotiv Plovdiv secured a place in the first round of the UEFA Cup against OFK Belgrade, its President, Georgi Iliev, was understandably a happy man. One hour later, he was dead, cut down by a sniper's bullet. There was understandable outrage among the club's followers, but did not come as a surprise in some other circles – least of all the Interior Ministry, whose secretary general called Mr. Iliev "one of the big criminals in Bulgaria" and predicted that dozens of others would suffer the same fate ere long *(The Observer of 25/9/2005, p. S5)*.

The Iliev killing has indeed given rise to many questions. Mr. Iliev headed a business consortium called VAI Holding, officially concerning itself with tourism, property, gardening and import/export. However, it is widely believed that behind the consortium's legal activities lies a vast enterprise or organised crime involving drug trafficking and illegal rackets. The chief of the police force operating in Burgas, where the murder took place, unhesitatingly commented that:

> ***"The assassination of Georgi Iliev is without doubt connected to the recent murders in Sofia [the nation's capital] over control of the drug market (Ibid).***

This entire issue also needs to be seen in the context of Bulgaria's impending accession to the EU in January 2007. The European Commission has been exerting a great deal of pressure on the Sofia authorities to reform laws against corruption. This has given rise to rumours that Mr. Iliev may not have been killed by organised crime, but by the country's secret services as part of a major exercise in "cleansing" the country of its leading criminals (Ibid). No further details were available at the time of writing.

Van Persie release "imminent" (The Netherlands)

It will be recalled from a previous issue of this Journal *([2005] 2 Sport and the Law Journal p. 56)* that Robin Van Persie, the Netherlands international footballer currently employed by English Premiership side Arsenal, had been arrested in Rotterdam on a rape charge. In the meantime, however, the alleged victim has admitted inventing at least part of her story. As a result, the charges against Mr. Van Persie were expected to be dropped shortly *(The Mail on Sunday of 28/8/2005, p. 95)*.

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

Zurich, Switzerland. In late November, it was learned that the offices of Sepp Blatter, the President, of football's world governing body FIFA, were raided earlier that month by the Swiss authorities. A team of investigators from the office of examining judge Thomas Hildebrand broke into the headquarters of FIFA in Zurich accompanied by warrants issued under Section 158 of the Swiss Criminal Code, which regulates embezzlement. The raids are part of a continuous investigation into the finances of FIFA and its former marketing agency ISL, which, as reported in a previous issue of this journal *([2002] 1 Sport and the Law Journal p. 16 et seq.)*. (On the subject of the "missing ISL cash", see also below, p.79).

Colombia. In early October, it was announced that the man who murdered Andres Escobar, the Colombian football international who was killed after scoring an own goal in the course of his country's 1994 World Cup defeat by the US, has been released early after serving 11 years of a 43-year jail sentence. The judge in question commented that he had ordered the release of the convict, Humberto Munoz, on grounds of good behaviour. The move was bitterly condemned by Mr. Escobar's father *(The Guardian of 8/10/2005, p. S12)*.

Security issues

Pakistan tour continues to give rise to safety concerns

It will be recalled from the previous issue *([2005] 2 Sport and the Law Journal p. 57)* that recent internal developments in Pakistan, including various bomb attacks believed to have been perpetrated by religious and political extremists, had caused concern among the sporting teams scheduled to tour the country – particularly those representing cricket, a boom sport in

2. Criminal Law

Pakistan. A few months before their winter tour of the country was about to start, the misgivings expressed by certain England players at this prospect were given some substance with the news that, for security reasons, the capital Karachi had been removed from the Test Match itinerary announced earlier by the England and Wales Cricket Board (EWCB). This followed the London bombings of 7 July, which gave rise to serious doubts as to whether the tour would go ahead after all.

The UK Foreign office had advised that, in the wake of the London attacks, British nationals of Western origin ran a risk of being targeted by terrorists in Pakistan, which caused some apprehensions among the potential members of the touring party. However, the EWCB wisely decided to wait until the end of the Ashes series taking place in England at the time of the London bombings before negotiating with the players about the feasibility of the tour *(The Independent of 29/7/2005, p. 76)*. Once the initial shock of this horrific event had worn off, the security concerns seemed to recede. In addition, it was felt that it would be seen as hypocritical on the part of the EWCB if, having received the assurances it required from the Foreign and Commonwealth office (FCA) and the Pakistan Cricket Board, it were to withdraw from the tour and then expect Pakistan to visit England the following summer – as it is still scheduled to do *(Ibid)*.

However, in late September two separate bomb blasts occurred in Lahore, the venue for a Test and one-day international during the planned tour. These claimed the lives of at least six people and injured more than 20 others. Although a recent inspection of facilities in Pakistan, completed by Richard Bevan, the Chief executive of the Professional Cricketers' Association, had found no major cause for concern, the EWCB Chairman David Morgan admitted that these latest bombings could prompt the Board to take a closer look at security arrangements. The Australian A team were in Lahore at the time of the attacks, which appeared to have been aimed at civilian targets. Although no member of the touring party was injured, arrangements were made to move the one-day international scheduled that week against Pakistan A from the Bagh-e-Jinnah ground to the more heavily fortified Gadaffi stadium across the town. (Australia refused to tour Pakistan on safety grounds in 2002) *(The Guardian of 23/9/2005, p. S1)*.

In spite of these alarms, the England winter tour went ahead without any undue security alarms.

3. Contracts

Media rights agreements

[None]

Legal issues arising from transfer deals

Mikel transfer leads to strife (Norway)

The news that a promising young footballer of Nigerian nationality was to be transferred to Manchester United from a Norwegian club caused very few raised eyebrows at first. However, controversy soon engulfed the transfer deal when the transferee in question, Jon Obi Mikel, claimed that he had been bullied into signing the agreement and did not in fact with to join the English Premier League side. This charge was contested by United, and, together with their counterparts at Lyn Oslo, the club from which Mr. Mikel was to be transferred, insisted that the latter was at first delighted to sign for the old Trafford club, but that he had been influenced to change his mind after the transfer had been completed *(The Independent of 21/9/2005, p. 76)*.

Under orders from the world governing body, FIFA, Mr. Mikel then returned to the Norwegian capital and stayed at a hotel with his agent, John Shittu. United manager Sir Alex Ferguson and Chief Executive David Gill then flew to Oslo in order to meet Lyn's director of football, Morgan Anderson, and go through the final details of a joint submission which FIFA had required to be submitted by 30 September. Even these discussions became the subject-matter of controversy in an increasingly acrimonious dispute, with Mr. Shittu alleging that Ferguson attempted to arrange a secret meeting with the player – an allegation which was denied by Mr. Anderson. Once these papers were submitted, both sides were allowed to make further observations on the available evidence, before FIFA's dispute resolution chamber should have determined whether Mr. Mikel's transfer should proceed in January 2006 as planned *(Ibid)*.

However, in the meantime a new complication seemed to arise in late November 2005, when police moved in to investigate accusations of fraud. More particularly Mr. Mikel's lawyer, Stephen Tregear, accused Mr. Morgan of fabricating the relevant transfer agreement. In addition, the Nigerian midfielder has sued Lyn Oslo in order to have the contract set aside, thus allowing him to join Chelsea rather than Manchester United *(Daily Mail of 30/11/2005, p. 74)*. No further details were available at the time of writing.

Employment law

NHL strike ends – at a cost (US/Canada)

It will be recalled from a previous issue of this Journal *([2005] 1 Sport and the Law Journal p. 63)* that the national ice hockey championships in the US had to be abandoned for the first time in the course of its existence because of industrial action on the part of its players. The strike related to proposals by the National Hockey League and team owners to introduce a salary cap, and finally ended early in the summer of 2005, the lock-out having lasted 301 days *(The Daily Telegraph of 5/10/2005, p. S2)*.

Essentially, the end result of the dispute was undoubtedly a victory for the employers. The new contract has cut salaries on all existing player contracts by 24 per cent. It imposes a salary cap by imposing a payroll ceiling on each team, ranging from £21.5 million to $39 million during the first year, on the basis of projected total league revenue of $1.7 billion. No single player may be paid more than 20 per cent of his team's overall limit. This will mean a maximum individual salary of $7.8 million, compared to the $10 million which the very top stars could command before *(The Independent of 5/10/2005, p. 78)*.

However, an even greater revolution is being enacted on the actual ice itself. Because ice hockey was becoming an increasingly tedious spectacle more akin to tug-o-war than the free flowing, high scoring game it was intended to be, far-reaching rule changes have been introduced. The goals have been moved closer to the end boards, effectively extending the rink by four feet and making it harder for goaltenders to deal with ricochets. The size of the pads and other protective gear which the latter wear has been reduced by 11 per cent. In addition, referees have been instructed to be strict on obstruction and violent play by defenders, which will mean more penalties and probably more goals. Ties will no longer be allowed – where the score is level the match will be decided by sudden-death shoot-outs, pitting a single player against the goaltender *(Ibid)*.

However, the major question is whether the spectators will return to the NHL ice rinks. The new rules should certainly provide an incentive for the most exciting speed skaters having vision and deft control of the puck. However, tempting the punters will be far from easy. Even before the lockout, viewing figures had been tumbling, and this plus the long shutdown cost it its slot on the major ESPN television network. It will now be seen on the less lucrative Outdoor Life Network.

3. Contracts

Nevertheless, contrary to the direst predictions, all 30 franchises have survived, and the game remains secure in its Canadian and North-Eastern heartland. However, it is more doubtful whether it can break through into the newer "sunbelt" areas *(Ibid)*.

Italian footballer takes minimum wage – and earns papal blessing

Professional footballers are generally regarded as some of the more rapacious creatures on this earth, but some among its ranks have been known to display less materialistic tendencies. One such paragon of virtue is undoubtedly Damiano Tommasi, who has been elevated to hero status both on and off the field in Italy for asking his team to pay him no more than the national minimum wage. Whilst some of his team-mates at AS Roma are raking in millions, Mr. Tommasi has declared that he simply wanted to return to playing football at the highest level, for which a modest salary would be sufficient to meet his needs. He said that in so doing, he would still be earning more than many ordinary Italians. This gesture has caused him to be lionised in Italy, where football achieves even greater levels of deification than it does in this country. Even the Vatican's official mouthpiece L'Osservatore Romano has congratulated him for failing to pursue an exorbitant salary or re-signing fee, as do so many of his colleagues *(The Observer of 6/11/2005, p. 22)*.

Sporting agencies

[None]

Sponsorship agreements

Carolina Kluft in sponsorship dispute (Sweden)

Ms. Kluft is one of Sweden's most popular sporting figures in view of her success at the very top level in the gruelling heptathlon event. However, on the eve of the World Athletics Championships, held in Helsinki in early August 2005, it seemed as though this popularity might be dented after the country's tabloid newspaper with the largest circulation, Expressen, ended a sponsorship deal with the country's athletics federation because of her behaviour.

The dispute flared after the newspaper published an article by columnist Mats Olsson in which he wrote that Ms. Kluft's "greatest injury is called Patrik Kristiansson" – an ever so subtle reference to her boyfriend. This caused Mr. Kristiansson – himself an Olympic and world champion pole vaulter – to declare that he would refuse to wear Expressen's logo at the world championships. In this, he was backed by the couple's trainers, Agne Bergvall and Miro Zalar. However, the newspaper's marketing director, Mats Lothen, claims that this support means that the Swedish athletics federation is in breach of contract, saying:

> ***"They obviously can't tell the difference between journalism and marketing. Our sponsorship should not mean we allow its stars to direct our editorial" (The Guardian of 6/8/2005, p. S4).***

It was not known at the time of writing whether this would lead to any court action on the part of Expressen.

Other issues

Irish bookmakers' challenge to BHB reaches the courts

The trials and tribulations experienced by the British racing authorities on the subject of its charges for making available pre-race data to bookmakers are well documented in this Journal *(see e.g. [2003] 2 Sport and the Law Journal, p. 43 et seq.)*. Now it appears that this whole affair has assumed an international dimension, more particularly across the Irish Sea. In mid-November 2005, it was learned that the a challenge had been brought in the Commercial Court of Dublin by a consortium of Irish bookmakers to the right of the British Horseracing Board (BHB) to make charges for these pre-race data. The bookmakers in question are bringing the action in an attempt to obtain restitution of the £20 million per annum which they pay for these data rights. They are claiming that the agreements they currently have with the BHB are void, mainly because of the decisions of the European Court of Justice (ECJ) and the English Court of Appeal which were made last year and reported in a previous issue ([2005] 1 Sport and the Law Journal p. 83). In these decisions, the bookmakers William Hill were found not to have violated the database rights of the BHB by publishing runner-and-rider information on their website. The BHB was unsuccessful in its bid to have the decision overturned in the Court of Appeal. As a consequence, the Irish bookmakers are seeking recovery of some or all amounts paid to the BHB, as well as damages *(The Independent of 9/11/2005, p. 76)*. The outcome of this case was not yet known at the time of writing.

3. Contracts

Eliades launches new court action against Lewis (US)

The legal battles between former world heavyweight boxing champion Lennox Lewis and his former manager, Panos Eliades, have been well documented in these columns *(see, e.g., [2002] 1 Sport and the Law Journal p. 50)*. In their latest judicial battle, Mr. Eliades has brought a £3.7 million claim against his ex-client, whom he managed from 1991 to 2001, over what he alleges is the loss caused to him by an asset-freezing order imposed on him. The order lasted 16 days in January 2002 after Mr. Lewis had failed to win any compensation from Mr. Eliades, who had been found by a New York federal jury to have defrauded the former champion out of millions of dollars. Mr. Eliades alleged that neither he nor his companies had sufficient assets to pay the boxer. The US court had awarded Mr. Lewis approximately £4 million in damages, and the British courts allowed him to pursue Eliades for approximately £3 million of that amount *(The Guardian of 6/10/2005, p. S5)*.

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

New "Bosman" on the way? FIFA sued for compensation in club v country dispute

On numerous occasions, this column has reported on the complaints raised by leading professional football clubs arising from the losses they allegedly sustain as a result of the international call-ups which to which their top players are frequently subjected. Until now, there has been a great deal of bluster on this issue, but without any concrete results to date. That may about to change dramatically as a result of legal action taken by a Belgian club against the sport's world governing body.

During the 2004-5 season, Charleroi, who play in the Belgian Premier Division, withdrew their best player, midfielder Abdelmajid Oulmers, from the Morocco team scheduled to play a friendly fixture against Burkina Faso in order to protect him from injury. However, the world governing body in football, FIFA, ruled that Mr. Oulmers should play in the international fixture. During the resulting match, the Moroccan international tore several ankle ligaments and was out of action for seven months. Charleroi missed out on a place in the lucrative European Champions' League, and blamed their failure to do so on the absence of Mr. Oulmers. Accordingly, they have brought a court action against FIFA for compensation *(The Observer of 23/10/2005, p. S1)*. Later, European governing body UEFA joined the battle on the world governing body's side. More particularly FIFA will use UEFA's lawyers to advise them *(The Guardian of 2/12/2005, p. S2)*.

This issue has now taken on a momentum of its own, far beyond the realms of Belgian football. The powerful G14 group of top European clubs are giving financial backing to Charleroi in their action. Legal experts even believe that the matter may be referred to the European Court of Justice (ECJ). According to Jean-Louis Dupont, the lawyer who won the historic ruling in the Bosman decision, FIFA are abusing their dominant position, thus bringing them into conflict with Article 82 of the EC Treaty, He also points out that the 2006 World Cup will yield FIFA more than £1.5 billion in earnings, and that it is therefore anomalous that they should be getting the most important ingredient – the players' services – free of charge, without even being required to pay compensation in the event of players sustaining injury. There are currently some national federations which do pay the clubs for the release of their players. Thus German clubs receive €6,000 per player from the German Football Association. However, the poorer federations, particularly those in Latin America and Africa, are unable to afford this.

Expert legal opinion seems to back the Belgian club's case. Stephen Weatherill, an Oxford University scholar in European law, predicts that:

> ***"If Oulmers, like Bosman, goes all the way, it will dramatically alter the balance of power within the game. If Charleroi and the G14 win this case, the voice of the clubs will become much louder. Governing authorities will not be forced to abandon their right to shape matters such as the offside rule, but their exclusive grip on decision-making that directly affects the commercial interests of the clubs will be loosened. The lesson of Bosman is that the game can cope, but only if it responds imaginatively" (The Observer, loc. cit.)***

Indeed, should the Belgian club succeed in their action, the FIFA policy on players being released for international duty could be thrown into disarray, and the effect could be as dramatic as that produced by the Bosman decision. Yet not everyone would regard this outcome as an unalloyed blessing. It has been argued, with some justification, that the effect of a ruling in favour of Charleroi will merely be to inflate the top-level wage market at the expense of people and clubs who require the money in order to foster the game at its roots. In addition, to channel even more money in the direction of the G14 clubs would encourage their belief in tournament revenue as a legitimate aid in balancing their ailing books *(The Sunday Telegraph of 13/11/2005, p. S8)*.

The outcome of this case was as yet unknown at the time of writing.

3. Contracts

Swedish football club refund travelling supporters after "unacceptable" performance

In a display of humility and equity which might well be copied by some of the more money-obsessed reaches of the game, Elfsborg, a team which plays in the Allsvenskan (Swedish league), decided to refund the entrance fees and travelling costs to all those fans who attended their sides' 8-1 defeat at Djurgarden, who had won the title the previous week and finished 16 points ahead of them. The club admitted that their side's performance had been "unacceptable" and pledged to refund expenses to all 200 fans who had made the 700 km round trip to Stockholm *(The Guardian of 26/10/2005, p. S5)*.

4. Torts and Insurance

Sporting injuries
[None]

Insurance
[None]

Libel and defamation issues

Maradona sued by son (Italy)
In December 2005, it was learned that the Italian-born son of former Argentine football star Diego Maradona was to bring legal action against his father for defamation, moral damages and failure to keep up maintenance payments. Nineteen-year-old Diego Armando junior, who was fathered by Mr. Maradona when the latter was playing for Italian side Napoli, was angered recently when his father distanced himself from the teenager in a television interview. The former international, who also has two daughters, said that no court could compel him to love his son, and spoke of his nephew as "the son I never had". He has been involved in several paternity suits over his son, but their blood ties were confirmed by DNA tests in 1993 *(The Daily Telegraph of 2/12/2005, p. 18)*.

Lance Armstrong settles one dispute, commences another (US/UK)
The seven-times Tour de France winner from Texas seems to find it hard to keep out of the legal headlines nowadays (Sport and the Law Journals passim). In November 2005, a year-long legal dispute between Mr. Armstrong and his former personal assistant Mike Anderson was settled out of court following mediation, on terms which remain undisclosed. The previous week, a court had dismissed one of Mr. Anderson's claims, to wit that Armstrong owed him $300,000 in order to set up a bicycle shop. This left one charge, i.e. that of defamation, which has now been settled.

However, as one dispute ends, another has started up elsewhere – i.e. in Britain. It will be recalled from a previous issue of this Journal *([2005] 2 Sport and the Law Journal p. 65)* that Mr. Armstrong was bringing legal action in France over the allegations made in a book called LA Confidentiel over the Texan cyclist's alleged use of illegal substances. Mr. Armstrong is now suing the Sunday Times for printing a review of the book (one of whose authors, David Walsh, is its chief sports writer). The case is due for trial soon *(The Daily Telegraph of 24/8/2005, p. S5)*.

Other issues

Lagat refuses to abandon claim against IAAF (US)
Bernard Lagat, the current Olympic 1500 metres silver medallist, appeared to be in trouble with the doping authorities when he was suspended for two months for using the prohibited blood booster EPO. However, a negative B-sample later overturned the initial test. Mr. Lagat is now seeking £300,000 by way of compensation from the world governing body in athletics, the IAAF, as well as from the World Anti-Doping Agency (WADA). The IAAF had previously offered him a deal under which he would have been cleared of doping charges in exchange for abandoning his legal action seeking compensation for the income he lost during his suspension *(The Daily Telegraph of 2/12/2005, p. S6)*.

However, Mr. Lagat, who is Kenyan-born but now a US citizen, replied that he could not accept the IAAF offer because it contained no apology, failed to acknowledge that testing methods were not fail safe, and did not include an offer of compensation. The case was expected to go to trial in February 2006 *(Ibid)*.

5. Public Law

Sports policy, legislation and organisation

Issues relating to the hosting of major tournaments

Failed Paris Olympic bid: the aftermath and recriminations

The reader scarcely needs any reminding that, after months of perhaps the most bitter, divisive and puerile bidding process ever, the 2012 Olympics were finally awarded to London. This naturally caused a good deal of disappointment among the "major losers". However, in complete contrast to the Olympic ideal which they purport to espouse, some of the disappointed parties appear to have taken defeat in a less than decorous and – dare one say it – sporting manner.

This is certainly the case with the fair city of Paris. Whilst a certain degree of disappointment on their part was perfectly understandable after losing the bid at the third time of asking, one might have expected a little more grace from this most elegant of capital cities. However, the day after the result was announced, newspapers such the leading sporting daily L'Equipe could not bring themselves to congratulate their cousins across the water, even through gritted teeth, preferring instead thhe screaming headline "Pourquoi Londres?" (Why London?). The French media were also redolent of dark admonitions against the Olympic movement in general, and its current president in particular.

More specifically, there was the prevailing feeling that the Paris bid team had been misled by President Jacques Rogge into believing that, if they played the bid strictly by the Olympic rule book and did not remonstrate when London from time to time seemed to sail uncomfortably close to the wind, this would greatly benefit their bid. This came out instatements such as those made by Paris mayor Bertrand Delannoe, who claimed that "victory was decided on something other than Olympism" (whatever that may mean). Certainly the Paris bid was well prepared and carried out, with a competent team headed by the personable Phillippe Baudillon as well as his able director of communications, Jerome L'Enfant, who got their message across to the media in an effective manner. Mr. Baudillon also claimed to have been let down by Dr. Rogge, whom he claimed promised them their bid would not be harmed by "doing the right thing", adding:

> ***"But we were not taken seriously, and I think there us a problem with the administration of Mr. Rogge. I am very upset with him. We were very rational, we did not challenge some of the things the British did because we were advised not to. We were told by Mr. Rogge we did not have to use such tools. London were very close to the yellow lines a lot of time"***
> ***(The Independent of 11/12/2005, p. 66).***

Even if all this were true, it is difficult to believe that the Paris bidding team actually believed that Dr. Rogge could virtually guarantee them victory – indeed, the IOC President may have cause to feel slightly defamed by these statements, implying as they do that he had the power and will to manipulate the vote by the various delegations. And the reality was that it was very probably the rash of last-minute lobbying by Sebastian Coe and Tony Blair "wot won it" for London. On the other hand, there were other French sources who pointed the finger of censure in a totally different direction. Thus Eunice Barber, the prominent French heptathlon athlete, laid the blame fairly and squarely on the French politicians – but for being too prominent! She stated:

> ***"I think in France in general, sport is becoming too political and that is very, very bad. It was a big shock ... I think most of the French thought they had already won it"***
> ***(The Guardian of 6/8/2005, p. S4).***

This view seemed to be echoed by other prominent French athletes. Whatever the cause, perhaps the wisest course to pursue was to accept defeat philosophically and write it off to experience. Nevertheless, it is very unfortunate that this third defeat will very probably deter the French capital from bidding again for a very long time.

Turin organisation of Winter Olympics runs into problems (Italy)

Few European cities have as much civic pride and efficient public services as the Italian city of Turin. As a result there were very few qualms when the organisation of the 2006 Winter Olympics was entrusted to this city. However, as the date of the Games approached, the relevant officials of the International Olympic Committee began to display a certain degree of nervousness as to whether the Transalpine city will actually be ready to host the Games by the time specified – so much so that a visit of the site was organised by the IOC in order to check its readiness for the Games, to be held in mid-February 2006. In a carefully-worded statement, the Co-ordination Commission chairman, former ski champion Jean-Claude Killy, stated:

> ***"With less than 50 days until the Olympic flame is lit, the IOC came here looking for progress. As construction reaches its final stages, we have been pleased to see that Torino's Olympic transformation is nearly complete. Almost***

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all the ingredients are now in place for Torino 2006 to offer the world a great Olympic and Winter Games" (The Guardian of 23/9/2005, p. S4).

It was difficult to tell whether this meant cautious optimism or diplomatically-worded exasperation. However, by early December even the organisers of the Turin Games themselves acknowledged that they faced a race against time in order to be ready for the big event. Work on the main structures had been completed, but the city's streets continued to resemble construction sites, whilst the mountain venues at Sestriere, Pragelato and Cesana were still filled with heavy building equipment and scaffolding. In addition, the Games faced problems beyond mere aesthetics. Ticket sales were unusually slow – indeed, the Games supervisor, Mario Pescante, described Turin as "provincial" for having failed to respond enthusiastically to the Games *(The Guardian of 1/12/2005, p. S9)*.

At the time of writing, it looked as though the actual organisation of the Games would proceed as per schedule. However, further problems seemed to lie in wait for the long-suffering organisers, taking the following shape:

(a) Environmental protest. The Winter Games risk being caught up in an increasingly acrimonious dispute over the construction of a high-speed railway link through the Italian Alps. The planned £10 billion rail link between Lyon and Turin has attracted virulent – not to mention violent – protests on environmental grounds. Several factories have staged sympathy strikes, and demonstrations have blocked motorways and railway lines. Protesters have even pledged to disrupt the Turin games. Significantly, some of the skiing events are scheduled to be held in the valley where the demonstrations have been taking place *(The Daily Telegraph of 7/12/2005, p. 17)*.

(b) Criminal law relating to doping: in Italy, doping is a criminal offence which is capable of attracting a term of imprisonment, whereas the IOC merely applies sporting penalties. Mr. Killy announced that various politicians, including the Mayor of Turin, would meet in Rome in order to discuss this legal dilemma *(The Guardian of 1/12/2005, loc. cit.)* (This issue is also dealt with later, under "Drugs legislation and related issues", see below p.85)

Russian resort to bid for 2014 Winter Olympics

The difficulties experiences by cities such as Turin do not appear to deter other locations from bidding to host the Games. In mid-July 2005, it was announced that Russia's Black Sea resort of Sochi will submit a bid for the 2014 Winter Olympics. Fewer than three weeks following Moscow's unsuccessful bid to stage the 2012 Summer Games, the Russian Olympic Committee voted unanimously to advance Sochi's bid to the IOC. *(The Daily Telegraph of 27/7/2005, p. S2)*.

Will Beijing 2008 deliver?

With the Beijing Olympics fewer than 1,000 days away, it may be appropriate to ask the question whether the Beijing Games will "deliver" – not only in terms of having all the sites and facilities installed by the time the first spectators find their way to their seats, but also in relation to the question whether the Chinese can comply with the scale of the Games which they had promised to deliver. Close inspection of the current position appears to indicate that several pledges will fail to be met.

It appears that, in fact, various aspects of the 2008 Games will renege on previous commitments. Thus the equestrian events have been moved to Hong Kong – much to the dismay of many in the equestrian community. Plans to rebuild the tennis centre have been abandoned in favour of building a new, cheaper version. Now, it emerges that for the Beijing Games the main stadium will not have the wonderful roof which was planned – which represents a cutback saving millions *(The Daily Telegraph of 10/11/2005, p. S11)*.

In part, this apparent backsliding is inspired by worthy motives. Chinese officials are determined that there shall be no repeat of the enormous costs which have been incurred by other Olympic cities (see below and Journals passim!). It must also be conceded that construction of the various venues is so far ahead of schedule that the International Olympic Committee (IOC) have requested their hosts to slow the pace of construction. One of the reasons is the psychology of expectation: one of the problems with the Athens Olympics was that predictions had been so dire that the very fact of delivering the Games on time had been regarded as a minor miracle and perhaps blinded world opinion to some of the less successful aspects of the 2004 Games *(Ibid)*.

5. Public Law

Cost of Athens Olympics set to rise...
Perhaps the most unsurprising, nay predictable, Olympic news item to emerge in the past few months has been that the cost of the Athens Olympics was expected to rise to £ 9 billion – i.e. 18 per cent higher than previously estimated, according to a Greek government source *(The Daily Telegraph of 10/8/2005, p. S6)*.

Ajax win court battle over "closed doors" fixture

When the Netherlands football season started in August, the opening fixtures list had an odd look to it, in that it did not feature top club Ajax Amsterdam. This was because the Mayor of Amsterdam had announced that he did not have sufficient police resources to handle the fixture with Den Haag, which is a fixture often beset with hooliganism problems. The Netherlands football federation having ordered Ajax to play the fixture behind closed doors, the famous old club went to law. As a result, a court rescheduled the match for January 2006 *(The Independent of 13/8/2005, p. 64)*.

Betfair gains access down under thanks to Tasmanian parliament

In late November 2005, it emerged that Betfair, the leading internet betting exchange, had succeeded in its prolonged battle to obtain a foothold in the vast Australian market, following the adoption by the Tasmanian Parliament of a bill granting the company a licence to operate in that state. Under Australian federal law, Betfair may now offer betting accounts to any of the country's residents, giving it access to one of the most vibrant betting arenas in the world *(The Guardian of 25/11/2005, p. 11)*.

The attempts by the betting firm to expend its business down under has been bitterly opposed by the domestic racing authorities, who believe that it will undercut their margins of pari-mutuel betting and thus cut back their gambling income. However, their please went unheard, and Betfair is now able to expand its business in the southern hemisphere ahead of a possible flotation on the stock market next year *(Ibid)*.

Cage-brawling banned or restricted (US)

Concern has recently been expressed in US circles about a new sport – if that is indeed the correct description – which has been sweeping the American Midwest. It is called cage-brawling, a new style of prize fighting in which such practices as eye-gouging, attacks on the groin and a finger into any orifice are prohibited, but which otherwise seems to allow every form of physical attack. Those defending its practice call it a combination of wresting, jujitsu and boxing and point out that all three are established Olympic sports. It has soared in popularity in the Midwest during the past three years, but is increasingly risking a crackdown (The Daily Telegraph of 28/9/2005, p. 19).

It has already been banned outright in New York in 1997, after Brooklyn's District Attorney threatened with assault charges if a fight is organised. It has also been subjected to severe restrictions in South Dakota also, In Sioux Falls, the County Commission has banned cage-brawling from city property or from establishments which receive more than 25 per cent of their income from alcohol sales. Any fight promoter must provide evidence of at least $1 million in liability insurance *(Ibid)*. More state legislatures look set to follow this trend.

Environmental issues

Costa Rica bans swimming with dolphins

In early August 2005, a new law prohibiting people from swimming with Dolphins and whales entered into effect in Costa Rica following pressure exerted by the environmental group Momar. Not even researchers will be permitted to swim with the animals or keep them in captivity *(The Independent of 5/8/2005, p. 33)*.

Public health and safety issues

Fittipaldi questions safety of South African GP event

Recent months has seen the start of a new event in motor racing called the Grand Prix Masters, a series involving former Grand Prix drivers. However, it seemed to get off to an inauspicious start in November 2005 when Brazilian former GP star Emerson Fittipaldi questioned whether he would compete in the South African event because of safety fears. In comments which may cast doubt on the long-term viability of this kind of event, he stated:

> ***"I like the concept, but there is a big difference between this concept and golf masters and tennis masters. In golf, if you make a mistake with your equipment the ball goes into the tree, but a mistake in Grand Prix Masters means that we go into the tree together. We haven't been racing for years. We could miss a brake or whatever" (The Daily Telegraph of 10/11/2005, p. S12).***

This new event – a prelude to a possible six-race series in 2006, has coaxed out of retirement such luminaries of

5. Public Law

the sport as Nigel Mansell, the 1992 GP winner, and Australian Alan Jones. However, unlike their present-day successors, they will not have driver aids such as power steering and traction control when they compete in their identical Delta Motorsport-prepared 3.5 litre cars capable of reaching speeds of approximately 180 mph *(Ibid)*.

Eventually Mr. Fittipaldi did compete in the event. He was pipped for first place by Nigel Mansell (www.motorsport.com.).

German football fixture abandoned because of unsafe stand

In early December 2005, the First Division football game between Kaiserslauten and Eintracht Frankfurt had to be abandoned after a crack appeared in the stand at the Franz-Walter stadium *(The Independent of 5/12/2005, p. 76)*.

Nationality, visas, immigration and related issues

Zimbabwe footballers vanish on British tour

In earlier issues of this Journal *(e.g. [2003] 3 Sport and the Law Journal p. 64)* attention has been drawn to the potential for unlawful immigration into this country presented by certain sporting events which attract overseas competitors who then seem to vanish without trace. The same phenomenon seems to have occurred in late September 2005, when British immigration officials started a search for eight Zimbabwean footballers who disappeared after playing a fixture at Bradford. Players from two Zimbabwe teams – League champions Caps United and Highlanders Football Club – failed to board aeroplanes to Harare after the exhibition game, which was played at the Odsal stadium *(The Independent of 26/9/2005, p. 18)*.

In fact, British consular officials in Harare were unsure as to how many of the party of 45 having multiple entry visas disappeared into Zimbabwe's growing diaspora into the UK, Godfrey Japajapa, the Fixtures Secretary of the Zimbabwe Premier Soccer league, who travelled with the two teams, said that the reason behind the players' decision to remain in Britain was that they were being used as "tools" by Zimbabwe asylum seekers with cases pending at the UK Home Office. More particularly he alleged:

> ***"These asylum seekers want to use the players' choice to stay as evidence that all is not well in Zimbabwe so that they will be granted asylum status" (The Daily Telegraph of 26/9/2005, p. 15).***

To date, no further news has been forthcoming about the fate of these missing persons.

Qatar tempting Schoeman to change nationality

In late November, it was learned that South African Roland Schoeman, a double swimming world champion, had been approached by the Qatar Swimming Federation with an offer to change nationality. This prompted the South African Swimming Federation to find an alternative financial package; however, the offer from Qatar is said to be substantial. If Mr. Schoeman accepts, this would devastate South Africa's Commonwealth Games team, since his likely three titles in Melbourne could constitute half the country's medals haul. Qatar has already succeeded in persuading several athletes into switching nationality – including eight Bulgarian weight lifters *(The Guardian of 24/11/2005)*. No further details were available at the time of writing.

Sporting figures in politics

Liberian elections end in chaos as former Chelsea star Weah falters

It will be recalled from a previous issue of this Journal *([2005] 1 Sport and the Law Journal p. 74)* that George Weah, the Liberian international footballer who had a successful career in Europe's premier leagues, had decided to stand for the Presidency of his long-suffering native country. Although he was the favourite to win, he was eventually beaten by veteran opposition politician Ellen Johnson-Sirleaf, amid chaotic scenes which once again raised fears of civil unrest of the type which has beset this country for too long in the past.

The campaign had started well for Mr. Weah, who concentrated on basic promises of restoring water and electricity supplies in a country devastated by 14 years of warfare, as well as other fundamental necessities such as education and transport. He also pledged a zero-tolerance approach towards corruption *(The Guardian of 25/8/2005, p. 14)*. Together with his formidable status as the only African ever to have won the World Footballer of the Year award, as well as his undoubted charisma and plain speaking, this seemed to be a winning combination in a country desperately looking for a "saviour". Yet even at this early stage of the campaign there were gaffes and mishaps. At one rally he kept his followers waiting for five hours in the heat and humidity before rising to speak at his headquarters in Monrovia, the capital. His team

5. Public Law

neglected to provide the crowd with water, except for a lorry which occasionally hosed down exhausted bodies *(The Daily Telegraph of 10/10/2005, p. 14)*.

In addition, as the campaign progressed, Mr. Weah seemed to be become ever more sullen and withdrawn, shutting himself away with his closest aides for endless meetings, and shunning the press who appeared to be hounding him with the same question: how can a footballer lead a country? He even became a target for death threats. Some of his staff also engaged in questionable practices. Thus the first chairman of his party, Orishall Gould, was compelled to resign for embezzling social security funds administered by him. Three of his bodyguards were reported to have belonged to the Anti-Terrorist Unit, an infamous group attached to former President Taylor, who fomented much of the disorder during the previous decade which cost many lives. However, such meetings as he did hold were attended by huge crowds, and Mr. Weah kept preaching the gospel of peace and reconciliation – particularly between the various groups that make up Liberia and which have been locked into internecine struggles since time immemorial *(The Independent of 11/10/2005, p. 24)*. His main opponent, Ellen Johnson-Sirleaf, formed a sharp contrast with Weah, coming as she did from the ranks of World Bank economists and being regarded as part of an out-of-touch elite.

As a result, Mr. Weah was the clear favourite to win on polling day. Tens of thousands of Liberians patiently queued for hours as the country enthusiastically seized the opportunity to draw a line under its bloody past. This was the first-round ballot in which Mr. Weah came top, obtaining 28 per cent against 20 per cent for Ms. Johnson-Sirleaf. Since he failed to obtain a 50 per cent majority, a run-off vote between the first two candidates had to take place *(The Guardian of 9/11/2005, p. 14)*. It was at this point that the election took on a more turbulent dimension, with unfortunate echoes of the country's violent past. With around one-third of the vote counted, Johnson-Sirleaf seemed to have taken an early lead with 60 per cent of the vote. Even though the turnout was lower than in the first round, international observers declared that the elections had been free and fair. However, Mr. Weah disagreed and called these early results "fraudulent" and the voting "riddled with irregularities". Worse still, his supporters threatened "chaos" if their man did not win *(The Daily Telegraph of 10/11/2005, p. 19)*. Mr. Weah continued to attack, claiming that he had evidence that the poll had been fixed, and dramatically brandishing ballot papers which he claimed had been premarked for his rival *(The Guardian of 10/11/2005, p. 22)*.

As the count progressed, it seemed increasingly clear that Ms. Johnson-Sirleaf had indeed won. With 90 per cent of the votes counted, she had taken 59 per cent of the vote, 18 points clear of her rival. Mr Weah, for his part, lodged a complaint of fraud with the elections committee and the international observers who monitored the election *(The Guardian of 11/11/2005, p. 21)*. After this failed, his party, the Congress for Democratic Chane (CDC), petitioned the Supreme Court to suspend the counting on grounds of fraud, which they alleged included ballot-tampering, harassment and intimidation of voters *(The Independent of 12/11/2005, p. 30)*. At the same time, some of the more militant of CDC supporters clashed with UN peacekeepers in Monrovia as part of their protest against the result, in spite of pleas from Mr. Weah to desist from such actions *(Ibid)*.

With Ms. Johnson-Sirleaf now the undisputed winner, Mr. Weah continued to dispute the result. The new President urged her opponent to cease his protestations, adding that he risked fomenting civil unrest if he continued his allegations of fraud and ballot-rigging. She hinted that she could take the sting out of the dispute by offering Mr. Weah a post in her government *(The Sunday Telegraph of 13/11/2005, p. 20)*.

Other issues

[None]

6. Administrative Law

Planning law

[None]

Judicial review (other than planning decisions)

Tennis doubles players seek review of ATP "2008 Initiative" (US)

The world of professional tennis is undoubtedly evolving, but not all the changes planned or decided are to the taste of its exponents – especially when it means that those directly affected might be faced with extinction. This is certainly the case with the male doubles players of the world, who have united to take legal action against the Association of Tennis Professionals (ATP), the governing body of the men's tour.

The latest mutiny within men's tennis was caused by the changes decided by the ATP in the structure of doubles matches leading up to the "2008 initiative", after which only players who gain entry to ATP events will be allowed to compete in doubles. This prompted a swift reaction from the world's leading doubles players, who called a press conference at the US Open in early September in order to announce their decision to take legal action. They stated that their objective was to preserve an integral part of the sport and protect their livelihood *(The Independent of 3/9/2005, p. 66)*.

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

Other issues

[None]

7. Property Law

Land law

[None]

Intellectual property law

Lance Armstrong wins cyber-squatting case (US)

In early November, the cancer research charity owned by seven-times Tour de France cyclist Lance Armstrong won a "cyber-squatting" case against websites which sold his Livestrong bracelets. Two court rulings ordering a California-based operator to transfer the domain names were dealt with by the World Intellectual Property Organisation (WIPO), a specialist UN organisation. The domain names in question, Livestrongbracelets.net, talklivestrong.com and mylivestrong.com, were registered in late 2004, offering the bracelets in "bad faith", according to the rulings. The Austin-based foundation, established in 1997 by Mr. Armstrong, had registered the trademark in 2004 *(The Guardian of 2/11/2005, p. 19)*.

Victory for Puma in Cameroon "one-piece" dispute

In late October 2005, it was learned that FIFA, the world governing body in football, had reached an out-of-court settlement with sportswear manufacturers Puma after a long-standing dispute over the one-piece kit which the Cameroon national squad wore at the 2004 African Cup of Nations. FIFA claimed that it had reached a settlement "in the interests of international football", although neither party would disclose further details. Puma had been seeking $2.4 million in damages, as well as a ruling that it should be allowed to market the garment, claiming that there are no rules against wearing a one-piece kit in the laws of football *(The Guardian of 26/10/2005, p. S5)*.

Cameroon wore the green and red strip for their three group matches and quarter final, but in April 2004 FIFA fined them £90,000 and initially docked the team six World Cup qualifying points. In support of this penalty, the world governing body claimed that, under Law 4, basic equipment comprises a jersey or shirt and a pair of shorts. Puma disputed this interpretation, alleging that FIFA's decision was influenced by its rival Adidas, which has a close association with the world governing body *(Ibid)*.

Use of Bradman name takes the biscuit (Australia)

Sir Donald Bradman was undoubtedly one of the greatest cricketers who ever lived. It is perhaps not surprising that, particularly in his native Australia, some have sought to profit financially from being associated with the great man. This was undoubtedly the case with Unibic, a Melbourne-based firm which recently has placed on the domestic market Bradman's Chocolate Chip Cookies, wrapped in gold and green packaging, the Australian sporting colours. This move was authorised by the charitable foundation set up by Sir Don himself before his death in 2001. This commercialisation of the great cricketer's name has not been to the taste of some people – in particular his family, and Sir Don's son, John, is said to be contemplating legal action against the foundation which authorised it *(The Independent of 15/10/2005, p. 37)*. It is not yet known at the time of writing whether this threat has been carried out.

Other issues

[None]

8. Competition Law

National competition law

[None]

EU competition law

Premier League dispute with European Commission reaches settlement

It will be recalled from the previous issue of this Journal *(e.g. [2005] 2 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. Although 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, 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, which it considers to constitute a restriction on consumer choice.

In the course of the subsequent months, a good deal of jousting was in evidence – even though all those in the know realised full well that the only realistic outcome was a compromise. Hopes of such a settlement rose considerably in mid-October 2005 with a meeting between Richard Scudamore, the Premier League's Chief Executive, and Neelie Kroes, the EU Competition Commissioner. The Commission had initially stipulated that no more than 50 per cent of the next television deal, covering the 2007-2010 seasons, could be allocated to one broadcaster, thus ending the Sky monopoly. However, it now appeared that, while Ms. Kroes insisted she still wanted the next deal to be awarded to more than one broadcaster, she was no longer insisting on the 50 per cent rule. That concession was seen as a minor victory for Mr. Scudamore, who had presented new proposals relating to the next television deal. Originally, the Premier League had announced that the next television deal would offer six packages of 23 matches with the pledge that Sky, or any other broadcaster, could bid for only five of these. However, the Commission expressed the fear that no broadcaster would be willing to buy just one package and that Sky would ultimately acquire all six, and thus continue to monopolize live television rights. In response to this concern, Mr. Scudamore approached the Commission with a modified proposal of five packages of 28 matches. This approach appears to have mollified Ms. Kroes, who proceeded to issue a statement stating that the proposals were constructive and moved both parties closer to an amicable outcome *(The Daily Telegraph of 19/10/2005, p. S9)*.

The EU Commission examined the details of this latest proposal – bearing in mind that it remained keen to hold the Premier League to a pledge which they made in 2003 that live football would be available on more channels, and that it had threatened to bring charges under EU competition law if the Premier League failed to comply. Having examined these proposals, the Commission then set the League a deadline of three days to produce a final set of proposals for the auctioning of broadcasting rights as from 2007. More particularly Ms. Kroes demanded a series of clarifications and refinements to the proposals made by the League *(The Guardian of 22/10/2005, p. 24)*.

Ultimately, it still took a few weeks to hammer out a final deal, which was reached in mid-November. Under the new arrangement, matches will be divided into six tranches of 23 games, with no single broadcaster being able to acquire all the packages. It offered the possibility of live matches on terrestrial television for the first time since 1992. In fact, ITV, the BBC and Five have all signalled their intention to bid, as have the pay-TV groups NTL and Setanta. The Premier League will also encourage bids from new entrants such as BT, France Télécom and AOL by making all the packages "platform neutral" for the first time. This means that, instead of hiving off new media rights into a separate package, winning bidders will be able to distribute games as they see fit. As such, a telecoms company could choose to boost the take up of broadband by screening games exclusively on the internet *(The Guardian of 18/11/2005, p. S1)*.

The Premier League executive also gave assurances to Ms. Kroes that the six packages will be equally balanced, ensuring an equal spread of major clubs. The European Commission has also insisted on the appointment of an independent trustee to oversee the auction for the rights from the 2007-8 season onwards. The settlement has been interpreted largely as a victory for the Premier League. By maintaining the number of matches on offer at 138, in the face of EU pressure to make more available, it also hopes to quell concern that the market has become saturated with live games *(Ibid)*.

9. EU Law

EU law (Excluding competition law)

UEFA "foreigners" plan "infringes EU law"

It will be recalled from a previous issue of this Journal *([2005] 1 Sport and the Law Journal p. 73)* that, concerned at the number of foreign players appearing for the leading professional clubs in Europe, UEFA, the European governing body in football, had devised a plan which would restrict the numbers of such foreign players by insisting on a minimum number of home-grown players. More particularly, the UEFA scheme provides that, from the start of the 2006-7 season, clubs must include at least four home-grown players in their 25-man squads for European Champions League and UEFA Cup matches, this figure rising to six in 2007-8 and eight in 2008-9. Not unsurprisingly, this plan was fiercely opposed by the clubs concerned, more particularly in the context of the powerful G14 group of leading sides, who pledged to fight these proposals all the way, if necessary in the law courts.

It seems, however, that the leading clubs may not have to go to such lengths after all, since the EU institutions may have intervened before they take any action. In the first place, it emerged that a report commissioned by the European Parliament indicated that these proposals were contrary to EU law. Even though the quotas referred to above concern the place where a player has been trained rather than his nationality, the study – completed by Netherlands institute TMC Asser, Lancashire University and Dutch sporting consultancy Sport2B – argues that they indirectly discriminate against foreign nationals. It adds:

> ***"It is quite obvious that most of the home-grown players would be nationals of the specific state and not foreigners. The proposed rule would indirectly discriminate [against] foreigners, making it more difficult for foreign players to transfer to a country where they were not trained and educated" (The Daily Telegraph of 29/9/2005, p. S8)***

It concludes that the rule would most likely not be able to be introduced in the current framework of EU law, and calls for consultations across the sport to examine possible alternatives *(Ibid)*. UEFA defines "home-grown players" as those trained by their clubs or by another club or national academy in the same country for at least three years between the ages of 15 and 21 *(The Independent of 29/9/2005, p. 75)*.

At the time of writing, there was no indication that UEFA was about to change its policy in the light of these findings.

Ferrari "finds loophole" in EU ban on tobacco advertising

Under the EU Tobacco Advertising Directive, tobacco sponsorship of Grand Prix motor racing was to be abolished as from 31/7/2005. However, there are indications that the legislation may have some flaws in its wording, judging by the loopholes which some authorities seem to have discovered in it, and which may enable them to circumvent its provisions.

Thus the Ferrari team announced that they would defy the advertising ban for the Monza Grand Prix in Northern Italy in September, because the event can be described as "national" rather than as a "cross-border" competition. They therefore considered themselves bound only by Italian law. This is bound to lead to an angry showdown with the European Commission, which insists that if the Italian Government allows Ferrari to advertise cigarettes it will be in breach of the Directive, which prohibits sponsorship of "cross-border cultural and sporting events" *(The Sunday Telegraph of 31/7/1005, p. S1)*. However, Monza judge Antonio Garzon accepted appeals submitted by consumer association Codacons to deny Ferrari the right to advertise its trademark Marlboro cigarettes on any of the team apparel. Garzon, according to Codacons, "accepts that Ferrari's conduct is illegitimate and counter to standing laws [...] which deny tobacco advertising rights out of general public interest" (Newsbriefs, on www.tobacco.org). .

The Hungarian authorities, who host an annual Grand Prix event in Budapest, have also been looking at ways of exploiting any weaknesses in the wording of the directive. They maintain that they are exempt from the ban by new legislation. A spokesperson from the Ministry for the Economy in Budapest added that this would be done by classifying the F1 race not as a sporting event but as an event of outstanding economic significance. Hungary's argument is based on the fact that hotels and guest houses generate nearly one-tenth of their annual revenue during the Formula One weekend, with the local economy benefiting by over $40 million per year *(The Sunday Telegraph, loc. cit.)*.

Other tactics rely on the expertise displayed by the tobacco industry in subliminal advertising. British American Tobacco (BAT), which sponsors the BAR 5team, has prepared team cars which include the distinctive red target associated with the Lucky Strike cigarette name without the brand name. On the other hand, the Jordan-Midland team, sponsored by the Gallaher Group (who produce Benson & Hedges) fielded a vehicle bearing the "sound alike" logo "Be on edge"

9. EU Law

in lettering similar to that displayed on B&H packets. EU officials have indicated that they intend to find ways of taking action against subliminal advertising *(Ibid)*.

The world governing body for the sport, the FIA, has in the meantime pledged to meet UK Government guidelines aimed at ridding Formula 1 racing of all tobacco advertising by 1 October 2006. However, the sport appears to have been given clearance to broadcast races from non-EU countries in which tobacco logos appear on cars without risk of prosecution. The print and electronic media do not appear to be exempt; however, it does not seem likely that prosecutions will follow if they transgress *(The Independent of 1/8/2005, p. 68)*.

EU conducts review of football excesses

In late November 2006, it was announced that the European Union was to lead a review of the manner in which football is being run across the continent. Following consultations with Sepp Blatter (president of world governing body FIFA) and Lennart Johansson (President of European governing body UEFA), the initiative will seek to curb what UK Sports Minister Richard Caborn regards as "excesses" of present-day football. At the time of writing, no terms of reference had as yet been fixed, but player salaries, the role of agents and youth development are expected to come under specific scrutiny *(The Guardian of 16/11/2005, p. S4)*.

In the first instance, Mr.Caborn chaired a meeting of Europe's sports ministers with a view to introducing measures which will assist in stimulating a competitive balance. Mr. Caborn commented:

> ***"It is time now for all those partes with responsibility for the game to come together at a European level and see if some intervention is necessary to remove some of the excesses and bring credibility back to the game. Concerns about a number of matters involving football have been expressed by UEFA and FIFA, and we believe these issues are also of concern to the public "*** *(Ibid)***.**

He also expressed concern about the salary levels which some players achieve. He pointed out that the G14 group of clubs have introduced a limit of 70 per cent of turnover to be used for salaries. However, he was aware that the G14 restrictions did not prevent some of their players achieving levels such as £100,000 per week, as is the case with Rio Ferdinand at Manchester United. *(Ibid)*

Sportswear giants plead with Peter Mandelson over leather curbs

The European Commission is currently looking into claims that China and Vietnam are dumping cheap goods on Europe, more particularly leather wear. However, major European sports good companies, including Adidas and Nike, have warned the European Trade Commissioner, Peter Mandelson, that any moves to curb imports of leather from these two countries would place 640,000 jobs at risk *(The Independent of 17/11/2005, p. 65)*.

10. Company Law

Bankruptcy (actual or threatened) of sporting clubs & bodies

Riddick Bowe files for bankruptcy

In mid-October 2005, it was learned that Riddick Bowe, the former world heavyweight boxing champion, had filed for bankruptcy protection whilst he attempts to revive his career, listing more than $4.1 million in claims against him *(The Daily Telegraph of 18/10/2005, p. S19)*. No further details were available at the time of writing.

Other issues

Effects of ISL bankruptcy linger on...

It will be recalled from a previous issue of this Journal *([2001] 2 Sport and the Law Journal p. 62)* that, in mid-2001, ISL, the marketing company associated with football world governing body FIFA, went bankrupt – in circumstances which did little credit to either FIFA or its president. One of the more dubious aspects of that affair was the disappearance of $60 million, being the proceeds of television rights. This sum was allegedly deposited in a Swiss bank by former ISL staff shortly after the company went bankrupt. FIFA initially pressed charges against ISL but withdrew when they discovered the actual whereabouts of the cash. They have instead preferred to work with the relevant lawyers in order to recover the money, and are expecting to receive it early in the new year 2006 *(Daily Mail of 8/12/2005, p. 83)*.

Adidas acquires Reebok in order to conquer US

In early August 2005, it was learned that two of the biggest brands in sportswear joined forces when Adidas announced that it was buying rivals Reebok, which started as running shoe shop in darkest Bolton (UK). This takeover, worth £2.1 billion, will enable the combined company to challenge industry leader Nike for world domination. Adidas, which is a German company, is the second-largest sportswear company behind Nike but does not have a strong hold on the US. In buying Reebok, it hopes at least to double its North American sales and follow Puma, number four in the market, which has successfully repositioned itself as a fashion brand. With Reebok on board, Adidas will have around 20 per cent of the US market – still short of Nike's 36 per cent. However, the combined group will have 14 per cent of the global athletic clothing market – just shy of Nike's 15 per cent *(The Daily Telegraph of 4/8/2005, p. B1)*.

At the time of writing, the deal still had to be approved by regulators and Reebok shareholders, who will receive a $59 share in cash, but is expected to be completed early next year *(Ibid)*.

11. Procedural Law and Evidence

[None]

12. International Private Law

[None]

13. Fiscal Law

[None]

14. Human Rights/Civil Liberties

Racism in sport

Cissé targeted for racial abuse in Bulgaria – and doubts whether UEFA can stamp it out...

The day this section of the Foreign Update becomes as redundant as a typewriter in a modern office will be one of the more exhilarating days in its author's life. However, there is little sign of the dawning of that happy day, since the incidents which involve racial abuse show no sign of declining. Thus the 2005-6 football season was barely a few days old when the first case on the European stage was brought to public attention – i.e. that which occurred during the first round of European Champions League matches, more particularly between CSKA Sofia and Liverpool in Bulgaria. In the closing stages of the home side's defeat, sections of the Vasil Levsky stadium crowd directed vile racial abuse at Djibril Cissé, Liverpool's French international striker. Once again, monkey chants were prominent in this invective *(The Independent of 11/8/2005, p. 68)*.

Naturally, the UEFA delegate present at the game included these incidents in his report, but the general expectation was that any penalties imposed on the Bulgarian club would not go beyond a mere fine. This was indeed the case – a week later, CSKA were fined the sum of £13,000 by UEFA. The side's executive director immediately announced that it would appeal... *(The Sunday Telegraph of 21/8/2005, p. S8)*.

It was perhaps because of this widespread belief that the measures at UEFA's disposal to deal with such incidents are not the answer to the problem that the victim of the abuse in this instance made a statement casting doubts on the European governing body's chances of eradicating this scourge. He commented:

> ***"You can say UEFA should take stronger action when it happens but I'm not sure what they can do. You really can't stop stupid people doing this. This is the first time anything like this has happened to me. I think the only solution is to educate people so they understand they should not be doing this. I am strong enough to deal with it. I won't let it affect me. I'm just sad that we have to talk about these issues rather than football"***
> ***(The Independent of 12/8/2005, p. 65).***

Mr. Cissé also exonerated the Bulgarian champions of any blame for these incidents *(Ibid)*.

... but UEFA (and others) respond to the challenge

Even before Mr. Cissé made the comments documented above, concern had been growing at the European governing body at increasing levels of racism, much of it documented in previous issues of this Journal. Particularly worrying were the trends in Eastern Europe, especially Romania and – as is related in the previous section – Bulgaria. It appeared that in Romania the situation was so alarming that the authorities had requested UEFA to act in order to control blatant displays of racialism during fixtures. This includes 40-metre high banners proclaiming messages such as "Jews and crows (gypsies) out of Romania", and spectators arriving at grounds bearing large portraits of Hitler, of Corneliu Zelea Codreanu, the pre-war leader of

14. Human Rights/Civil Liberties

the fascist iron Guard, and of General Ion Antonescu, the wartime leader of Romania who allied his country with the Nazis. Top club Steaua Bucarest have experienced particularly ugly scenes, and UEFA are currently appealing against the apparent leniency of a £10,800 fine imposed on the club for racist behaviour by their fans during a fixture with Irish team Shelbourne *(The Daily Telegraph of 8/9/2005, p. S9).*

As a result, UEFA have actively canvassed plans to ban clubs whose fans subject players to racialist abuse from its competitions for up to three years. Per Ravn Omdal, the vice-president of the European governing body, also announced that referees and neutral match delegates would be issued with new guidelines to stop or abandon matches interrupted by racist chanting and other incidents, such as throwing bananas. These are some of the tougher measures to be adopted by the UEFA Executive Committee in order to stamp out this kind of behaviour *(The Guardian of 1/12/2005, p. S5).*

This new "zero tolerance" policy was drawn up in co-operation with cross-party MEPs, who published a declaration condemning all forms of racism – on and off the pitch – and who hope to obtain sufficient backing in order to be able to present a formal motion for approval by the European Parliament. At present, UEFA is able to fine clubs and national associations, and to compel clubs to play before empty stadiums or switch matches to neutral grounds, but has been wary of imposing a three-year ban on participation in both the Champions League and the UEFA Cup – on legal grounds. Senior UEFA officials have pointed out that such a lengthy ban could cost clubs up to €60 million and even more should they lose sponsorship contracts because of the ban. UEFA will therefore require strong political backing if it is to enforce the proposals set out earlier *(Ibid).*

In the meantime, following lobbying by Greek MEP Manolis Mavromatis, UEFA have requested European broadcasters covering the Champions' League, including Sky and ITV, to broadcast anti-racism messages before the start of all games. Mr. Mavromatis, himself a former television sports journalist, is a leading campaigner on sports racialism issues in the European Parliament. This was a subject which was specifically placed on the agenda for the meeting of European sports ministers in Liverpool on 20 September *(The Independent on Sunday of 4/9/2005, p. S2.).*

Racial issues continue to beset Southern African sport

It is a matter of regret that this column must once again draw attention to this problem – particularly in view of the many brave and genuine efforts made in those countries which were formerly tainted with the brush of apartheid to draw a line under the past and work towards a genuine sporting democracy free from any racial bias. However, it is a hard fact that many problems remain and sometimes take on entirely surprising forms, as is detailed below.

In the late summer of 2005, it looked at first as though the demons of racialism had once again bedevilled South African rugby union. It was alleged in late August 2005 that the Springbok captain, John Smit, had subjected a nightclub security guard to racial abuse after his side's defeat by the All Blacks in the Tri-Nations tournament in Dunedin. The side had travelled to Australia for a brief stopover, and the incident is alleged to have taken place in the King's Cross district of Sydney – well known as the city's red-light area. Allan Teli, a Samoan security guard, made a formal complaint to SA Rugby, which regulates the professional game in South Africa, to the effect that Mr. Smit, being in an intoxicated state, had racially abused him after refusing a request to leave the premises. Later, however, the complaint was withdrawn (www.planet-rugby.com). It is not known whether Mr. Smit intends to take any legal action arising from this affair.

The issue of the South African rugby authorities' attitude towards accusations of racism returned a few months later with the publication of an autobiography by former Springbok captain Corne Krige, where he claimed that he left South African rugby because of a "weak ruling" given in an inquiry into alleged racism prior to the World Cup. More particularly he sheds some light on the incident in which the white forward Geo Cronje allegedly refused to share a room with a black team-mate on racialist grounds *(see [2003] 3 Sport and the Law Journal p. 103).* An initial investigation found "no conclusive evidence" of racism at the time, and a scheduled investigation was later abandoned after a change in the leadership of South African rugby. He added:

> ***"I thought it was a weak ruling. Of course no-one was going to come out and say Geo was a racist. But from the facts I gave them and the way I phrased my answers, well, if they couldn't make up their minds after that, perhaps they shouldn't have been holding an inquiry in the first place" (The Guardian of 3/11/2005, p. S6).***

14. Human Rights/Civil Liberties

Hitherto, incidents of racism in Southern African sport have concerned exclusively allegations made against white persons who abuse those of a different skin colour. However, an incident in Zimbabwe seemed to indicate that "reverse racism" sometimes applies as well. Thus in early September 2005, there occurred an incident in Zimbabwe in which white reporters seemed to be subjected to discriminatory treatment by the soldiers guarding the Harare Sports Club, where Zimbabwe play most of their international cricketing fixtures. A reporter attempting to attend a press conference was turned away at gunpoint and ordered to use a different – locked – gate rather than walk past the high-walled estate of President Mugabe, which abuts the club ground. His non-white colleagues apparently experienced no problems in this regard *(The Guardian of 3/9/2005, p. S21).*

However, the most bizarre twist to date in the heady mix of race issues and sport came in late July, when it emerged that the South African authorities were invoking apartheid-era laws in order to rebuild the Johannesburg city centre in time for the 2010 World Cup in football. Street hawkers, unofficial security guards and scrap collectors have been moved, sometimes by force, out of the dilapidated office blocks which have become homes for thousands of poor families in the city, in order to pave the way for new businesses and hotels. In many cases, hired security guards have beaten the residents and stolen their property. This eviction process has aroused protests from civil rights groups, who accuse the South African authorities of imitating Zimbabwe's President, Robert Mugabe", in his infamous "Operation Drive Out Trash" (see also above, p.47) *(The Independent of 30/7/2005, p. 30).*

These incidents were particularly sensitive for the people of South Africa, particularly the non-whites, because memories remain relatively fresh of the apartheid era when thousands of black people were cleared from areas designed for whites only and compelled to live in cramped townships. Jean du Plessis, deputy director of the Centre on Housing Rights and Evictions (COHRE) commented:

> ***"Johannesburg has been carrying out supposedly urgent "health and safety" evictions from so-called "bad buildings" using the National Building Regulations and Building Standards Act – which was passed under apartheid – to secure eviction orders. The city's policy of "bad building" clearances is arbitrary, inhumane and in violation of international human rights law and South Africa's constitution"*** *(Ibid).*

The Johannesburg city council however, insisted that it was acting within the law by cleaning up the central business district, which has become a no-go area after the end of white rule in 1994. More particularly they claimed that many offices had been illegally converted into residential accommodation and that the tenants were being moved for their own safety *(Ibid).*

Basketball ban on bling is "racist", allege leading players (US)

In a recent rule change, the US National Basketball Association has imposed a dress code on its players, in the sense that the latter are required to wear "business-casual" attire when involved in all activities relating to their team or league. This meant a ban on all the chains, pendants and medallions so beloved by many of its exponents, as are sunglasses worn indoors, headphones, flip flops and headgear of any type. Players are allowed to wear "neat" warm-up wear on flights to matches, but no T-shirts, vintage team jerseys, shorts or trainers.

Not all players were happy with this new rule, and in mid-October 2005, Stephen Jackson, a young black player for the Indiana Pacers, mounted a visible protest by arriving for an exhibition match against San Antonio dripping with four chunky chains – also known as "bling". Thereupon Mr. Jackson alleged that the no-jewellery rule was aimed at young black men because chains were associated with hip-hop culture. He maintained that the NBA feared that it would become too "hip-hop". He commented:

> ***"I have no problem dressing up because I know I'm a nice-looking guy. But as far as chains, I feel that's a racial statement. Almost 100 per cent of the guys in the league who are young and black wear big chains. So I definitely don't agree with that at all" (The Daily Telegraph of 21/10/2005, p. 15).***

According to the Washington Post, the spark for the new dress code was a dinner given in honour of the US Olympic basketball team in Belgrade last year. While the Serbian national team wore matching sports jackets, many of the NBA players arrived sporting an assortment of sweat suits, oversize jeans, diamond earrings and platinum chains. Larry Brown, the coach, was said to be so embarrassed that he considered sending some of the worst dressed players back to their hotel *(The Guardian of 31/10/2005, p. 21).*

It is not known whether Mr. Jackson was disciplined for his infringement.

14. Human Rights/Civil Liberties

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

Messina, Italy. In late November, Messina's defender Marco Zoro threatened to bring a match in the Serie A (Premier League) to a halt after suffering racial abuse from travelling Internazionale Milan supporters. The Ivory Coast international picked up the ball in the course of the second half and walked off the pitch towards the fourth official before other players, including Inter's Brazilian player Adriano and Nigerian striker Obafemi Martins, persuaded him to continue. It is reported that the supporters in question shouted monkey chants whenever he touched the ball *(The Guardian of 28/11/2005, p. S10)*.

Florence, Italy. Shortly after the incident related above, Patrick Vieira, the former Arsenal midfielder who now plays for Juventus, was racially abused by his club's own travelling fans at Firoentina, according to his team-mate Emerson *(The Independent of 5/12/2005, p. 76)*.

Human rights issues

Pinsent "shock" at Chinese human rights abuses

Matthew Pinsent, the four-times Olympic rowing gold medallist has now embarked on a career in broadcasting, and one of his first assignments was to visit Beijing in order to monitor preparations for the 2008 Olympics. What he found must have made a profound impact on him, since he professed himself "shocked" at the treatment of young Chinese gymnasts training for the big event. He claimed that children as young as five were suffering considerable pain whilst training at a specialist sports school. He alleged that a boy was beaten by his coach, leaving red marks on his back. He commented:

> ***"It was a pretty disturbing experience. I was really shocked by some of what was going on. I know it is gymnastics and that sport has to start its athletes young, but I have to say I was really shocked. I think it's a brutal programme. They said this is what they need to do to make them hard. I do think those kids are being abused. The relationship between coach and child is very different here. But I think it goes beyond the pale. It goes beyond what is normal behaviour. It was really chilling"***
> ***(The Daily Telegraph of 18/11/2005, p. S16).***

Mr. Pinsent added that, when he spoke to the vice-principals of the school, the latter replied that hitting was against the law, but that there were parents who wanted them to do it. The International Gymnastics federation pledged to seek clarification on this issue, whilst the International Olympic Committee pointed out that they would not comment on the reports which they had received – which were subject to Mr. Pinsent's "personal interpretation" *(Ibid)*.

Gender issues

Women boxing close to achieving Olympic status

At present, boxing is the only Olympic sport at which women are not represented. The participation of women in this sport is highly controversial – indeed, in Britain it was illegal until 1998. This state of affairs may be about to end, since the ruling Executive of the International Olympic Committee (IOC) is currently considering a proposal from the International Amateur Boxing Association to be allowed to compete at the London Olympics in 2012. To accommodate the introduction of the women's event, several weight categories in the men's division would have to be eliminated as the IOC has capped the number of medal events across all sports at a maximum of 301 *(The Guardian of 26/10/2005, p. S5)*.

The debate on the question of allowing women's boxing at the Olympics is a long-running one. As long ago as 1974, a poll organised by Sports Illustrated found readers overwhelmingly opposed to their participation in the 1976 Montreal Olympics. It remains unpopular with many leading figures in the world of boxing. However, it is estimated that over 30,000 women in 120 countries box competitively. In September 2005, the world championships, held in Russia, attracted 152 boxers from 28 countries, and the sport received a considerable boost last year with the Academy Award-winning film Million Dollar Baby, in which Clint Eastwood played a veteran trainer who gradually becomes a convert to women's boxing *(Ibid)*.

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Van de Velde could take legal action to play in women's event

Jean Van de Velde has for some time now been regarded as the court jester of golf. He enhanced that reputation considerably in late October 2005, when he announced that he would attempt to qualify for the women's British Open in protest at the R&A's decision to allow female players to enter the 2006 Open. He stated that he would, if necessary, be prepared to "shave his legs and wear a kilt" in order to achieve his objective. However, it looks as though his quest is doomed, since the ladies Golfers Union rules state clearly that all players in its competitions must be of female gender, adding that a member of the Committee may require a player to provide proof of gender to a medical expert *(The Guardian of 28/10/2005, p. S6).*

In spite of this, the French golfer appears to be determined to press his case, and refused to rule out legal action. He commented:

> ***"My whole point is that if women are allowed to play in our tournaments, then reciprocity should apply. If not, I don't understand what all this is about. I am trying to make the point that there are more important things for our governing body to be concerned with, like searching out whether people are playing with illegal clubs or drugs"*** *(Ibid).*

No further details are available at the time of writing.

Afghanistan fitness instructor seeks to found first women's political party

In early November, it was learned that Fauzia Sadat Gailani, a female fitness instructor, intends to form Afghanistan's first women's political party after having been elected to the country's new Parliament *(The Sunday Telegraph of 6/11/2005, p. 32)*. No further details are available at the time of writing.

Field it like Flintoff? First women's cricket series between India and Pakistan

In contrast with boxing, cricket has for many decades now allowed women to compete at the very top level. However, in the Asian test-playing nations the women's game has made slower progress. This is particularly the case in Pakistan, a country dominated by the Islam ethic. It was not until late September 2005 that the first women's national football championship opened, in which the players had to compete in long baggy trousers and loose shirts, and men were only allowed inside the stadium if accompanied by their families.

Shortly afterwards, women's cricket also made a breakthrough in Pakistan with the organisation of the first series with arch-rivals India. The organisers of the event have been keen to avoid giving Islamic conservatives any excuse to criticise the fixtures, which is why a ban on unaccompanied males was strictly enforced. According to Shamsha Hashmi, Secretary of the Pakistani Women's Cricket Association (PWCA):

> ***"We have to keep in mind our cultural values and give no reason for anyone to discourage women's cricket. We see cricket as a channel for women's empowerment and development in Pakistan. Those playing the game now are becoming aware of their basic rights" (The Independent of 28/9/2005, p. 66).***

The author of this column is sure that he is not alone in wishing this particular venture every possible success in the future.

Other issues

[None]

15. Drugs legislation & related issues

General, scientific and technological developments

New scientific doubts about effectiveness of EPO tests

That the testing procedures, devised and controlled by the World Anti-Doping Agency (WADA) may not be entirely reliable is an issue which has been adumbrated before in these columns (see e.g. in relation to nandrolone testing *([2005] 2 Sport and the Law Journal p. 87 et seq.)* In mid-September 2005, the reliability of testing procedures was once again under scrutiny when it emerged that fresh scientific doubts about the effectiveness of the test for erythropoietin (EPO) may have a profound impact on prominent doping cases such as that of Lance Armstrong (extensively dealt with elsewhere in this issue – see below, p.88).

In 2000, a test to detect this most potent of performance-enhancing drugs was hailed as a breakthrough in the campaign against doping. The drug in question had come to prominence in 1998 when various cyclists in the Tour de France were found to have taken advantage of it. However, the case of Mr. Armstrong, as well as that of the thriathletes who have had bands quashed or who avoided punishment after testing positive for EPO, have caused a number of experts to challenge the reliability of the test in question. Among the latter, the case of Belgian athlete Rutger Beke is particularly compelling.

Mr. Beke was initially banned for 18 months after having tested positive for EPO. However, his suspension was lifted in August 2005 when researchers at the Catholic University of Leuven, Belgium, confirmed that he had "naturally excreted proteins that would yield a positive test". During the research in question, several athletes gave false positives for EPO after undergoing strenuous exercise. Mr. Beke commented:

> ***"EPO is a protein. Everybody has it in their body. The main problem is when I do high physical activity, especially anaerobic, I produce a lot of proteins. The problem is that with everybody else there is a filter in the kidneys that stops your proteins from ending up in your urine. When I do anaerobic exercise the filter doesn't work properly and all those proteins end up in my urine. Now the big problem is that the anti-doping agencies don't see that the EPO proteins I produce are the same as synthetic. So I had to prove that mine are natural. Unfortunately it took 10 months" (The Guardian of 20/9/2005, p. S6).***

Following Mr. Beke's case, fellow-triathletes Virginia Berasategui Luna and Iban Rodriguez Martinez were also cleared because of doubts on the manner in which EPO came to be found in their bodies. The World Anti-Doping Agency (WADA) is currently advising its accredited laboratories to check with scientists in Paris or Lausanne – where the EPO test was largely developed – whenever any doubt arises over a positive test involving EPO.

The problem may reside not so much in the test as with those who analyse the results. It appears that the EPO tests show up in little bars. The bars for synthetic protein and the body's natural protein – the same protein which arises in everyone's body – show up in the same size and in the same place. As a result, those carrying out the tests do not see the difference. It would therefore seem that the tests are too one-dimensional to be reliable. Rutger Beke also added that the director of the Flemish doping laboratory had maintained for nine months that the test was failsafe, that any exception to it was impossible. Subsequently, however, he wrote to the Flemish doping commission saying that he was no longer 100 per cent sure.

Another case which seemed to indicate the unsafe nature of the procedure was that of Bernard Lagat. It has already been mentioned above (supra, p.68) that Olympic medallist Lagat, was suspended for two months for using the prohibited blood booster EPO. However, a negative B-sample later overturned the initial test. Mr. Lagat is now seeking compensation from the world governing body in athletics, the IAAF, as well as from the World Anti-Doping Agency (WADA). Mr. Lagat commissioned his own research following the initial positive test. Dr. Hans Heid, of the German Cancer research Centre in Heidelberg, had criticised the basis on which the test had been conducted, in particular the lack of consideration given to possible influences exerted by different nutritional, ethnic or physiological factors.

The head of the WADA-accredited laboratory in Lausanne, Dr. Martial Saugy, has conceded that, unlike the majority of banned drugs, EPO was not a substance for which it was simply a matter of examining what the sample contained and then decreeing whether an athlete was guilty. Although it publicly supports the current EPO test, WADA is funding research into developing a more clear-cut method of detection. Nicole Packer, an Executive Vice-President at Proteome Systems in Sydney, which has received one of the research grants, stated that:

> ***"This is not like a pregnancy test, where you are either pregnant or you're not. It has to be prepared carefully and interpreted by an expert, who can mostly call it, I believe.***

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But it is definitely skill-based, and that is why WADA is looking for a more clear-cut test" *(Ibid).*

It looks as though it will be extremely unsafe to penalise any athlete on grounds of EPO consumption until such a test is designed.

The doping eliminator strikes (US)

In mid-October 2005, it was learned that Arnold Schwarzenegger, the Austrian-born Hollywood strongman-turned governor of California, had signed a bill banning the use of dietary supplements by the state's 700,000 high school athletes. Ever the model of consistency, Mr. Schwarzenegger, who allegedly has links to this particular industry, has admitted to using anabolic steroids when competing as a bodybuilder. The new law requires high school athletes to sign a pledge not to use supplements, and companies will not be allowed to promote them at sporting events *(The Guardian 12/10/2005, p. S2)*.

Legal here, illegal there... a tale of two stimulants

One of the factors which has for a long time bedevilled the issue of drug-taking in sport is one in which the technological aspects are narrowly linked to the legal – in other words, the fact that what is legal in one jurisdiction may well be illegal in another. This is certainly the case in the case of US racing, the more so because the use of unlawful stimulants tends to be seen as a separate issue from the legal use of drugs on race days. Thus Bute, an anti-inflammatory drug which can reduce the pain from swollen joints, is lawful in most states, even though a considerable number of breeders in Kentucky – effectively the homeland of US racing – have recently called for its prohibition on race days in this state.

However, whereas the tide may be turning against Bute, the anti-bleeding drug Salix – formerly known as Lasix – is ubiquitous in the US and likely to remain so. According to US speed analyst Andrew Beyer:

"Lasix was an issue when it first came around (sic), but I can remember at the time that a friend of mine suggested the way to put it behind us was to have every horse get it, and that's basically what happened" (The Guardian of 9/11/2005, p. S11).

However, in other countries race-day medication is not seen as such a good thing. Indeed, in Britain it is banned altogether, and Peter Webbon, the chief veterinary advisor to the Jockey Club (which regulates the industry in this country) considers that many US states are moving in the direction of the UK on this issue (Ibid.)

Doping issues and measures – international bodies

Pound in spat with UCI over Armstrong allegations

(This issue is dealt with below – see p.88)

ATP hands over drug testing to ITF – with more positive tests as a result?

That tennis is the only major sport whose drug-testing procedures are carried out and controlled by its trade union – i.e. the Association of Tennis Professionals (ATP) – is something on which major reservations have been expressed, both in these columns and elsewhere. Particularly the Greg Rusedski fiasco was widely viewed as an indictment of the current system *(see [2005] 1 Sport and the Law Journal p. 93)*. Although no-one has ever questioned the integrity of the ATP in these matters, this presented a clear conflict of interests, and increasingly voices were raised in favour of entrusting this task to an independent body. This was achieved at last in early October 2005, when the ATP agreed to have its entire drug-testing programme brought under the umbrella of the International Tennis Federation (ITF), in an agreement which will last until the end of 2010, the ATP will pay the ITF a six-figure sum to assist with the running of this programme *(The Guardian of 5/10/2005, p. S6)*.

The agreement in question covers at least 600 tests at ATP events annually, in addition to the 500 tests on male players at events coming within the jurisdiction of the ITF. The cases resulting from such tests will be managed by the ITF – from the collecting of samples to any appeal at the Court of Arbitration for Sport (CAS). Before this announcement, the ATP had failed to join the WADA anti-doping code of conduct, claiming that it was concerned about the anonymity of any player failing a test. Such concerns are no longer relevant under the new deal. The final step for the ITF will be to convince the WTA, the governing body in women's tennis, to surrender its anti-doping programme to the ITF as well. The ITF is known to be keen on increasing the number of tests on women players, which currently falls well short of the number carried out at the level of men's tests *(Ibid)*.

Some time after this decision was announced, Dick Pound, the ubiquitous chairman of the World Anti-Doping Agency (WADA), commented that he would not be surprised if more players tested positive now that the ITF had taken over the drug-testing programme. He called the former ATP system an "imperfect and

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botched process" and hoped that, with a more rigorous testing procedure in place, "the penny would drop" among the players *(The Guardian of 3/12/2005, p. S11)*.

FIFA continues to stand aloof from WADA code

It has been reported in previous issues of this Journal *([2004] 2 Sport and the Law Journal p. 93)* that football, and more particularly its world governing body FIFA, have thus far been most reluctant to accede to the WADA doping code, more particularly the statutory punishment for first-time doping offenders. In mid-September 2005, an attempt at reconciliation was made when Sepp Blatter, the FIFA President, attempted to convince the WADA Chairman, Dick Pound, that football had fallen into line with other sports and "could do no more" to prove its commitment to the fight against doping. The development which prompted this approach was a modification in FIFA's articles regarding doping under which FIFA had abandoned the assertion that any footballer caught taking performance-enhancing drugs would be banned for a minimum of six months. Henceforth, penalties would range from a warning to a life ban, in accordance with the WADA code *(The Times of 13/9/2005, p. S8)*. In addition, WADA may now appeal against a doping penalty imposed by FIFA to the Court of Arbitration for Sport (CAS).

Naturally, WADA officials have not taken this rule change at face value, and its lawyers have been examining these rule changes with care. In particular, WADA is likely to object that FIFA has not adopted Article 102 of the Code, which states that the minimum penalty for a first offender must be two years' suspension. FIFA used to apply a minimum penalty of six months, but under the rule change no minimum applies. FIFA argue that specifying a particular punishment would be contrary to Swiss law *(The Daily Telegraph of 15/9/2005, p. S4)*. This refusal has in the past led to disagreements between Dick Pound and FIFA, with the former threatening that FIFA would be excluded from the Olympic Games. According to a WADA official:

> ***"FIFA have come some way to satisfying us. But the two-year rule is important. We do not want a fight with FIFA. But we cannot allow FIFA's rules to be very different to that of WADA. The danger is that other sports will take that as licence to do what they want and this will drive a coach and horses through the WADA code. What we might do when our executive meets in Montreal is ask CAS to make a ruling whether the FIFA rules meet our requirements"*** *(Ibid)*

It is not yet known whether in fact WADA have taken this step, or still intend to do so.

IAAF throws out US "life ban for steroid users" proposal

In early August 2005, a proposal tabled by the US that life bans should be introduced for doping cheats failed at the International Association of Athletics Federations (IAAF), the sport's world governing body, despite an admission that the sport had been tainted by recent drugs scandals. USA Track & field, which regulates the sport in the US, withdrew its controversial plan after IAAF President Arne Ljungqvist, who also chairs the Medical Commission of the International Olympic Committee (IOC), advised the meeting, where 209 nations were represented, that such a move could lead to legal challenges. Instead, Mr. Ljungqvist proposed that the IAAF should lobby the World Anti-Doping Agency (WADA) to increase the minimum sentence for a first offence from two to four years *(The Guardian of 4/8/2005, p. 29)*.

The IAAF general Secretary, Istvan Gyulai, had opened the two-day congress by admitting that the BALCO investigation (of which more later – see p.89) had caused harm to the sport. However, he added that the disclosures made during this affair would enable the IAAF better to target its efforts to eradicate illegal drug-taking from athletics and thus sustain fair play *(Ibid)*.

European Olympic body told of "serious differences" on tackling doping cheats

In late September 2005, Mario Pescanti, the Italian Minister for Sport, conceded that there were serious differences on the way to tackle drugs cheats. Mr. Pescanti, who is also a senior member of the International Olympic Committee (IOC), made these comments as he chaired a session of the European Olympic Committee (EOC) in London. He stated:

> ***"It is ridiculous. We started this fight against doping in the world of sports and we brought in the political world. Now the situation has changed and people in sports are fighting. I had a meeting with sports ministers in Liverpool chaired by Richard Caborn [the British Minister for Sport] about doping and there was a difference of opinion on how to tackle it." (The Daily Telegraph of 24/9/2005, p. S9)***

It is expected that a convention will be signed by UNESCO which binds governments on the doping issue in an effort to create a common world-wide policy. However, Mr. Pescanti commented that this would not solve the problem – which arose mainly from the fact that several sports are uncomfortable with the WADA code, particularly (as has been extensively outlined above in relation to FIFA) the two-year ban on first offenders *(Ibid)*.

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UNESCO adopts doping convention

In mid-October 2005, it was learned that Unesco, the UN organ responsible for education, science and culture, adopted the International Convention against Doping in Sport. It is hoped that the Treaty will be ratified by 30 member states in time for the Winter Olympics, to be held in Turin in February 2006 *(The Daily Telegraph of 20/10/2005, p. S10)*.

Doping issues and measures – individual countries

Tour riders face more doping tests (France)

In late October 2005, it was learned that, in a move likely to infuriate the Union Cycliste Internationale (UCI), the world governing body in cycling, the organisers of the Tour de France called upon the World Anti-Doping Agency (WADA) to perform more unannounced tests on top cyclists at their training camps before next year's event. As the 2006 race route was being officially presented, Jean-Marie Leblanc, who has organised the Tour since 1989, stated that the cycling authorities appeared to be unable to resolve the doping issue within the sport completely. Here again, the allegations made against Tour winner Lance Armstrong (see below) were mentioned as an example. He added:

> ***"As organisers, all we can do is provide sports bodies with the means necessary to carry out tests. But we do have the capacity to act as a warning system. Because the federations are not managing to completely cut out this canker, we are appealing to the supreme authority, the World Anti-Doping Agency"***
> ***(The Guardian of 28/10/2005, p. S5)***

The reaction by the UCI was not known at the time of writing.

Italy will enforce tough doping laws during Turin Games but refrain from jailing

It is a known fact that Italy has some of the toughest anti-doping rules in the world on its statute book. This phenomenon is likely to come to prominence during the Winter Olympics, to be held in Turin in early 2006. This gave rise to the spectre of Italian police entering the Olympic village in order to arrest athletes who fail doping tests. This was in spite of a plea made by Jacques Rogge, the president of the International Olympic Committee (IOC), that these laws be relaxed during the 17 days of the Games. Offenders face penalties which can reach three years' imprisonment *(The Guardian of 20/10/2005, p. S5)*.

However, with only a few months to go before the start of the Games, Mario Pescante, the Italian Sports Minister, announced that athletes competing in the various events need not fear a term of imprisonment under Italian anti-doping legislation. He pronounced himself optimistic about ending a dispute with the IOC on this matter and insisted athletes did not risk jail *(The Guardian of 10/12/2005, p. S12)*.

East German doping issues once more make the headlines

The German Democratic Republic, as the East German communist state was known, may have been dead for a generation now, but the legacy of some of its practices continues to cause ructions – particularly in the world of sport. The success earned by many of its sporting stars, particularly in athletics and swimming, has frequently been called into question as having had its basis in dubious and unlawful methods.

Thus in mid-October 2005, it was announced that German officials intended to scrutinize the validity of 22 national records held by athletes from the former East Germany because of widespread suspicions that many of them were doped. The investigation was triggered off by Professor Ines Geipel, an East German athlete of the 1980s, who requested that her name be erased from the record-holding 4x100 relay team of 1984 *(The Guardian of 13/10/2005, p. S2)*. As a result, the German Athletics Federation (Deutscher Leichtatletik Verband – DLV) considered striking other names from the record book. It appointed a fact-finding commission in order to determine whether any evidence could be found of doping having directly influenced any national record performance. Although the governing body diplomatically emphasised that all records were to be examined (i.e. those of West German as well as East German athletes) it is obvious that the main focus is on the standards set by the representatives of the German Democratic Republic.

During her time as an athlete, Professor Geipel spent six years as a member of the GDR national squad. She was based at a training centre in Jena, where the Jenapharm pharmaceutical company manufactured their own range of anabolic steroids, to be administered – in calculated doses – to the country's running, jumping and throwing elite. Coaches were instructed to inform athletes that the blue pills which they were asked to consume were merely vitamins. In fact they were Oral-Turinabol, Jenapharm's trademark anabolic steroid *(The Independent on Sunday of 23/10/2005, p. 88)*. She commented:

> ***"I was completely naïve. There was never any specification about the substances that I was given. When I was in the DDR system I couldn't take any responsibility***

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for myself or for my body. The system was a conspiracy. The athletes weren't told anything about what was happening. The DDR's programme of forced doping is a matter of public fact now, and for that reason I want the right to my own responsibility. The record that I was involved in must be removed. I want young athletes coming into the sport to have a fair chance. They cannot match these records because they were set by athletes on drugs" *(Ibid)*

Professor Geipel is not the only person whose record has come under scrutiny. In an extensive examination of files kept by the East German secret police, the Stasi, for their revelatory 1991 book Doping-Dokumente, Brigitte Berendonk and Werner Franke uncovered a list of annual dosages of Oral-Turinabol administered to Marita Koch, whose 400 metre record has been unchallenged for over 20 years. They also discovered a letter from Ms. Koch to Jenapharm, complaining that Bärbel Wöckel, another member of the 4x100 metre relay team referred to above, was given stronger doses of steroids because her uncle was president of the pharmaceutical company. Neither Koch nor Wöckel, however, are as keen as Geipel to go public on this issue *(Ibid)*.

The practices of East German sporting authorities have also left a legacy in the world of swimming. In early November 2005, it was learned that Karen König, a former east German swimming champion, has taken legal action against Germany's current Olympic Committee over the latter's alleged involvement in administering anabolic steroids to her during her sporting career. She is claiming that this has ruined her life. More particularly, she alleges that she was forcibly drugged from the age of 13 onwards, and was led by trainers from the former Communist state to believe that the drugs in questions were vitamins. She is suing the National Olympic Committee (NOC) for £7,200 *(The Independent of 2/11/2005, p. 23)*.

It is feared this case may set off a wave of expensive lawsuits from thousands of former athletes. Thousands of former athletes from that era have complained of chronic, and in some cases life-threatening, health problems such as depression, cancer, bulimia and infertility which they claim to be the long-term consequences of such treatment. Ms. König broke a world record for the freestyle relay in 1984, and won two European titles the following year. She speaks with a deep, cracked voice and suffers severe depression as well as other hormonal imbalances. Like Professor Geipl, she believes that she was given the anabolic steroid Oral Turinabol in blue pills and told these were harmless. The NOC denies the accusations and claims that the athletes were aware of what they were ingesting *(The Daily Telegraph of 2/11/2005, p. 14)*.

BALCO affair draws to a conclusion (but are there others in store?)

Sufficient space has been devoted in these columns to the scandal which originated in the Bay Area Laboratory Co-operative (BALCO) case to underline the significance of the various facts and intrigues which have resulted from the doping scandal which has rocked the world of athletics to its foundations.

From the previous issue *([2005] 2 Sport and the Law Journal p. 88)* it will be recalled that the charges brought against those suspected of selling illegal steroids and money laundering under the apparent respectability of a recognised drug-testing laboratory went to trial in San Francisco earlier this year. 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. In return for providing information on other participants in the scandal, Mr. Conte had accepted a sentence of four months' imprisonment and four months' home detention, with a further two-year suspended sentence.

It also emerged that co-defendants Greg Anderson, a personal trainer, and James Valente the Balco Vice-President, had also pleaded guilty to various charges which included the supplying of drugs. Mr. Anderson was sentenced to three months' imprisonment and three months' home confinement. James Valente, on the other hand, was sentenced to probation.

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. He avoided a custodial sentence after he agreed with the US Anti-Doping Agency (USADA) to plead guilty to this minor charge. He was also issued with a brief ban by USADA after pleading guilty to misbranding the sleeping disorder medication known as modafinil.

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The attentive reader will have noted a slight reservation about the alleged "closure" which this represents about the entire BALCO affair. There is every indication that this is a scandal which has a good deal more life in it than was previously anticipated. This is particularly the case because of Mr. Conte's apparent determination to reveal more about BALCO's business and its customers. On leaving court following his verdict, Mr. Conte declared:

> ***"It is said that I have become the poster child for the wrongdoing in Olympic as well as professional sports. Ironically, I find myself as someone qualified to help solve this problem plaguing sports precisely because I've been a major contributory to the controversy. I've decided to direct my knowledge, experience and determination toward making sports more honourable for the athletes and fans" (The Daily Telegraph of 20/10/2005, p. S10).***

Some people may be forgiven for uttering the word "humbug" when reading these pious words. Certainly Mr. Conte has been accused of relishing the publicity which he has received during the two years of inquiries into the BALCO affair, and he has apparently been flooded with offers to "tell all" in a book. He has already spoken on national television about his association with Marion Jones, claiming that he watched the former Olympic medal-winning sprinter inject herself with steroids. This brings us to another aspect of this long-running saga.

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. The action brought by Ms. Jones, who has never tested positive, was suspended until the conclusion of the Conte criminal trial. The question is now whether Ms. Jones will actually continue her action. It is expected that she may wait until the conclusion of a hearing by the Court of Arbitration in Sport into allegations against Tim Montgomery, her partner and the father of her child. Mr. Montgomery – as will be recalled from Journals passim – has never tested positive either, but the USADA has charged him with doping infringements from evidence gathered in federal investigations into BALCO. As this issue went to press, the CAS decision was expected shortly *(The Daily Telegraph of 22/10/2005, p. 95)*.

So it looks as if this saga might be drawing to a close. However, the world of sport may have further revelations in store for it. In what may prove to be yet another "laboratory scandal", US government agents raided a laboratory in Champaign, Illinois, operated by Patrick Arnold, known for introducing the steroid precursor androstenoide into the US (Ibid.).

China prepares for "drug-free" 2008 Games – amid scepticism

Every Olympic host city and nation seeks to set the standards to be achieved at each successive Games at ever higher levels, and it looks as though Beijing and China will be no exception in two years' time. These standards cover not only the degree and quality of the facilities and organisation, but also the extent to which doping devalues performances during the various events. The best possible demonstration of China's readiness on all these fronts was the country's 10th National Games, held in mid-October 2005. These featured 10,000 athletes and 32 sports. There were 47 drug-testing stations dealing with over 100 urine samples per day during the Games' 12 days *(The Daily Telegraph of 12/10/2005, p. S22)*. Almost inevitably, these procedures yielded a positive test, to wit that of Sun Yingjie, a leading Chinese distance runner and medal hopeful for the 2008 Olympics. The results of the first and second tests proved to be identical, producing a positive for the banned testosterone derivative androsterone. At the time of writing, the Chinese Athletics Association were about to hold hearings on this matter, which are likely to result in a two-year suspension for the athlete. *(The Guardian of 9/11/2005, p. S2)*.

However, there remains a certain degree of scepticism on some quarters over the eagerness with which the Chinese authorities documented and publicised this case. Ms. Sun's case did indeed seem a clear-cut case of a set of barely credible performances having been assisted by the ingestion of unlawful stimulants. Initially, she won the Beijing Marathon in a very fast time of 2 hr 21 min. Barely 30 hours later she achieved a silver medal in the 10,000 metre event. As if this were not enough by way of exploits, she then qualified for the 5,000m final. From an athletic viewpoint, to achieve a string of endurance races at this intensity defies belief *(The Guardian of 25/10/2005, p. S10)*.

However, as former British long-distance medallist Steve Cram pointed out, not only Sun Yingie but also others have achieved similar results in the past. What does stretch the credibility of this affair is the positive test announced afterwards. Androsterone was found to be present in her A sample even though it was not present in the tests give 24 hours earlier. Zhao Jian, the deputy head of the Chinese Games' Anti-Doping Commission, described androsterone thus:

> ***"This steroid has been listed as a banned substance for a long time and has been easy to detect for a long time. It is not likely she took it accidentally" (Ibid.)***

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Mr. Cram ponders the reasonable question as to why, if the drug in question was so easily detectable, one of China's top athletes, who travels extensively and competes in major championships, was stupid enough to ingest it. He points to an experiment carried out by the US Washington Post the previous week, under which the latter bought five supplements on the internet and requested Don Catlin, the director of the US Olympic drug-testing laboratory at the University College of Los Angeles (UCLA), to test them. Mr. Catlin is the person who first identified THG, the designer steroid at the heart of the BALCO case. His tests revealed that four of the supplements contained new designer steroids which he had never seen before, and the fifth had only been in circulation for two years. One of the distributing companies in question proudly boasted that its new steroid is the closest thing possible to trenbolone, a steroid of proven efficiency which is prominent on the doping list of the World Anti-Doping Agency (WADA). Its boasts continued with the reassurance that the new steroid was not on any banned list – including that of the US Anabolic Steroid Act which was adopted in 2004.

So inevitably, the question is asked as to how such a blunder could have been committed by a top athlete when more refined substances were easily acquired. Although Ms. Sun has vigorously protested her innocence and has asked her own questions of the federation, her fate seems almost certain to be sealed at the time of current writing. Mr. Cram is not alone in questioning the Chinese authorities' new-found zeal for detection, which seems to have been surpassed only by their swiftness to pass judgment and sentence. It is also a fact that Ms Sun may be dispensible by the time of the 2008 Games, as witness the plethora of records and personal bests achieved at the Chinese National Games in question *(Ibid)*. So could it be that Mr. Sun has been the sacrificial lamb thrown to the wolves of publicity and superficial doping vigilance? The reader is left to draw his/her own conclusions.

Is US racing riddled with doping? Recent cases give rise to concern

The Breeders' Cup meeting is one of the most important international advertisements for US racing. It is therefore highly likely that an almighty sigh of relief went up in New York racing circles towards the end of October, when the powerful finish shown by Wild Fit was insufficient to carry her past Folklore in the Juvenile Fillies event. The reason for this is that Wild Fit is trained in California by Jeff Mullins, who has acquired a familiar, one might even say notorious, profile Stateside.

In January 2005, one of Mr. Mullins's horses tested positive for sodium bicarbonate, being a constituent of the chemical mixes which are allegedly used on some horses in order to improve their performance. These mixes, known as "milkshakes", are administered through a tube directly into a horse's stomach via its mouth. This cannot be very pleasant for the horse, but it will in theory reduce the build-up of lactic acid (a cause of fatigue and oxygen debt) during strong exercise. As a result, the Californian authorities imposed a 30-day suspension on Mr. Mullins, during which time his runners were ordered to stay in a detention barn for several hours before a race. His winning percentage, which previously was a very creditable 28 per cent, fell to 13 per cent overnight. Although Mr. Mullins blamed this on the disruption caused to his horses' regimes, many remained unconvinced *(The Guardian of 9/11/2005, p. S11)*.

However, whilst the defeat suffered by Wild Fit was good for US racing's image, the biggest winner of the night was another trainer who had recently served a suspension for drugs offences. Richard Dutrow Jr., who saddled a double in the Sprint and the Classic with Silver Train and Saint Liam respectively, was deprived of his licence for 60 days earlier that year following a positive test for mepivacaine in 2003, and another for clenbuterol the following year. In addition, there was at the time of writing a high-profile case proceeding against Gregory Martin, who trained at Aqueduct in New York until earlier last year. It will therefore come as no surprise to learn that doping has been a key theme of the latest racing year in the US. Mr. Martin was arrested by federal agents in January 2005, and has been charged with doping and race-fixing. Various individuals linked to the Gambinbo crime family also face charges. Andrew Beyer, the best-known US speed analyst and a columnist for the Washington Post, comments:

> ***"In almost every racing jurisdiction in the country, there are trainers whose percentages raise suspicions. As a player, all I can do is look at the form and the performance of certain trainers, and if they consistently do things that defy logic, perform feats that the greatest horsemen in history could not have accomplished, then my deductions are that they are cheating"*** *(Ibid)*

However, Mr. Beyer is of the opinion that attitudes in US racing are beginning to change, and that an awareness has arisen that is a truly critical issue which is undermining public confidence in the sport. He believes that the introduction of the security barn system by New York is a significant step towards probity in horse racing *(Ibid)*.

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Long-running Lance Armstrong saga: the final showdown?

On the subject of one of its legendary figures, Lance Armstrong, followers of cycling are generally imbued with a sense of wonder and admiration tinged with the slight reservation which derives from the persistent rumours which have been circulating as to the probity behind Mr. Armstrong's unprecedented feat of winning seven successive Tour de France races. These rumours seemed to gain in substance a few weeks after the Texan's latest – and perhaps final – Tour triumph when L'Equipe, probably France's most respected sports newspaper which also sponsors the Tour, featured several claims that he had used the performance-enhancing EPO drug during the 1999 Tour. The newspaper featured the story across four pages in one edition under a banner headline, and concentrated on six urine samples provided, apparently anonymously, during that year's Tour which resulted in Mr. Armstrong's first Tour victory following his legendary recovery from cancer *(The Daily Telegraph of 24/8/2005, p. S6)*.

It was in 2001 that a test for EPO was first developed, and the urine samples in question were therefore tested retrospectively – in 2004, for reasons which the French newspaper report leaves unclear. The latter claims that there was "characteristic, undeniable and consequent" evidence of EPO in what are alleged to be the cyclist's urine tests, which are performed by France's national anti-doping laboratory in Chatenay-Malabry. Another aspect of this story which is unclear is how the samples in question were identified as Armstrong's. In fact, the laboratory in question appeared to contradict L'Equipe by confirming that all their tests conducted during the 1999 Tour were anonymous, and that no link could be established with any specific rider.

Predictably, Mr. Armstrong reacted strongly to these allegations, stating:

> ***"It is a witch hunt and nothing short of tabloid journalism. I will simply restate what I have said many times: I have never taken performance-enhancing drugs. Yet again a European newspaper has reported that I've tested positive for performance-enhancing drugs. The paper even admits in its own article that the science in question here is faulty and that I have no way to defend myself. They state: 'There will therefore be no counter-exam nor regulatory prosecutions, in a strict sense, since defendant's rights cannot be respected'"*** *(Ibid)***.**

Mr. Armstrong, who has never failed a doping test in 13 years of competitive cycling, routinely takes legal action against individual or organisation which makes allegations of drug use – one of which is referred to earlier (see above under "Libel and defamation issues", p.68).
A few days later, Mr. Armstrong sustained his defence by attacking the procedures on which the allegations of doping were made. Appearing on the Larry King show, run by the CNN broadcasting station, he claimed that for these tests, no protocol was followed and that there were various other areas of uncertainty involved in this case. However, the head of the Paris anti-doping laboratory which conducted the tests, Professor Jacques de Ceaurriz, stood by his tests, stating that EPO is a protein and either breaks down over time and becomes undetectable, or remains as it is *(The Guardian of 27/8/2005, p. S4)*. The previous day, the Tour de France director, Jean-Marie Leblanc, had confirmed that he supported the report published by L'Equipe. Initially, he had pleaded for Armstrong and his management to be given time to defend themselves, but now he seemed to have made up his mind about the veracity of the report. He even went so far as to claim that "we were all fooled" by Mr. Armstrong, believing that his morphology after the battle against cancer and his obsessive professionalism were the key factors in his 1999 Tour win *(The Independent of 25/8/2005, p. 64)*.

The entire affair took on a new twist a few weeks later, when Dick Pound, the President of the World Anti-Doping Agency (WADA), claimed that the allegations against Mr. Armstrong had almost certainly been leaked by Hein Verbruggen, the head of the Union Cycliste Internationale, the world governing body in cycling. Mr. Pound had studied the results from the Paris laboratory in question, WADA itself having no jurisdiction in the matter since the alleged infringement took place before its establishment in November 1999 *(The Guardian of 16/9/2005, p. S6)*. Several days later Mr. Verbruggen hit back. He not only vehemently denied any personal involvement in the leaking of this information, but also accused the WADA President of "obstructing and delaying" its investigation into the alleged doping offence. In another broadside at Mr. Pound, the UCI also called for WADA to assign responsibility for total co-operation with the UCI investigation to an individual who would "honour WADA's obligations of ethical behaviour and transparency". It also emerged that the samples in question were allegedly identified as Armstrong's thanks to the bar codes featured on them *(The Guardian of 21/9/2005, p. S10)*.

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Mr. Verbruggen later sought to shed some light on the mystery in an interview with a British journalist in which he gave his version of the events as they had unfolded in this imbroglio:

> ***"What happened is that the journalist (from L'Equipe) contacted Lance Armstrong and said he wanted to do a positive story on him. But he said he wanted to be sure Armstrong had never asked for an exemption to take drugs for therapeutic use. Lance said; 'You can go to the UCI and see the forms'. His lawyer said no. The journalist then called the UCI's Head of Doping. He said only one person can convince him and that is Hein Verbruggen. But the journalist said: 'Mr. Verbruggen does not talk to me'. The journalist is on my personal blacklist but I agreed to speak to him. He just needed to know whether Armstrong had ever asked for exemption to take drugs for therapeutic use. I said I would see what I could do and I spoke to Armstrong's team manager. I told him it might be good. He decided he can come to the UCI office and see all the forms. The journalist came and saw there never any request for therapeutic use. He made a photocopy of one of the forms and used that in the article but he also showed five other forms which did not come from the UCI. Where did they come from? We do not know. We have written to WADA asking a lot of questions and we have written to the laboratory. The reply they have given us does not answer our questions" (The Daily Telegraph of 22/9/2005, p. S4).***

This entire affair broke out just as Mr. Verbruggen was about to be replaced as Head of the UCI by Irishman Pat McQuaid. Immediately on assuming office, Mr. McQuaid joined calls for an independent inquiry into the controversy. Earlier, the Jacques Rogge, the President of the International Olympic Committee, had also pronounced himself in favour of such an investigation. Mr. McQuaid also denied that a gift from Mr. Armstrong, made to the UCI's anti-doping programme last year well before L'Equipe made its allegations, had resulted in a potential conflict of interest with the investigation into the affair being carried out by the world governing body, although he admitted that there was a danger of such a perception arising. He confirmed reports that Armstrong had donated a sophisticated blood centrifuge to the UCI, but denied that there was any connection between this gift and the investigation being carried out. Mr Pound begged to differ, albeit in somewhat Delphic terms. He stated that if there was not "an actual conflict of interest, there may be an apparent conflict" (which in effect was what Mr. McQuaid had admitted) *(The Guardian of 30/9/2005, p. S6).*

In the event, arrangements for such an independent inquiry were made. It emerged that this would be entrusted to a Dutch lawyer, Emile Vrillman. Although previously unconnected with cycling, Mr. Vrillman is familiar with the potentially murky ground which he will be expected to cover. Before becoming one of the Netherlands' best-known sports lawyers, he was a director of the Dutch national anti-doping agency (The Independent of 7/10/2005, p. 72). Mr. Vrillman announced that he intended to look at the accuracy of the results and the manner in which they were made public (The Guardian of 11/10/2005.) This column awaits the results of his findings with interest.

Controversy surrounds "legalise doping" advocates

From time to time, those who steadfastly believe that doping should be legalised and/or decriminalised make their views known in public – and this naturally causes ructions in certain quarters. Thus in late October 2003, there were ripples of concern in the normally placid waters of British canoeing with the somewhat curious appointment of a coach who apparently endorses the legalising of drug-taking in sport. Bulgarian-born Krassimir Ivanov, who coached a Belgian kayak pair to a place in the finals at the Athens Olympics, was given a full-time post with the British Canoe Union (BCU) despite an interview in a Belgian sports journal in which he was quoted as saying:

> ***"Doping should freely allowed (....) then everyone will do it but it will eventually reduce the chances that drugs will be taken because everyone will know what everyone else is doing" (The Independent of 23/10/2005, p. 74)***

This statement led to calls for Mr. Ivanov's suspension and an investigation by concerned parties within the sport. However, Mr. Ivanov, now a naturalised Belgian, vehemently denies administering or being involved with drugs, even in the days when he was living behind the Iron Curtain, and UK Sport, which enforces this country's doping regulations, pronounced itself satisfied that no athlete under his direction had ever tested positive for banned substances, nor has he encouraged their use *(Ibid)*.

Another case was that of US skier Bode Miller, whom WADA-chief Dick Pound branded as "irresponsible" for suggesting doping should be liberalised. Mr. Miller had apparently stated publicly that doping should be legalised or that accepted levels of banned substances should be increased *(The Guardian of 26/10/2005, p. S4).*

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Doping issues – Athletics

Rutger Beke to sue over EPO doubts (Belgium)

It has already been explained above (p.85) that Rutger Beke, a leading Belgian triathlete, was initially banned for 18 months after having tested positive for EPO. However, his suspension was lifted in August 2005 when researchers at the Catholic University of Leuven, Belgium, confirmed that he had "naturally excreted proteins that would yield a positive test. A Belgian regional disciplinary board had decided that the tests had not provided adequate evidence of guilt.

As a result, Mr. Beke has announced that he intends to sue the World Anti-Doping Agency (WADA) as well as two doping laboratories for £84,000 in damages. His claim was for both the material and moral loss which the athlete had incurred during his suspension and the appeal process. His lawyer has issued letters to both WADA and the laboratories concerned, which are located in Ghent and Cologne, and has stated that legal action would follow if the replies were unacceptable *(The Guardian of 8/9/2005, p. 30)*.

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

Lagat continues action against IAAF

This issue is dealt with in full elsewhere in this Journal, see above p.68.

Long-running Kenteris/Thanou saga continues... (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 has been extensively covered in previous editions of this column. It will be recalled that the Greek federation cleared the two athletes, and were therefore free to continue their athletics career, and that the IAAF announced its intention to appeal against this decision before the Court of Arbitration for Sport (CAS), describing the decision as "erroneous" ([2005] 2 Sport and the Law Journal p. 90). The CAS hearing was still pending at the time of current writing. The main reason for this is that the hearing was extended in October 2005 because all the evidence had yet to be heard *(The Daily Telegraph of 18/10/2005, p. S10)*.

It will also be recalled that continued interest in this case did not end with the sporting authorities, since the Greek criminal authorities had also brought charges against the two, as well as against their coach, Christos Tzekos. In mid-November an Athens public prosecutor called for the three to stand trial, along with two doctors and at least two people suspected of misleading the authorities. The misdemeanour charge carries a maximum two-year jail sentence *(The Guardian of 17/11/2005, p. S2)*.

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

Michael Johnson allowed to keep relay medal

It will be recalled from a previous issue of this Journal *([2005] 1 Sport and the Law Journal p. 100)* that Jerome Young and Alvin Harrison, members of the gold medal-winning 4x400 m team at the Sydney 2000 Olympics, had been banned for life and for two years respectively for doping offences. It will also be recalled that, in the first instance, this meant that the entire medal-winning team would consequently lose their medals. This decision was overturned by the Court of Arbitration for Sport (CAS), which decided that only Mr. Young's medal should be cancelled since he was the only athlete to have tested positive before the commencement of the 2000 season, which included the Olympic Games in Sydney *(The Daily Telegraph of 25/7/2005, p. S8)*.

Drugs haul embarrasses Finnish World Championship hosts

The World Athletics Championships were held in Helsinki in August 2005. It proved to be a highly successful event, but had a shadow cast over it when, on the eve of the Games, Finnish police seized a considerable amount of prohibited performance-enhancing substances at the home of one of the country's top coaches. Authorities commenced an investigation after police claimed to have discovered human growth hormone and testosterone at the home of Kari Mattila, the former coach of Timo Tompuri, a Finnish discus thrower due to compete in the Championships. The Finnish team were naturally quick to dissociate themselves from this incident. In the words of spokesman Mika Noronen:

> ***"It is important to keep in mind that Kari Mattila has not been engaged in any coaching co-operation with Timo Tompuri since October 2004 and that he has no official connection to the Finnish athletics federation of the Finnish team at the world championships" (The Guardian of 6/8/2005, p. S16).***

Mr. Noronen also claimed that Tompuri had been tested by several anti-doping officials on a number of occasions earlier that year and that all tests had proved negative. In spite of this, the incident had unfortunate echoes of the Kenteris/Thanou affair referred to earlier, which also occurred on the eve of a major event *(Ibid)*.

15. Drugs legislation and related issues

"Doping cheats cost me Championship medals" claims Arron (France)

Christine Arron is one of the major figures in French athletics. However, she has not won a major individual title since the 1998 European Championships, where she won the 100 metre event. She has recently alleged that she would have more medals if she had not been required to compete against doping cheats. It must be admitted that there is at least some prima facie evidence to support this claim. The four World Championships in which Ms. Arron has competed have seen medals won by athletes involved in doping controversies, including Ekaterina Thanou, whose case is adequately documented above (p.94). Another fellow-competitor was Kelli White, who won the 100 metre event at the 2003 Championships, has since been suspended for doping offences. Marion Jones, who won in 1997 and 1999, is currently embroiled in the BALCO affair extensively documented above *(The Independent of 3/8/2005, p. 65)*.

Doping issues – Cycling

Tyler Hamilton case: no end in sight

It will be recalled from a previous issue of this Journal *([2005] 2 Sport and the Law Journal p. 90)* that the US rider Tyler Hamilton had been banned for two years by the AS Anti-Doping Agency (USADA) after testing positive at the Athens Olympics. It was also reported in the same issue that Mr. Tyler had appealed to the Court of Arbitration for Sport (CAS) against this sentence. This case looks set to last a good while since the second hearing only started in January 20065, the controversy having already lasted for 16 months *(The Guardian of 22/11/2005, p. S2)*. This column will, as ever, follow the outcome of this case with the keenest of interest.

Musseeuw faces criminal prosecution over drug allegations

The crowning point in Johan Museeuw's cycling career was undoubtedly his victory in the World Championships in 1996. His nadir may well come in less glamorous circumstances. As was recorded in an earlier edition of this Journal *([2003] 3 Sport and the Law Journal p. 111)*, the Belgian ex-champion was investigated by Belgian police two years ago as part of a wider inquiry into a ring of suspected drug traffickers. He was banned for two years in October 2004, but by that time he had already retired from competitive cycling.

This affair assumed the form of a criminal prosecution when, in October 2005, Mr. Musseuw and his co-accused appeared at a hearing of the Kortrijk Public Prosecutor's Office (Openbaar Ministerie) on various drugs charges. Prosecutors and defence lawyers submitted initial statements. A further hearing was scheduled for December, and a final ruling on whether the accused will face a full criminal trial was expected early in the new year 2006. Mr. Musseuw's lawyer. Jef Vermassen, is claiming that a fair trial is no longer possible because of various leaks to the national media, which recently published the full prosecution list of the substances allegedly involved *(The Guardian of 12/10/2006, p. S5)*.

The prosecutors maintain that their case is based on the documentation supplied by mobile phone text messages between Museeuw and a veterinary surgeon, Jose Landuyt. It is claimed that code words such as "wasps" and "jam tarts" were used to refer to various drugs. More particularly he is accused of possessing the blood booster EPO and its synthetic version, aranesp, as well as a syringe containing the anti-inflammatory dexomethasone. Museeuw has already admitted possession of the anti-inflammatory on the grounds that it had been prescribed to him following a serious crash *(Ibid)*.

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

Vuelta winner tests positive

In mid-November 2005, the news broke that Roberto Heras, who won the Tour of Spain (Vuelta) four times, had tested positive for the banned substance EPO. The Spanish rider was immediately suspended by his team's management company, Active Bay, pending the result of the "B" sample test (The Guardian of 9/11/2005, p. S9). Although Mr. Heras has vehemently protested his innocence, the "B" sample also tested positive, and Mr. Heras now looks likely to be banned and stripped of his last Vuelta win (www.velonews.com).

Tour de France trio deny doping reports

In mid-September, Manuel Beltran (Spain), Bo Hamburger (Denmark) and José Castelblanco (Columbia) issued denials of reports which appeared in Le journal de dimanche, a French newspaper, that in the course of the 1999 Tour de France they produced urine samples which were found to contain the banned blood booster EPO. It is alleged that this was a result of a recent investigation carried out by a French laboratory (The Guardian of 13/9/2005, p. S10). No further details are available at the time of writing.

15. Drugs legislation and related issues

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

Rory Sutherland. In mid-September, this Australian cyclist was suspended by his Dutch professional team, Rabobank, after having tested positive for a banned substance. At the time of writing, it is not clear what substance was detected – except that it did not concern blood doping or EPO *(The Guardian of 20/9/2005, p. S2)*. No further details are available at the time of writing.

Barry Forde. In late November, it was learned that Barbadian Barry Forde was to face an investigation after a doping test revealed high levels of testosterone in his system. Mr. Forde, who was the first cyclist from the English-speaking Caribbean to win a world championship medal, was tested in October while competing in France *(The Daily Telegraph of 1/12/2005, p. S22)*.

Dario Frigo and Alberto Elli. In late October, the Italian cyclist Dario Frigo received a six-month suspended prison sentence and a €7,500 fine for doping offences dating back to May 2001, when several hundred police officers raided team hotels on the Tour of Italy in an episode known as the San Remo Blitz *(see [2001] 2 Sport and the Law Journal p. 77)*. Mr. Frigo is also involved in a French judicial investigation after his wife Susannah was found to be transporting a consignment of EPO in her car during last year's Tour de France. Four other riders, including the former Tour de France yellow jersey wearer Alberto Elli, received lesser sentences from the San Remo court.

Unai Yus. The Spanish rider was suspended during last year's Tour of Spain after substances not on the team's official medicine list were found in his room by the team doctor *(The Independent of 7/9/2005, p. 65)*. No further details are available at the time of writing.

Doping issues – Swimming

East German swimming champion sues German Olympic Committee over doping scandal

(This issue is dealt with in full under "Doping issues and measures – international bodies, above p.86)

Doping issues – Baseball

Palmeiro banned for steroid use....

In early August 2005, it was learned that one of baseball's major stars, Rafael Palmeiro, was issued with a 10-day ban for infringing the sport's anti-steroids policy – fewer than five months after informing the US Congress that he had never ingested steroids, as was reported in the previous issue of this Journal *([2005 2 Sport and the Law Journal p. 92)*. This was stunning news in baseball circles, the more so since Mr. Palmeiro is the player with the highest profile by far to have been caught violating the sport's new drugs legislation. He announced that he would accept the suspension, but firmly denied having ever intentionally used steroids, adding that he had no idea how the banned substance entered his body *(The Times of 2/8/2005, p. 69)*.

The question now is whether Mr. Palmeiro's qualifying statement that he has never used steroids "intentionally" will spare him charges of perjuring himself before the Congress. The Congressional hearings at which he testified were organised after publication by retired player and self-confessed steroid user Jose Canseco of a work which contains allegations of widespread doping amongst top players, including Palmeiro *(The Independent of 2/8/2005, p. 69)*. This book followed the BALCO scandal, extensively dealt with elsewhere in this Journal (see above, p.89).

... but fans forgive Giambi by bestowing award

It would seem that, in spite of the high-profile doping violation described above, baseball and its fans continue to apply a somewhat laissez-faire approach towards such offences. This is amply illustrtated by the decision to bestow a major award on Jason Giambi, who, as was reported in the previous issue *([2005] 2 Sport and the Law Journal p. 69)* has admitted taking unlawful performance-enhancing substances. In an internet poll, the New York Yankees first baseman was voted the major league comeback player of the year, recording no fewer than 100,307 votes *(The Guardian of 11/10/2005, p. S8)*.

15. Drugs legislation and related issues

Doping issues – Tennis

Argentinian players fall foul of doping rules

One of the more amazing aspects of the campaign against doping in sport is the extent to which this malpractice seems to have penetrated the world of tennis, which – unlike athletics and cycling – has not been viewed as a sport capable of being immoderately affected by it. However, judging by recent events, it looks as though tennis might become as great a problem area in this respect as the sports referred to earlier.

In early August 2005, it was learned that Guillermo Canas, the world's No 10 player, had been banned for two years after failing a drug test, according to the Association of Tennis Professionals (ATP). This equalled the highest penalty ever administered for doping offences in tennis, and Canas became the player with the highest profile in tennis to be penalised since tennis signed up to the World Anti-doping Agency code which requires an automatic two-year ban for breaches such as those committed by the Argentinian player. He tested positive for the prohibited diuretic HCT at the ATP tournament in Acapulco. Mexico, in February 2005. He was also ordered to repay $276,000 in prize money and forfeit 525 singles and 95 doubles ranking points. He will be barred from competition until June 2007 *(The Guardian of 9/8/2005, p. 28)*. Mr. Canas has appealed to the Court of Arbitration for Sport (CAS) *(The Guardian of 6/10/2005, p. S7)*. The outcome of this case was not yet known at the time of writing.

Two months later, it was another Argentinian, Mariano Puerto, who seemed to make the headlines for the wrong reasons. Mr. Puerto, who had already been suspended for nine months in 2003 after testing positive for clenbuterol, faced suspension for life following reports that he had tested positive for the banned stimulant etilefredine at the French open championships in May 2005. This seems to continue a disquieting sequence of doping infringements by Argentinian players. Guillermo Coria served a sevn-month ban for nandrolone, and Juan Ignacio Chela was suspended for three months for steroid abuse. It has to be conceded that, although etilefrine is included on the WADA list of banned substances, doubts have been raised about the appropriateness of banning it. In 2004, the Austrian skier Rainer Schönefelder, who won the slalom world title, tested positive for this substance but blamed the result on a household cold remedy. The Austrian Ski Federation accepted his plea and merely issued him with a warning *(The Guardian of 6/10/2005, p. S9)*.

Doping issues – Football

Drug traffickers disguise themselves as football team (Spain)

They had all the trappings of a real football squad – even a snarling coach – but the 10 men arrested in Cadiz, Spain, had no intention of even kicking a ball in anger. They were in fact drug traffickers who used their dress and equipment as a ruse to bamboozle border police as they passed from the Spanish enclave of Ceuta (North Africa) to Algeciras, on the Spanish mainland. The fake team would usually cross the Straits of Gibraltar into Cadiz on Saturday afternoons with the hash tucked beneath their jerseys, staging a drama in order to enhance their credibility before border agents *(The Guardian of 5/11/2005, p. 19)*.

The alleged manager would carry a roster in his hand and continuously bark orders at the young men. The players would return to Ceuta after the fictitious match – and a series of actual drugs sales on the mainland. Police are unaware how long the fake season lasted before a tip prompted the investigation. The "game" ended when officers stopped the team's cars and found a total of 16 kg of hash hidden beneath the players' strips *(Ibid)*.

Abel Xavier appeals

In late November 2005, it was learned that Abel Xavier, the Middlesbrough defender, had appealed to UEFA against his 18-month suspension for using the anabolic steroid dianabol (Daily Mail of 30/11/2005, p. 74). No further details are available at the time of writing.

Doping issues – Weightlifting

In mid-December, Halili Mutlu, the Turkish three-time Olympic champion, was banned for three years by the International Weightlifting Federation for steroid abuse. Mr. Mutlu denies having ingested nandrolone, which was detected in a urine sample at the European Championships in Sofia last April, where he obtained three gold medals in the 62 kg category *(The Daily Telegraph of 7/12/2005, p. S21)*.

Another Turkish weightlifter, Sedat Artuc, who won the bronze medal at the 2004 Athens Olympics in the 56 kg category, also incurred a two-year ban for missing an out-of-competition test in September, claiming he was ill *(Ibid.)*.

15. Drugs legislation and related issues

Doping issues – Boxing

In November, John Ruiz brought legal proceedings against fellow-heavyweight James Toney, claiming that the latter's use of steroids gave him an unfair advantage during their April bout. Mr Ruiz's lawyers claim that he has incurred financial damage as a result, even though the World Boxing Association restored him as champion following Mr. Toney's positive steroid test. The latter had won the heavyweight title fight but was deprived of the crown when a post-fight test revealed that he had used nandrolone *(The Daily Telegraph of 3/11/2005, p. S7)*. No further details are available at the time of writing.

16. Family Law

[None]

17. Issues specific to individual sports

Football

"Real's Brits" in disciplinary trouble (Spain)

Britain has in the course of the past few decades exported a number of prominent footballers to the Continent, many of them to eminent sides. Thus Real Madrid have been similarly blessed – although "blessed" is not perhaps the term most real fans would have used on contemplating some of the disciplinary infringements perpetrated by their English guests, which only works to the disadvantage of their side.

Mr. Beckham's series of altercations began with an incident which, although no official action was taken against it, seemed a portent of things to come. With the 2005-6 season well under way, England captain David Beckham was accused of slapping an opponent during an away fixture with Espanyol (Barcelona). At a certain point during Real's 1-0 defeat, Mr. Beckham exchanged angry words with the home side's substitute Sergio Sanchez, who was warming up along the touchline, as he prepared to take a corner in the 82nd minute. Beckham then pointed towards the tunnel to indicate that he intended to continue the "discussion" once the final whistle had sounded. Mr. Sanchez takes up the story:

> ***"I was stretching on the touchline and coughed as he was about to take the corner. He took it badly and then started to insult me. He thought I'd put him off. He was shouting and swearing at me and pointing towards the dressing room. Then, after we won, Beckham was waiting and blocked my path in the tunnel. That's when he slapped me. He was going crazy, swearing and calling 'son of a whore'. I couldn't believe it. It's no way for the captain of England to behave. Luckily for him, some other players got between us and pulled him away" (Daily Mail of 20/9/2005, p. 76).***

The Beckham camp for its part denied Mr. Sanchez's story, claiming that, far from merely coughing, Sanchez had been shouting at Beckham as the corner was taken, and that it was "ludicrous" to suggest the English player had laid a finger on him. In the event, no disciplinary action was taken as neither Sanchez nor his club lodged an official complaint *(Ibid)*. However, fans and club officials were only too aware that Mr. Beckham had already picked up two red cards in Spain (making a total of five in the course of his career). This factor and his alleged loss of coolness in the incident described above did not bode very well for the remainder of the season, and very soon other incidents materialised.

The following month, Mr. Beckham ill-advisedly chose the referee as his target and thus earned himself another card of unenviable colour. With Real trailing 2-1 at home to Valencia with a few minutes remaining, the referee blew for a foul by Raul on Madrid's right touchline. Beckham reacted furiously and threw up his right arm in disgust, upon which he appeared to say something to the referee. Having been shown the yellow card for this offence, Mr. Beckham walked away applauding sarcastically, causing the match official to show him second yellow and thus dismiss him. The Real player reacted furiously and had to be restrained by team-mates as he remonstrated with the referee. This was the second red card Real had to endure in the match, Denmark's Thomas Gravesen having incurred one when he had been on the pitch for barely six minutes *(The Daily Telegraph of 24/10/2005, p. S6)*. Mr. Beckham was later merely fined £40 by the Spanish football authorities, after Real appealed against the red card, maintaining that he had shown neither disrespect nor sarcasm *(The Daily Telegraph of 26/10/2005, p. S3)*.

However, in early December he was in trouble again during a Madrid derby match, when he tackled Getafe striker Riki from behind to earn himself a straight red card. The Getafe coach, Bernd Schuster, had an angry exchange with the England captain as he left the pitch *(The Independent on Sunday of 4/12/2005, p. S8)*.

Mr. Beckham was not the only Englishman at Real to ruffle the feathers of football officialdom this season. In his first appearance for his new club, former Leeds player Jonathan Woodgate, was fortunate to remain on the field after a heavy tackle on Atletico Bilbao's Carlos Gurpegi, but only earned a yellow card. However, he committed another foul this time on Etxeberria, and the yellow card he thus earned inevitably entailed a sending-off. It was altogether a horror debut for the England player, as he had headed into his own net during the first half *(The Independent of 23/9/2005, p. 65)*.

17. Issues specific to individual sports

Platini advocates more match officials rather than electronic wizardry

(This issue was dealt with elsewhere in this issue, see above, p.46)

FIFA set precedent by redressing referee error

In early September 2005, officials of the world governing body in football, FIFA, set a precedent for overruling the referee's decision after ordering the World Cup qualifying game between Uzbekistan and Bahrain so be replayed. Uzbekistan won the first leg of the Asian zone play-off, but were incensed when Japanese referee Toshimitsu Yoshida disallowed an Uzbekistan penalty because an attacking player had encroached upon the penalty area. Instead of ordering the penalty to be retaken, the referee ordered a free kick to Bahrain, thus keeping them within sight of a two-leg play-off against the fourth team from the Concacaf region *(The Daily Telegraph of 7/9/2005, p. S3)*.

After the match, Uzbekistan called for an investigation into the penalty incident. However, having obtained a decision which seemed to be in their favour, they expressed anger at the match having to be replayed in its entirety, and accused FIFA of "stealing" their slender lead *(Ibid)*.

Cocu banned for Netherlands qualifiers

In late September 2005, Philip Cocu, the Netherlands international midfielder, was issued with a two-match ban following his dismissal during his team's World Cup qualifying tie with Andorra. Mr. Cocu was shown the red card during the Dutch side's 4-0 win. He will accordingly miss the Netherlands' last two qualifying ties against the Czech Republic and Macedonia *(The Independent of 27/9/2005, p. 77)*.

Cricket

The end of a dynasty? Dalmiya favourite fails in BCCI presidential election bid

In late November 2005, the power struggle within Indian cricket ended with the victory of Sharad Pawar over Jagmohan Dalmiya, who had been one of the most influential figures in the world of cricket for over a decade. It was he who oversaw the emergence of India as the principal generator of revenue for the game, and the rise of Asian nations as the most powerful block on the International Cricket Council (ICC), the world governing body in the sport. Mr. Dalmiya's favoured candidate for the presidency of the Board of Control for Cricket in India (BCCI) was Ranbir Singh Mahendra, who was beaten by 20 votes to 11 by Mr. Pawar, the current Minister for Agriculture. The election had to be monitored by an appointee of the Supreme Court in order to avoid being derailed by infighting *(The Guardian of 30/11/2005, p. S2)*.

Leg-before decisions to be subject to television evidence

The International Cricket Conference (ICC), the world governing body in cricket, has for some time now been promoting the use of electronic technology in order to assist correct decision-making on the field of play in major fixtures. Another milestone in this development was reached in early September 2005, when it decided that umpires will be allowed to use television evidence in order to assess lbw decisions in Test matches. Referral to a third umpire was given a trial during the Super Series test match and international series between Australia and the rest of the World XI. This move came amid controversy over questionable decisions which were given during the Fourth Test between England and Australia at Trent Bridge. The feeling in the Australian camp was that most of the dubious decisions during this year's Ashes series went against them *(The Guardian of 2/9/2005, p. 32)*.

This decision to allow umpires to consult television evidence on lbw decisions will take international cricket into uncharted territory. One-day international matches have already been the subject-matter of experimentation in relation to lbw decisions, more particularly the 2002 ICC Champions Trophy tournament, It is believed that the majority of umpires currently officiating in Test Matches are broadly in favour of this type of technological assistance *(Ibid)*.

In a separate development, it was decided that neutral umpires would officiate at the five-match one-day series of internationals between Pakistan and England in the autumn of 2005 *(The Guardian of 2/8/2005, p. 27)*.

Afridi incident mars Pakistan v. England series

The winter series between Pakistan and England served as a rude awakening for English cricket, that, in spite of its historic Ashes victory in the 2005 series, they still had a good deal to prove before they could lay claim to the title of the world's No 1 in Test cricket. However, the series was marked by some unsavoury incidents which are all too characteristic of some undesirable aspects of the modern game – i.e. the desire to win at all costs.

17. Issues specific to individual sports

In reply to the Pakistan total of 462, England were struggling at 92-2 when a deafening blast resounded around the Faisalabad ground. At first, the fear was that a bomb had been detonated, but such fears were rapidly allayed when police inspected the site of the explosion and found that it was nothing more sinister than a gas cylinder bursting. However, as the officials and players' concentration was focused on the boundary, Pakistan all-rounder Shahid Alfridi walked down the wicket area and started to execute a pirouette – a move inspired less by artistic considerations than by an attempt to give himself and fellow-spinner Danish Kaneria an area of the pitch which might give them some assistance *(The Independent of 22/11/2005, p. 66)*.

The evidence of Mr. Afridi's misdemeanour having been incontrovertible, the latter had to appear before the match referee, Roshan Mahanama, and he was duly suspended for one Test and two one-day internationals. Only Afridi's previous record of good behaviour prevented the sentence from being heavier *(The Guardian of 22/11/2005, p. S7)*.

West Indies regional cricket allows overseas players

A from the 2006 season, regional trams in the West Indies will be allowed one overseas player. In addition, West Indies players will be permitted to move freely among the six established sides. A spokesman of the West Indies Cricket Board commented that the free flow of West Indian players opened the way for teams to strengthen weak areas whilst allowing prospective international players an opportunity to be on show. This move is in accordance with the free movement of persons in the Caribbean, which takes effect in January 2006 *(The Guardian of 24/8/2005, p. 29)*.

Wasim Akram criticises ICC on "chucking" laws

In late November 2005, Wasim Akram, the former Pakistan international bowler, levelled heavy criticism at the International Cricket Council (ICC) over its regulations governing illegal bowling actions, claiming that this means unfair treatment for players from the Asian subcontinent. This comment was inspired by the treatment of Pakistan seamer Shabbir Ahmed, who had been reported for illegal bowling action (or "chucking") in the First test between Pakistan and England in November 2005. He commented:

> ***"Take the case of Shabbir. He was cleared three times earlier and has been called again. What is surprising is that most of this is happening to bowlers from our part of the world. This is because our representation on the ICC is minimal" (The Guardian of 30/11/2005, p. S8)***

It has to be admitted that the Sri Lankan bowler Muttiah Muralitharan, India's Harbhajan Singh and Pakistan's Shoaib Akhtar have had their bowling action scrutinised in recent years. However, to claim that Asian countries are currently under-represented on the ICC could be described as something of an exaggeration.

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

Mickey Arthur. In early November, the South African coach Mickey Arthur was fined 25 per cent of his match fee for having sworn at an umpire during the fifth one-day international between his side and New Zealand. Mr. Arthur was displeased when the umpires took the teams off for a second interruption for rain at the Centurion Ground after 19 overs of the South African innings – one over short of the 20 required to constitute an innings *(The Daily Telegraph of 8/11/2005, p. S19)*.

Shoaib Akhtar. On the occasion of the Second Test between Pakistan and England in mid-November, the Pakistan international bowler was fined 20 per cent of his match fee after logos displayed on his wristbands were found to infringe the policies of the International Cricket Council (ICC), the world governing body in the sport *(The Guardian of 22/11/2005, p., S9)*.

Sourav Ganguly. In late July, the world governing body in cricket, the ICC, reduced by two games a six-month ban in Indian captain Sourav Ganguly over the latter's slow over-rate during the one-day series with Pakistan in April *(The Guardian of 29/7/2005, p. 33)*.

Ashish Nehra. The Indian fast bowler was reprimanded by the ICC for excessive appealing during a fixture with Sri Lanka *(The Guardian of 2/8/2005, p. 27)*.

Rugby Union

Wallabies warned over drinking habits (Australia)

In late July 2005, the Australian Wallabies side started their Tri-Nations campaign against South Africa in Pretoria with a warning from their chief executive, Gary Flowers, that the national team's bid to recover the world title in 2007 was being undermined by the behaviour of players off-field. Only a few days before this statement, scrum half Matt Henjak had been disciplined after having been involved in an early-morning altercation in a Cape Town bar only two days before the Wallabies' Test against the Springboks.

17. Issues specific to individual sports

Three other players, Wendell Sailor, Lote Tuqiri and Matt Dunning, were fined and warned about their future conduct *(The Guardian of 28/7/2005, p. 30)*.

Controversial New Zealand referee banned from international duty

The 2005 British Lions' tour of New Zealand was a controversial one, not least because of the alleged differences interpretation of the rules of the game. One of the officiating referees who provoked a good deal of indignation in this regard was Steve Walsh, who in a game between the Lions and the Maoris made several inexplicable decisions. Mr. Walsh was consequently banned from officiating in Tests until February 2006. He was also reprimanded by the New Zealand Rugby Football Union. He had already been suspended by the International Rugby Board in 2003 following an altercation with England's fitness coach, Dave Reddin *(The Daily Telegraph of 20/10/2005, p. S9)*.

American football

Leading players disciplined

In mid-October 2005, Ronde Barber, who plays for Tampa Bay, was fined $30,000 by the National Football League (NFL) for punching an official during a game with the New York Jets. The cornerback inadvertently hit umpire Butch Hannah in the eye during a scuffle with the Jets' Kevin Mawae during the second quarter *(The Daily Telegraph of 14/10/2005, p. S22)*.

Two other prominent players, Terrell Suggs and Ed Reed, who appear for Baltimore, were fined $15,000 each for making contact with an official during their side's defeat to the Detroit Lions *(Ibid)*.

Other sports – Baseball

Baseball not finished as an Olympic sport?

It will be recalled from a previous issue of this Journal ([2005] 2 Sport and the Law Journal) that a decision had been taken by the International Olympic Committee to drop baseball from the range of sports available at the Games. In the meantime, a rearguard action has been started to return this sport to Olympic status. In fact, the Chief Operating Officer of Major League Baseball, Aldo Notari, has himself been involved in the campaign, although major league players will not be involved. When the IOC voted the sport out of the Olympics, it was suggested that the absence of major league players from the Games had been a factor. However, Mr. Notari has argued that this should not be regarded as a significant factor. He pointed out that there are 100 million baseball players in the world, whereas there are a mere 1,000 in the major leagues *(The Guardian of 26/10/2005, p. S3)*. BASL

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Clinical Negligence – Surgeon giving negligent advice to professional footballer – whether duty owed in contract or tort to footballer's club.

Sport and the Law Journal Reports

The law reports in the Sport and the Law Journal are compiled by barristers at 11 Stone Buildings, Lincoln's Inn, under the editorship of Alan Gourgey QC. The individual reporters (indicated by their initials after the date of the judgment) are Tim Penny, Nick Parfitt, Jamie Riley, Damian Murphy, Martin Ouwehand, Reuben Comiskey, Sarah Clarke and Tom Robinson. The Reports are published in chronological order and should be cited by their "SLJR" number.

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

(2005) SLJR 9-12 are reported in the Sport and the Law Journal, Volume 13 Issue 2

(2005) SLJR 13

Horse racing – jockey – acceptance of money and presents in exchange for information about horses – disciplinary committee – whether disqualification disproportionate

GRAHAM BRADLEY v THE JOCKEY CLUB

Court of Appeal (Lord Phillips MR, Buxton and Scott Baker LJJ) 12 July 2005 (Reporter: DM)

Facts

1. Graham Bradley was a successful steeplechase jockey until his retirement in 1999. Thereafter he earned his living as a bloodstock agent. In September 2001, Mr. Bradley voluntarily gave evidence in support of a close friend and fellow jockey, Barrie Wright, who was charged with conspiracy to import cocaine. Mr. Wright's defence was any money he had received related to the provision of inside racing information for gambling purposes as opposed to relating to drugs.

2. In his evidence, Mr. Bradley confirmed he too had received money and presents as payment for sensitive and privileged information about horses for gambling purposes from the same person that had given money to Mr. Wright. He said he did so in common with "every jockey in the country". Mr. Wright was acquitted.

3. As a result of his evidence, the Jockey Club informed Mr. Bradley that it intended to conduct an inquiry and Mr. Bradley accepted the Jockey Club's invitation to submit to the Rules of Racing. Mr. Bradley ended up before the Disciplinary Committee of the Jockey Club on 17-29 November 2002. The Jockey Club found Mr. Bradley to be in breach of a number of the Rules of Racing and imposed a penalty of disqualification for 8 years.

4. Mr. Bradley appealed to the Appeal Board which rejected the majority of his contentions but did reduce the disqualification period to 5 years.

5. On 28 May 2003, Mr. Bradley issued a claim based on (1) a breach of implied terms in his agreement to submit to the Rules, namely that the Jockey Club would carry out its disciplinary functions in accordance with the Rules reasonably and fairly and would only impose a proportionate sentence; and (2) that the decision was a restraint of trade since it would debar him from dealing as a bloodstock agent.

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6. On 1 October 2004, Richards J. dismissed the claim on the basis that the court's role was supervisory; that the primary decision-maker (the Appeal Board) had made a decision within the bounds of its discretionary area of judgment; and that the penalty was therefore not unlawful.

7. Mr. Bradley appealed on grounds that included contentions that Richards J. had erred in assessing the court's function as being merely supervisory and in refusing to step into the shoes of the Appeal Board. Leading Counsel for Mr. Bradley abandoned all grounds relating to the approach of Richards J. and concentrated solely on an attack on the penalty as being disproportionate.

Held

8. The appeal was dismissed. When an individual takes up a profession or occupation that depends critically upon observance of certain rules, and then deliberately breaks those rules, he cannot be heard to contend that he has a vested right to continue to earn his living in that profession or occupation. A penalty which deprives the individual of his living in that profession or occupation may well be that only appropriate response to his offending.

Commentary

9. Permission to appeal had been granted on the basis that there was a compelling reason for the Court of Appeal to clarify the correct approach to determining increasing numbers of claims "of this kind". Presumably, the "kind" referred to is where a decision of the internal disciplinary function of a sporting body / authority is made the subject of court proceedings usually for breach of contract.

10. Although the grounds of appeal which related to the approach (and therefore the reason why permission had been granted) were abandoned before the hearing, the Court took the opportunity to endorse the approach of Richards J. in glowing terms. The Court said that the judge had correctly stated the law with a clarity that, as the Master of the Rolls said, he "could not hope to better". The Court made clear that the decision to abandon the "approach" appeal had been wisely made.

11. The importance of this case does not so much lie in its ratio (that someone who has broken the rules of his profession cannot then claim that he has nonetheless a right in uncontrolled terms to practise it) but in the review of the approach of Richards J. By reference to the judgment of Richards J., the Court has provided firm guidance that its role is supervisory in circumstances where the complaint relates to the contract between a participant / member of a sporting body and the body itself. It is for the primary decision-maker to strike the balance in determining the appropriate penalty. A penalty so imposed is unlawful only if it falls outside the range of reasonable responses to the question of where the fair balance lies.

(2005) SLJR 14

Horseracing – Internet betting – Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

BRITISH HORSERACING BOARD LTD v WILLIAM HILL ORGANISATION LTD

Court of Appeal (Pill, Clarke and Jacob LJJ)
13 July 2005 (Reporter: MO)

Facts

1. The British Horseracing Board Ltd ("BHB") participates in the management of the horse racing industry in the UK. One of its functions is to compile and maintain a database containing a substantial amount of information gathered from horse owners, trainers and race organisers. The database includes "pre-race information" such as the name, place and date of the race, the closing date for entries, entry fee and contributions to prize money.

2. There are three steps leading to the issue of pre-race information:

a) the registration of information about the owners, trainers, jockeys and horses together with records of the performances of the horses in each race;

b) the determination of weight adding and handicapping for the horses entered in the various races;

c) the compilation of the lists of horses in the races.

3. The latter activity involves a call centre of about 30 operators who record race entries. The entries are then checked to ensure, among other things, that the horse meets the correct criteria for the race and then the entries are published provisionally. A horse's trainer must then call to confirm, or "declare", the horse's participation in the race. The operators then decide which horses can be authorised to run given the number of declarations. A central computer then allocates a saddle cloth number and stall to each horse. This then allows a final list of runners to be published the day before the race.

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4. The information on the database is used by the industry, the media and bookmakers and their clients. The contents of the database, or of certain parts, are forwarded to subscribers, such as bookmakers, in the form of a "Declarations Feed" by Racing Pages Ltd. Information is also sent to subscribers of Satellite Information Services limited in the form of a "Raw Data Feed".

5. William Hill is a leading provider of off-course bookmaking services and runs an on-line betting service on two internet sites. The information on the sites represents a very small proportion of total amount of information on the database because for each race it lists only the names of the horses, the racecourse and the date and time of the race. This information is obtained in part from the Declarations Feed and Raw Data Feed, to which William Hill subscribes.

6. In March 2000 BHB sued William Hill alleging infringement of their "sui generis" right under Article 7 and Article 10(3) of the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases ("the Directive"). The Directive has been implemented in the UK by virtue of the Copyright and Rights in Databases Regulations 1997.

7. Article 7(1) provides that:

> ***Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.***

8. The trial judge, Laddie J, found in favour of BHB and granted it a permanent injunction against infringement of its "database right". The judge found that the database had been established at considerable cost and involved extensive work such as collecting raw data, design, selection and verification of data and insertion and arrangement of selected data. There was, therefore, a "substantial investment".

9. The judge concluded that in taking the information from the Raw Data Feed and loading it onto its own computer for use on its website, William Hill had committed an unlicensed "extraction" of a substantial part of the database. He also held that transmitting the data onto its website for access by the public was an unlicensed "reutilisation" of the database. This was an infringement of the right defined in Article 7(1).

10. Upon William Hill's appeal, the Court of Appeal referred the question of interpretation of the Directive to the European Court of Justice.

The European Court of Justice ruling ([2004] All ER (D) 146 (Nov))

11. The ECJ referred to the purpose of the Directive, as set out in the recitals, that is, the promotion and protection of investment in data storage and processing systems as part of the development of an information market. The ECJ referred to the phrase "investment in...the obtaining...of the contents" and drew a distinction between, on the one hand, the investment in resources used to find existing independent materials and collect them for a database, and on the other hand, the resources used to create such independent materials. The ECJ said that the right provided for by the Directive was intended to promote the establishment of the systems and not the creation of materials capable of being stored in a database.

12. Similarly, the ECJ said that the reference to "investment in...the ...verification...of the contents" of a database was a reference to the resources used to ensure the reliability of the information contained in the database and monitor the accuracy of the materials collected. The ECJ said that this was different to resources used for verification during creation of data or other materials which are subsequently collected for the database. These latter resources, it said, are not protected by the Directive.

13. On this basis, the ECJ said that the investment of the BHB in the selection of horses admitted to run in races related to the creation of the data which makes up the lists in the BHB database. This was not an investment in obtaining the contents of the database and could not be taken into account by the Court in determining whether the BHB's investment in relation to its database was a "substantial investment", within the meaning of Article 7(1) of the Directive.

14. The ECJ therefore ruled that "resources used to draw up a list of horses in a race and to carry out checks in that connection do not represent investment in the obtaining and verification of the contents of the database in which that list appears."

15. The ECJ delivered its ruling on 9 November 2004 and the matter came back before the Court of Appeal so that the ruling could be applied to the facts.

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Held (allowing the Appeal by William Hill)

16. The right under Article 7(1) of the Directive did not apply to the database to the extent that it consisted of the officially identified names of riders and horses.

17. Nor did it apply where the BHB published a list of provisional runners prior to final declarations prior to big races such as The Derby.

Commentary

18. BHB argued that under the ruling, investment in a database was divided into two kinds: one being the gathering, recording and verifying of pre-existing data and the other being creative. BHB argued that essentially all BHB did was gather, record and verify pre-existing data and, in any event, there was at least a substantial investment in that activity.

19. BHB argued that the official race list, at the moment before it is published, is merely gathered in and verified material (namely the intentions of owners, provisional and undeclared) so that it therefore fell within the Directive under the ECJ ruling. Whilst accepting that there were checks to see if the information satisfied the criteria for the race, BHB argued that that activity was purely mechanical and not creative.

20. However the view of Jacob LJ in the Court of Appeal (with which the other members of the Court agreed) was that the ECJ had rejected that approach, focussing instead on the final published database. Given that only the BHB can provide an official list of what are the accepted declared entries then it is the BHB's stamp of authority which distinguishes the final published list from the a mere database of existing material. This means, Jacob LJ held, that the database contains unique information, the creation of which is not protected by the Directive.

21. Given that (save in the case of very large races) William Hill used the information from the final, unique, official list rather than any pre-existing version, there was no infringement of the right conferred on BHB by the Directive.

(2005) SLJR15

Clinical Negligence – Surgeon giving negligent advice to professional footballer – whether duty owed in contract or tort to footballer's club.

WEST BROMWICH ALBION FOOTBALL CLUB LTD v EL-SAFTY

Queen's Bench Division (Royce J) [2005] EWHC 2866 (QB). 14 December 2005: (Reporter: TR)

Facts

1. The Claimant Football Club ("the Club")'s senior physiotherapist examined one of the Club's players after the latter suffered a knee injury during training in November 2001. The physiotherapist advised the player to see a surgeon and said that the Club used the Defendant surgeon for this sort of injury.

2. The Defendant had treated players from the Club since about 1984, and accepted that he had treated about 34 patients from the Club in the period 1997 to 2002. Overall he treated some 3000 patients per annum.

3. The financial side of the Defendant's practice was mainly handled by his wife, who acted as his secretary. Invoices were issued to the Club, as were "chaser" letters if invoices went unpaid. Generally the invoices were paid by the Club's BUPA healthcare insurance, but the Club paid for treatment not included in the policy, and the Defendant looked to the Club for payment if BUPA did not pay.

4. The Defendant saw the player at his home, with the Club's senior physiotherapist in attendance. Although the physiotherapist's witness statement said that he had "instructed" the Defendant on behalf of the Club to investigate the injury and advise the Club on the best way to treat it, in evidence he accepted that "instructed" was not his expression, and that he had in fact attended on behalf of the player.

5. The Defendant advised reconstructive surgery on the knee, which was unsuccessful and caused the player to retire from professional football. The Club sued for breach of contract and in tort. The Defendant accepted that his advice had been negligent, but argued that he owed no duty of care to the Club, whether in contract or in tort. The existence of a duty of care in contract or tort was determined as a preliminary issue.

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Held

6. There was no contract between the parties, nor an intention on either side to create legal relations. The contract had been pleaded as an oral instruction by the physiotherapist, acting as the Club's agent, to investigate the injury and recommend further treatment, for reward. In evidence however, the physiotherapist considered his role as a referring healthcare professional and not an agent for the Club, instructing the Defendant for reward.

7. Although invoices were sent to the Club for payment, this was merely "a convenient mechanism to collect the fees". The judge found that the Defendant regarded the patient as having the primary liability to pay, and did not intend to enter a contract with the Club. The Defendant pointed to the potential conflict of interest of entering a contract with the Club, with a Club wishing a consultant to return a player to service before it was in the player's best interests to return to the pitch.

8. No duty of care was owed in tort. As a matter of principle a doctor could owe a duty of care to a person who was not his patient, but whether or not a duty of care did in fact exist would depend on the circumstances of the case. The judge applied the threefold test of Lord Bridge in Caparo v Dickman [1990] 2 AC 605:

8.1. The loss should be reasonably foreseeable;

8.2. There should be sufficient proximity between the parties to the claim;

8.3. It is fair, just and reasonable to impose the duty of care.

9. He found that it was reasonably foreseeable that the Club might suffer loss if the player was negligently treated so that he was forced to retire. He considered the real issues to be proximity, and whether the imposition of the duty of care was fair, just and reasonable.

10. In considering proximity the judge applied the six headings suggested by Neill LJ in James McNaughton v Hicks Anderson & Co [1991] 2 QB 113:

10.1. The purpose for which the statement was made: in this case it was advice to the player himself;

10.2. the purpose for which the statement was communicated: it was communicated to the physiotherapist, but in his capacity as the referring professional. The physiotherapist had said that he received the statements in order to help the player return to fitness;

10.3. the relationship between the adviser, the advisee and any relevant third party: although the Defendant had treated many of the Club's players over the years before 2002, he had also treated players from other clubs, and the Club's players made up a tiny percentage of those advised or treated privately.

The Defendant's relationship with the player was that of consultant and patient. The physiotherapist was present at the consultations with a principal interest in the welfare of the player, albeit that he was the Club's physiotherapist, and "in that sense" was there on behalf of the Club.

10.4. The size of the class to which the advisee belonged: the Club was the employer of the player and in a class of one.

10.5. the state of knowledge of the advisor: the judge found that the Defendant saw himself as giving advice to the player as his patient. The Defendant must have been aware that the Club's physiotherapist would hear and consider the advice. However in receiving that advice the judge said that the physiotherapist was acting, if not entirely then to a very large extent, as a referring healthcare professional.

11. The judge concluded that the evidence did not support a finding of sufficient proximity between the parties. He continued that, even if there was sufficient proximity, it would not be fair, just and equitable to find that there was such a duty. The potential tortious liabilities of consultants advising high-worth sportspeople would be vast if such liabilities extended to damage caused to the individual's club or country. Disclaimers might be necessary on the part of the consultant, and insurance premiums affected. The judge noted that no reported case had been cited to him showing a duty of care being held to exist in similar circumstances.

12. Overall therefore on these facts, no duty of care was owed in tort by the Defendant to the Club.

Commentary

13. The case is a useful reminder of the principles to be adopted in assessing both (i) whether parties have intended to create contractual legal relations, and (ii) whether a duty of care arises in given circumstances. The leading cases of Caparo v Dickman and James

McNaughton v Hicks Anderson remain the framework against which to assess allegations of the existence of tortious duties of care.

14. It is clear that the Defendant consultant had to compensate the player himself for his losses, but the judge was obviously concerned about the potentially huge liabilities owed by medical professionals to clubs, counties and national sporting bodies if such parties were able to claim for losses incurred as a consequence of negligent advice given to "their" athletes.

15. The case also highlights the dangers of witness statements which do not mirror a witness' own words. The physiotherapist's statement that he had "instructed" the Defendant on the Club's behalf was resiled from in evidence, and this appears to have become a key weapon in the Defence argument that nobody from the Club intended to create legal relations with the Defendant. BASL

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Reviews

Reviews

Neville Cox & Alex Schuster (with Cathryn Costello), Sport and the Law (2004) First Law, Dublin (514 pp). €135.00 (hardback).

Sport and the law is an amalgamation of many different legal disciplines applied to factual scenarios arising from a sporting context and supplemented by a growing body of legislation specifically applicable to sport. The relationship between sport and the law has traditionally been located in disputes of a contractual and commercial origin. The leading jurisdiction has long been the United States. More recently, the UK and Ireland have as jurisdictions in themselves, and as member states of the European Union, witnessed the emergence of an area of law loosely referred to as "sports law".

In the UK and Ireland, the evolution of sports law was chartered initially by eminent scholars such Grayson and Beloff, the latter contributing an insightful foreword to this text in which he states; "For a subject which is said not to exist, sports law has spawned a remarkable number of books." On this particular book, Mr. Beloff QC, President of Trinity College, Oxford and a leading member of the International Court of Arbitration for Sport, is of the opinion that it is an essential and valuable addition to the sport lawyer's library.

At first glance, Cox and Schuster's approach to this area of law is, however, conservatively drawn. Performance enhancing drugs, judicial review and decisions of sporting bodies, civil and criminal liability, the business of sport, EC law and gender issues form the basic contents. A comparative approach focussing mainly and understandably on the United States and the United Kingdom with occasional reference to "the Irish position" forms the basic structure. Nonetheless, that somewhat unadventurous layout does not take away from a number of innovative, controversial and perceptive views on the state of Irish sport and the impact which the law has had and will have on its operation and administration.

For example, chapter two, which concerns judicial scrutiny of the administrative decisions of sports governing bodies, should be mandatory reading for all those involved in the regulation of Irish sport. The form and substance of challenges to decisions of sporting bodies is concisely outlined. The chapter alerts Irish sporting organisations of the need to constantly review the nature and fairness of their disciplinary hearings.

The experience of Ireland's leading sporting organisation, the Gaelic Athletic Association, in the Irish courts during 2004 supports the authors' concerns. A number of GAA players, suspended on disciplinary grounds in an early part of a championship, sought interlocutory injunctions in order to put a stay on the suspension and participate in the latter stages of that championship (Cummiskey, G. "High road should be closed off says Kelly" The Irish Times, 13 August 2004.). In the United States, this type of opportunistic legal tactic is called an "ambush" injunction, the most celebrated example of which was Tonya Harding's legal ambushing of the US Olympic Committee permitting her to compete in the Winter Olympic of 1994, despite being under investigation for an assault on her rival Nancy Kerrigan (Harding v. United States Figure Skating Association 851 F. Supp. 1476 (D. Or. 1994) vacated on other grounds, 879 F. Supp. 1053 (D. Or. 1995). Returning to Ireland, the frustration suffered by suspended players is understandable but the repercussions for the GAA and Irish sport are serious. Aggressively challenging such injunctions, which hitherto has not been the practice of the GAA, is an option, albeit an adversarial and expensive one (Moran, S. "GAA must win fight for discipline" The Irish Times, 13 October 2004). It is submitted that the best advice to those involved in Irish sport is to carry out an audit of their disciplinary procedures based on the framework provided in this text.

One of the most pleasing aspects of the text is the manner in which the authors move fluently from the complexity of topics such as the international image rights of professional sports stars, to the practicalities of the Occupiers' Liability Act 1995 for local sports clubs. It is admirable that slightly esoteric aspects of sport and the law, such as the legality of boxing and lightening on a golf course, receive due consideration. Consistently, the analysis of such "staples" as the Bosman case, contained in chapter eight, is fresh and discerning (Case C-415/93, Union Royale Belge des Sociétés de Football Associations ASBL and others v Jean-Marc Bosman [1995] ECR I-4921.) All of this portrays not only knowledge of the legal issues involved but a familiarity and understanding of the nature and operation of the sports in question. In fact, even where a topic is very much at an embryonic stage, notably the impact of Irish equality law on sport, chapter ten's analysis is as thorough as could be expected.

Reviews

The strongest section of the book is chapter three's review of performance enhancing substance and methods. It is also contains its most provocative opinion. The authors argue that it is not quite clear what ethic is being protected by international sport's various anti-doping policies. They point out that modern sport is replete with technological and chemical aids – food and vitamin supplements, nitrogen and oxidisation cylinders and equipment made of the most sophisticated of compound materials. In a strongly worded piece, Cox and Schuster conclude that those who seek to maintain a Corinthian ethic in professional sport have failed to appreciate the impact of professionalisation. The professional sports industry is a win-at-all-costs business and the authors contend that "in this light and paradoxical as it may seem, it may be the prohibition rather that the use of drugs in sport that strikes at the dominant ethic thereof."

While strictly a personal opinion, it is submitted that this is a disappointing and weak contention. In a country that has won only nine Olympic gold medals, four of which have been tainted by allegations of substance abuse, a more sophisticated approach could have been considered. Moreover, the text's perspective is at odds with view of the global sporting community as reflected in the creation of the World Anti-Doping Agency and the decisions of the International Court of Arbitration for Sport. Both WADA and the ICAS forcefully endorse the principle of strict liability in the fight against the use of performance enhancing drugs in sport.

Finally, those involved in the organisation and administration of Irish sport may be somewhat demoralised by aspects of text. The hundreds and thousands of volunteers – officials, referees, coaches etc. – who offer their time and services in the name of the sport will in particular find much to worry them in chapter five's review of civil liability in sport. Nevertheless, Irish sport should be thankful that despite its increasing exposure to the law, it now has at its disposal such an erudite, sympathetic and scholarly work as this. BASL

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