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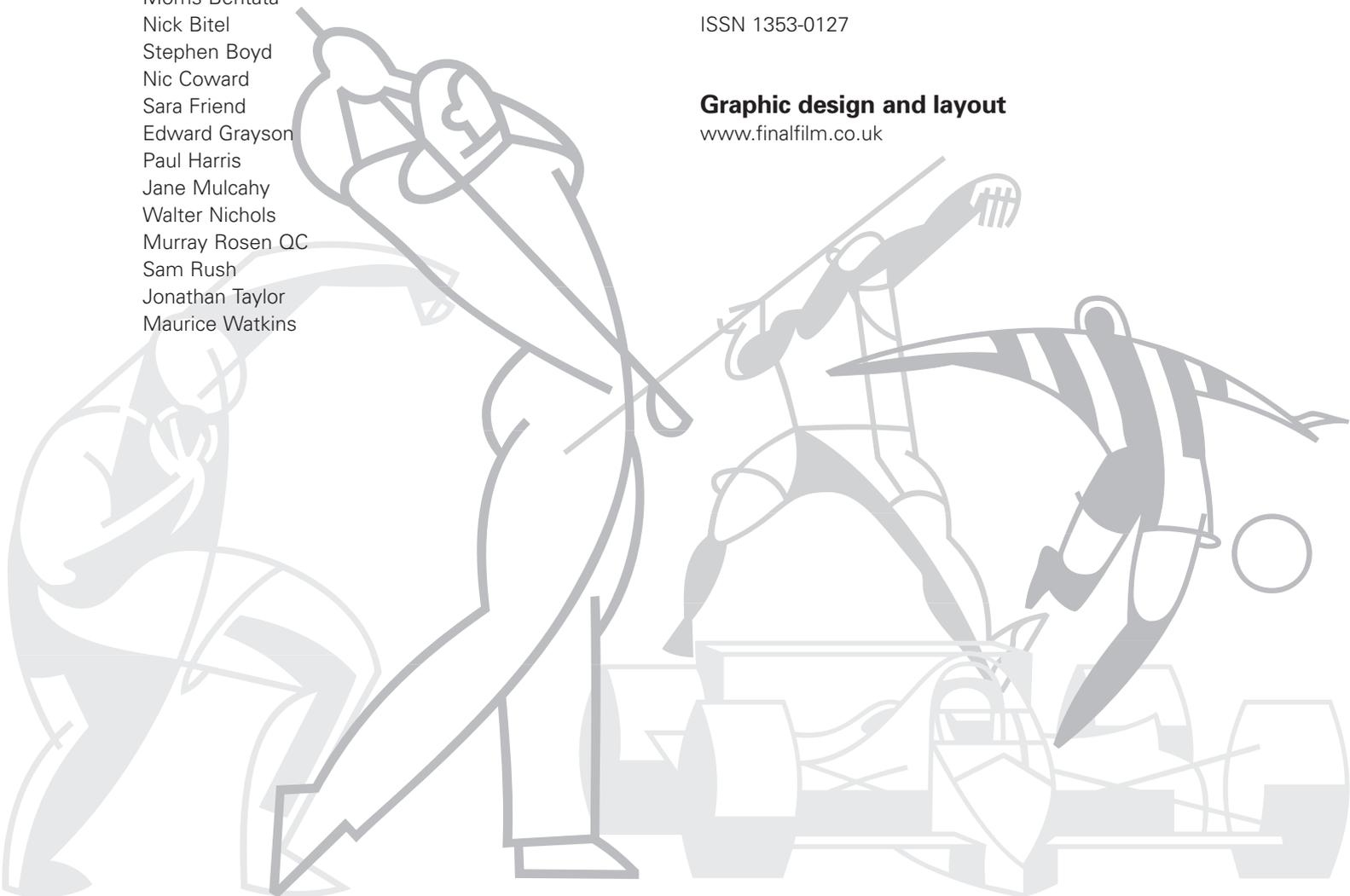
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Editorial

By Simon Gardiner, Editor

This issue of the Sport and the Law Journal covers a number of on-going and current issues. The Opinion and Practice section provides firstly a number of presentations from the November 2006 Annual BASL Conference held at the Emirates Stadium, the new north London home of Arsenal FC.

These are provided as a separate PDF file on the web page for this issue. The conference was a resounding success, both in terms of the high standard of speakers, but also the networking opportunities with the coming together of almost 150 delegates. The Organizing Committee of Paul Harris, Nic Coward and Fraser Reid should be warmly congratulated. A special mention must be made of Fraser, who has recently retired from the Board of Directors, after many years of admirable service.

There is also another interview carried out by Stephen Boyd, this time with Mel Goldberg, the new chairman of BASL. Mel discusses how he became involved in sports law and provides an indication of what he considers should be the direction and objectives of BASL over the next few years.

Finally two articles provide evaluation of developments in the governance of English football. Simon Gardiner considers the on-going Inquiry by the Premier League into 'Bungs' in English football. Mel Goldberg and Mel Goldberg and Simon Pentol consider the comprehensive set of revised regulations to clamp down on the most unsavoury aspects of player representation recently produced by the FA and examine the in particular, the role of the lawyer as opposed to that of the agent.

The Analysis section features two articles. Seema Patel and Simon Boyes' 'After Bosman: The Rise of the Bos(wo)man?', focuses on the whether the continued separation between male and female teams sport, particularly football, can be legally justified. Secondly, Neal Hooper's "'The WADA Code is fundamentally flawed.'" Discuss', provides an evaluation of the workings of the World Anti-Doping Code a number of years into its implementation.

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

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



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Opinion and practice



Interview with Mel Goldberg

By Stephen Boyd, Barrister

SB Let's start with your background. I understand that you went to Cambridge.

MG Yes, I did law at Cambridge. I always wanted to be a lawyer. My older brother is a solicitor, also mad keen on sport, better than me at most things, and so I kind of followed him: went to the same school, did similar subjects and the same sports.

SB Were you good at sport at university?

MG I got a blue in swimming and water polo. Those are the sports I concentrated on as an 18-year-old. I also played lots of other sports, including football, cricket, squash and tennis – most sports in fact. I just loved sport. I still play lots of tennis and work out at the gym 2 to 3 times per week.

SB So you became a lawyer really as a natural progression from doing law at university.

MG I never actually thought about doing anything else. I saw how well my brother did and I always wanted to follow in his footsteps. I've always had a logical and clear mind and tend to think in bullet points. I've always been very well organised which, I believe, is a great asset for a lawyer.

SB How did you come into sports law?

MG Firstly, I was always interested in sport. Secondly, in 1970 I went to Mexico to watch the World Cup. By coincidence I stayed at the same hotel as the England team, and got to know the players and management. Thirdly, later I went to live in America for three years. Sport is big business there and I could see there was enormous scope for development in this country, which was at that time comparatively backward in terms of sports law and sports representation. When I returned to England in 1990, I could see an opportunity for people with knowledge of the law to represent players if they were also knowledgeable in sport and understood how to maximise a player's income.

SB So prior to you coming back from America, you hadn't done any agent's or marketing work?

MG Not a great deal, although I looked after the affairs of Jonah Barrington and Johangir Khan, both world squash champions. I was also Chairman of the International Squash Players Association (ISPA).

SB So it was really being in America in the early 90s that opened up a new field for you.

MG Yes. I could see that there was a gap in the market. In the 80s, sports law as such didn't really exist in the UK, and I could see that players were not receiving professional advice. I could also see the huge impact that television would have on football and that players receiving large earnings would need advice about how to look after their affairs properly.

SB Did this coincide with the start of the Premiership?

MG Exactly.

SB And Sky came in about that time?

MG Sky changed everything. The reason there is so much money in football today is not because the football is better than it used to be, although it probably is, the reason is television. Television dominates our lives and, if you want to be successful, you have to appear on television.

SB Apart from the squash players, did you have any sports clients prior to the 90s or did it all start then?

MG I represented other sportsmen prior to the 90s, mainly footballers. I did quite a lot of boxing work when I was in the States, dealing with promoters like Don King. So I had lots of boxers I was acting for regularly when I came back to England. I actually managed two boxing World Champions (Tyronne Booze and Michael Bent). It was only later that I did more work that was sports specific. However, I still do general work for sports people.

SB What have been your most interesting clients/cases?

MG It doesn't take me long to work that one out. The most interesting case I did was the Grobbelaar match-fixing case in 1996. It was an amazing case. I acted for one of the players indicted, Hans Segers. I had done his contract with Wimbledon and, when he ran into difficulties, he phoned me. The case was at Winchester, which lasted three months, and the jury couldn't agree. So there was a retrial. Happily, he was acquitted. I wrote a book about it entitled "The Final Score" and my mother bought all the copies! As a result of that you

Interview with Mel Goldberg

cannot buy it anymore, it is sold out. I also gave away about 4 million copies! Like Wayne Rooney, I have now written more books than I have read (not quite true). You can't buy it anymore; it's sold out.

SB You've done work for non-sporting celebrities as well.

MG Yes, like Jordan. Jordan came to me as a client when she wasn't famous at all, and her career went through the roof. Now she is arguably the most famous woman in England. She even consulted me about breast enlargement. I do not know how she knew I was an expert in that field! I also act for Dionne Warwick who is a lovely lady.

SB Tell me about your appointment at the Amateur Swimming Association.

MG It came out of the blue. I stopped doing competitive swimming when I was about 35. Until then, I was training and regularly attending at the Otters Swimming Club. I got a phone call last year from the son of my swimming trainer, the coach at the Otters, who said that the ASA chairman had retired, they were looking for a new chairman and would I consider the position if he put my name forward. I was really amazed because I hadn't been involved in swimming for a long time and I said yes, I would be happy to do that.

They short-listed four people. To my surprise, I was unanimously appointed. I was really honoured, especially with the Olympics coming up, and swimming now takes up a lot of my time. I am looking forward to Beijing in 2008 and the London Olympics in 2012. This year I went to Melbourne Australia for the Commonwealth Games.

SB What ideas do you have for BASL under your chairmanship? Do you see the Association going off in any new directions or that there should be a different emphasis in any way?

MG First, I should like to pay tribute to the outgoing chairman, Murray Rosen, who did a great job. I'm also very pleased that he has agreed to stay on as a director. I'd also like to say a big thank you to Maurice Watkins, our outgoing president, a founder member who is still going to make the time to be a director and come to meetings. I think that is fabulous. I'd also like to welcome Michael Beloff QC, as the new president of the Association. We've just celebrated 10 years since the

Association was founded. The best thing it does is the annual conference, which generates a good attendance and quality speakers. I would like to expand the number of events we hold, some of which could be arranged to coincide with great sporting events. For example, one year we had a conference up in Manchester when Man United were playing a European cup match. I'd like to do more of that kind of thing. It may be interesting to hold the annual conference at different venues, although I must say that the Emirates Stadium this year was superb. Possibly next year Wembley Stadium will be ready and people will want to go there. I would like, if possible, to have a joint conference with Swiss lawyers in Geneva, so people can see what it's like to be a sports lawyer in a different country, and to form associations, which might be very useful from a business point of view.

One of the things I would like to see is the Association playing an active consultative role in matters relating to the governance of, and laws affecting, sport e.g., how do we feel that football transfers should be conducted to avoid the "bungs" culture? Our opinion should be sought. When you consider the quality of people who are directors of the Committee, with vast experience in different fields, I consider that we could make a contribution to the debate. My big shout is for every sportsman to have his or her lawyer, not necessarily an agent, who is well qualified in that field.

SB Is it true that you wear an Arsenal shirt in bed at night?

MG Not quite but I do have an autographed Arsenal shirt in my office, which upsets certain people, like Spurs players, when they come in. I have been thinking about having a swivel shirt so that I can turn it over. Obviously I support Arsenal, but I also like watching good football whoever's playing. I often go to Chelsea, for example.

Ambitions? If I had a magic wand it would be a tough choice between scoring the winning goal in a World Cup Final, and winning the Mens Singles Title at Wimbledon. That is why I keep training (joke)! I would probably choose the World Cup Winning goal since there is more coverage on television!

SB Thank you Mel

MG Thank you Stephen. 

Football: Bungs and brown paper bags revisited

The 'bung' became part of football and public parlance in the 1990s. These payments not declared for tax purposes and made to facilitate or sweeten particular transactions, have been common in football and other British sport.¹ They have been very much the tradition of 'doing business' in sport. In football, the bung is essentially where an undeclared payment is made to a club official by a player agent to facilitate a transfer deal to be completed.

By Simon Gardiner

However in football it is not only bungs that have been examples of financial irregularities. In the most commercialized of British sports, there is an infamous history generally of questionable financial payments.ⁱⁱ There are examples that date back to the early days of the professional game. Call them what you will, bungs, sweeteners or plainly illegal payments, they have been made to ensure deals are concluded. The illegality derives from the fact that they are secretive and not disclosed for tax purposes. A major question is whether they are illegal just as far as the internal rules of football or whether they are also illegal as far as the law.

History of Financial Impropriety in English Football

The development of the professional game was in fact first initiated by 'illegal payments' to players by Preston North End in 1884. The payments were contrary to the rules of the Football Association at the time, but as the scale of payments by other clubs in the north of England increased, this led to the professional football primarily developing in the north of England. In 1919, Leeds City was expelled from Division Two for illegal payments to players. Leeds United was formed to replace them. Until the 1960s and the introduction of a minimum wage for professional footballers, largely achieved by the campaign of Jimmy Hill of the Professional Footballers Association, the wages were reasonable in terms of average wages, but in no way comparable with wages of footballers today. In the context of the insecurity, risk of injury and short term nature of the job, the scope for additional backhand payments was obvious.

There are more recent examples of tax-free (ex-gratia) payments, often involving collusion between clubs. In the early 1990s, the Swindon Town chairman was given a prison sentence after he was found guilty of conspiracy to defraud the Inland Revenue. It arose that

a number of other clubs had colluded with Swindon concerning transfers between the clubs. The other clubs agreed that as part of the transfer Swindon would pay thousands of pounds direct to the player. To disguise the payment, the selling club agreed to act as a conduit for the money by describing it as a signing-off fee, which they were paying their player. This payment would be disguised as a lump sum payment terminating the services of the player. To facilitate this, the funds (from Swindon) would be routed through the club that was selling the player.

Agents invariably play a significant part in any transaction. The one modern incident that has led to financial dealings coming under the gaze of the law is that involving Tottenham Hotspur. The following extract from Williams' *Football Babylon* presents the events:

June 1992 saw a routine check of Tottenham Hotspur's PAYE files by the Inland Revenue which, revealed serious financial irregularities – a can of worms had been opened. As the taxmen probed deeper into the club's affairs, more and more irregularities were uncovered and a full scale Inland Revenue investigation began. Spurs commissioned city accountants Touche Ross to do a thorough review of the club's affairs. The irregularities under Irving Scholar's regime were numerous and scandalous. Amongst the revelations uncovered were ex-gratia payments to players that would result in considerable back tax liabilities for Spurs. Belgian Nico Claesen had been given a secret payment of £42,000 when he joined Spurs in 1986 which had not included the statutory PAYE deductions. Icelandic international Gudni Bergsson also benefited from a payment which was, like Claesen's, made via his former club. Irving Scholar authorised both payments.

Paul Gascoigne's and Chris Waddle's pension papers were backdated by two years and loans to both players used to buy houses around London were illegal. Scholar also gave a secret undertaking to both players, guaranteeing them ex-gratia payments of up to

Football: Bungs and brown paper bags revisited

£120,000 after they had left Spurs. A letter from Scholar to Gascoigne's agent Mel Stein promised to pay the player '£70,000 net of all UK taxes, up to a maximum of £120,000 gross'. The implications of such payments were, in the words of Touche Ross, 'like having a gun held to the club's head'. The special inquiry at Tottenham began on 17 July 1992. A few months later, in November, the Inland Revenue demanded a payment of £500,000, with the promise of more to come.

The transfers of Chris Waddle to Marseille and Paul Gascoigne to Lazio both involved payments to the football agent Dennis Roach who, as *The Sunday People* reported, was being paid by both sides in the deals which was in total breach of FIFA, UEFA and FA regulations. Scholar brought Roach into the equation and, even after Italian fixer Gino Santin was detailed to finalise Gascoigne's Lazio transfer, he received a pay-off payment of £27,500. However this was not the end of the line for Roach who continued to receive money. A Spurs document stated:

'It would appear that Mr Roach has been on the payroll of the club, unknown to Mr Solomon and Mr Berry, having been paid £64,400 in the year ending 31 May 1991. It would also appear that Lazio may also be paying Mr Roach in connection with the Gascoigne sale. This is forbidden both under Football League and FIFA regulations.'

Most damaging of all were the irregular payments made over three transfers: the £250,000 transfer of Mitchell Thomas from Luton to Spurs in 1986; the £425,000 signing of Paul Allen from West Ham in 1985 and the £387,500 transfer of Chris Fairclough from Nottingham

When Irving Scholar left Spurs the club was in big trouble. Terry Venables desperately searched for a business partner to save the club from financial ruin and certain closure.

Forest in 1987. Thomas had been given a £25,000 loan when he joined Spurs but papers forwarded to the Football League Tribunal at the time of transfer omitted to mention it. Thomas also received a letter stating that, in effect, the money was never going to have to be repaid. The loan was made three weeks before he actually became a Spurs player. Allen and Fairclough also received loans before joining Spurs – £55,000

and £25,000 respectively – and neither payment was disclosed to the Transfer Tribunal.

When Irving Scholar left Spurs the club was in big trouble. Terry Venables desperately searched for a business partner to save the club from financial ruin and certain closure. His knight in shining armour (or so he thought) was Amstrad boss Alan Sugar, a man with a bruising business reputation. It was not long before Sugar became concerned about the goings on at Spurs, the result of a combination of rumours and Inland Revenue facts. The relationship between Venables and Sugar became increasingly uneasy. Venables was dismissed by Sugar in a blaze of publicity and in 1993 the two men slugged it out in the High Court as Venables took legal action against his former partner. The legal proceedings were the usual claim and counterclaim, including evidence suggesting that some managers accept cash bungs as part and parcel of transfer deals. Alan Sugar knew that Tottenham's troubles with the Inland Revenue were to be laid directly at Scholar's door, yet Venables felt that Sugar consistently tried to portray him as the bad guy. As manager of the team under Scholar, Venables was employed by Tottenham Hotspurs FC, a subsidiary of Tottenham Hotspurs PLC and each organisation had its own independent board of directors. The FA examined the evidence and cleared Venables of any wrong doing. They must have been satisfied because, two years later, they appointed him England coach.ⁱⁱⁱ

An FA Commission of Inquiry ruled Tottenham Hotspur were guilty of 'avoidance and evasion of fees' concerning transfers. They were fined £600,000, had 12 points deducted from the next season's FA Carling Premiership total and were barred from the 1994–95 FA Cup. The subsequent three-man FA Appeals Board cut the 12 point deduction to six. The ban on the club's participation in the 1994–95 FA Cup remained and the fine was increased from £600,000 to £1.5 million.^{iv} Tottenham then considered taking the FA to the High Court but agreed to go to arbitration in keeping with the guidelines of FIFA, the sport's world governing body. The independent arbiters made a confidential decision but decreed that the FA acted outside its jurisdiction.^v Subsequently the FA ruled that Tottenham still had to pay the £1.5 million fine imposed for financial irregularities but it was confirmed that the FA Cup ban and six point deduction from their FA Carling Premiership total had been annulled.^{vi} It was the end of that particular saga.

Football: Bungs and brown paper bags revisited

The 'Bungs' Inquiry I

The first inquiry into bungs in football began in 1995. It commenced in response to allegations made in the High Court in a case between Terry Venables and Alan Sugar surrounding the transfer of Teddy Sheringham from Nottingham Forest to Tottenham Hotspur, concerning allegations of illegal payments made to Venables and the Nottingham Forest manager, Brian Clough. This court action was the culmination of a drawn out feud between Venables and Sugar and on-going allegations as to the fitness of Venables' acting in financial dealings.^{vii} Some bemoaned this as another example of the malaise of football and sport in general. Questions were raised in Parliament, primarily by the Labour MP Kate Hoey.^{viii} Many people in football said that this was all part of the culture and tradition. In another court case involving Terry Venables, the former Scottish international Frank McLintock, whose First Wave Agency acted in the Sheringham transfer, was paid £50,000 in cash on an invoice that did not mention his help in transfers. Justifying the payment, he said at the trial that:

"This is used by a number of clubs to get out of what they consider to be the antiquated laws of the Football Association. Some agents call it merchandising and have done no work of that kind whatsoever, but we have at least done some genuine work, which we can prove."^{ix}

The bung allegations led to an FA investigation carried out by an inquiry team consisting of the Premier League chief executive Rick Parry, Robert Reid QC and ex-player, Steve Coppell. After more than three and a half years of investigation, the Report was published in September 1997.^x The report considered many domestic transfers and also looked at the transfers of all foreigners to England between 1992 and 1994, around 35 cases and the increasing influence that agents were having on financial transactions. The main 'prosecution' made under FA rules was against the then Arsenal manager, George Graham, whom was adjudged to have pocketed around £400,000 in illegal payments from Norwegian agent Rune Hauge to sign Pål Lydersen and John Jensen. Graham received a national and international ban lasting for one year.^{xi} Graham quickly returned to the world of football at the end of his ban.^{xii}

As far as the alleged £50,000 bung in the Sheringham transfer, the Report concluded, 'We are satisfied that cash payments were made from the £50,000 to members of staff at (Nottingham) Forest'.^{xiii} A cash culture was exposed as existing at Forest, with members of the management and coaching team regularly receiving money-filled brown envelopes after transfers. Ronnie Fenton, the assistant manager at

Nottingham Forest at the time of the allegations and chief scout, Steve Burtenshaw, were charged with misconduct. Due to his ill-health, no further action was taken against Brian Clough.

So was the Inquiry, as some would suggest, merely a cosmetic exercise? The Report was over 1,000 pages in length. It certainly exposed the lack of financial probity within English football. However, it seemed there was no real political will within football to really engage with and expose the problem and bring disciplinary actions against all the potential actors. As the Inquiry progressed, what was unearthed became the real problem for football in terms of 'what is to be done?' Graham was very much the symbolic scapegoat.

Bungs Inquiry II

In March 2006, the Premier League initiated a second inquiry into bungs in football. Lord Stevens, the ex-Metropolitan Police Commissioner was appointed to head a team of investigators. This was in response to a number of allegations made by high profile individuals. The Luton manager Mike Newell, said he had been offered bungs a number of times. He commented: "I think it's become a culture in football and it's almost accepted and brushed under the carpet."^{xiv} Sven-Goran Eriksson, at the time England coach, claimed three unnamed Premiership clubs were riddled with corruption.^{xv} The Premier League stated the report was commissioned simply to find out where money in football transfers went – to clubs, players or agents – and if there were illicit payments to managers.

In September 2006, a BBC TV Panorama programme was aired entitled '*Football's Dirty Secrets*'. Undercover filming purported to show a number of agents claiming that some managers routinely accepted bungs during transfer deals.^{xvi}

In October 2006, an interim report which focussed on over 350 transfers involving Premier League Clubs that took place between January 2004 and January 2006 was presented. Lord Stevens declared 323 transfers as being clean but indicated that he would seek to use Football Association rules to force agents to open their bank accounts as investigations continue into the remaining 39 transfers, most of which are domestic transfers.

Football: Bungs and brown paper bags revisited

A total of 39 recommendations were made in the Interim report including:

- The creation of a body to handle the audit of transfers, instead of the Football Association;
- The need for a culture of rule compliance needs to be developed within football;
- Relatives acting as agent should not be paid in deals;
- Professional Footballers' Association should not act as agents.

The first three of these are welcome indications that the Report may bring about meaningful change. However the fourth seems to be odd. The PFA has shown itself able to provide a sound agency service for number of its members, free from the motivation of making money. As PFA chief executive Gordon Taylor commented:

"I find it totally incongruous and bizarre that instead of concentrating on transfer dealings he chose to single out the PFA, without even having the courtesy to contact us, and tell us what we should and shouldn't do ... anyone with any knowledge of football would know we are fully transparent in what we do ... put it this way: if it was just the PFA acting as agents for players, there would be no suspicions of any backhanders at all."^{xvii}

In response to the Interim Report and earlier concerns, the FA has already imposed some initial reforms. The

The Football Association has approved new regulations concerning agents following a meeting of the FA Council during summer 2006. The measures will be introduced in time for the 2007 summer transfer window, subject to Fifa approval.

FA compliance unit is to have more resources and greater powers. The Football Association has approved new regulations concerning agents following a meeting of the FA Council during summer 2006. The measures will be introduced in time for the 2007 summer transfer window, subject to Fifa approval. They new regulations include a ban on dual representation, whereby an agent acts for both parties in a deal. And overseas agents will be required to register with the FA when involved in a transaction in England,

thereby giving the FA jurisdiction over them. Clubs will also now not be able pay agents directly – instead payment will be deducted from a player's salary. It is likely that there will be further changes to player agent rules in the future.

Together with the internal governance changes accepted by the FA in response to the Burns Report, the FA is likely to be more responsive in engaging with financial impropriety.^{xviii}

The final Report is awaited. If the Bungs Inquiry I can be adjudged to have been a window dressing exercise that failed to engage with the reality of the problem and produced one symbolic prosecution, how confident should one be that Bungs Inquiry II will be more effective?

Evaluation of Current Inquiry

A number of points can be made:

This investigation seems to have greater independence than its predecessor. Taking a lead from the International Cricket Council's investigation into match fixing a few years ago who appointed ex-London Metropolitan Police Commissioner, Lord Condon as the head of its investigation, the Premier League have involved a similar high profile and independent investigator. Lord Stevens has reportedly been backed up a 10-man team of forensic accountants and fraud investigators.

A number of key footballing figures have been prepared to act as 'whistle blower' and air concerns on financial dealings.

The Panorama programme has added weight to the feeling that there is a real problem of financial probity in football.

The football authorities have acknowledged that they need to act at this time in terms of the exercise of effective good governance so that their self-regulation can continue to be the dominant form of regulation.

This dynamic is increasingly determined by growing political calls for more external regulation of professional football in particular and professional sport generally (see the Independent European Football Review).^{xix}

However, a more cynical view might be that this Report may again as in the 1990s, result in action against a relatively small number of scapegoats without really changing the pervasive culture of English football.

Football: Bungs and brown paper bags revisited

Sporting organizations are extremely closed institutions and football has shown itself very resolute at resisting meaningful inspection and change

There are grounds for optimism that what ever the result of the on-going Bungs Inquiry, positive change is occurring. There is increasing awareness within the football world that the characteristics of effective sports governance need compliance with the legal and ethical requirements of financial probity. Over the last 15 years, significantly large amounts of 'new monies' have into the English game from the much increased value of TV rights and the exploitation of other commercial rights, and as such is a big business.

What is required is adoption and adherence to appropriate corporate codes of conduct that commit them to a strict anti-corruption policy. On the international stage, the IIC can be seen as a good exemplar of a body that has taken financial corruption, in that case, match fixing seriously. An emphasis on robust investigation monitoring and a new punitive disciplinary code, together with prevention evidenced by protection for whistleblowers and education of players and officials has upheld the integrity of international cricket. On the national stage, the changes in the organizational structure and interventionist powers in horse racing have again improved the integrity of that sport.

English football needs to show it has the same resolve to aspire to the highest standards of ethical behavior. 

- i See the history of illegal payment in athletics, Downes and Mackay, *Running Scared: How Athletics Lost Its Innocence* (1996), pp 16–17.
- ii See Burrell, I and Palmer, R, 'Taxman blows whistle on football's fiddles', *The Sunday Times*, 6 June 1993, p 7.
- iii Williams, R, *Football Babylon* (1996), London: Virgin, p 139.
- iv Tottenham save six points but pay £1.5m', *The Times*, 7 July 1994, p 44.
- v Arbiters give Tottenham new hope of cup reprieve', *The Times*, 26 November 1994, p 48.
- vi 'FA upholds Spurs' £1.5m fine', *The Times*, 14 December 1994, p 42.
- vii See Harris, H and Curry, S, *Venables: The Inside Story* (1994), London: Headline, for further details; and *Panorama*, BBC TV, 16 September 1993.
- viii 'Why I'm so angry: bungs are tainting the game I love', *The Observer*, 5 November 1995, p 10.
- ix 'Soccer: clubs often dodge FA rules – McLintock', *The Guardian*, 13 December 1995, p 22.
- x *The Bungs Report, The FA Premier League Inquiry into Transfers* (1997), London: FA Premier League.
- xi 'FA hands Graham one-year ban', *The Times*, 14 July 1995, p 40; 'Ban Graham for life, says UEFA Chief', *The Guardian*, 4 March 1995.
- xii 'The resurrection of brother George', *The Observer*, 7 April 1996 and 'Soccer: Leeds forget past and pin faith on Graham', *The Guardian*, 11 September 1996, p 20.
- xiii See 'Bung-busters prepare to act on "cult of dishonesty"', *The Daily Telegraph*, 20 September, p 28.
- xiv
- xv See 'Newell has evidence of bung offer' www.bbc.co.uk/news 13 January 2006
- xvi See 'New allegations in Eriksson saga' www.bbc.co.uk/news 21 January 2006
- xvii Programme can be accessed at <http://news.bbc.co.uk/1/hi/programmes/panorama/5363702.stm>
- xviii Bung inquiry targets 39 transfers www.bbc.co.uk/news 2 October 2006
- xix Can be found at www.thefa.com/TheFA/StructualReview/

Football agent regulations: The case for the lawyer

By Mel Goldberg and Simon Pentol

Background

The rapidity with which some players move clubs, the amount of money exiting the game into agents' pockets, the dubious status of many agents and lack of regulation concerning the transfer of players and renegotiation of their contracts, has been a long-running thorn in the side of professional football.

Recent high profile exposes (the Ashley Cole 'saga' and Panorama programme) have fuelled the public perception that English football is 'dirty' and that (implicitly), agents are the root of the problem.

Without waiting for the outcome of the Stevens' Inquiry, the FA Board has just agreed on new regulations for the conduct of agents (awaiting approval by the FA Council) to be operational for the coming January 'transfer window'.

The new regulations add significantly to the most recent 'agent legislation' enacted by the FA whose Chief Executive, Brian Barwick claims [that] 'they will provide a major step forward in the regulation of this area and make it absolutely clear what is acceptable for players, clubs and agents'.

The Key Elements

Agents will only be allowed to act for one party only in a transfer or contract extension – either the player or (buying) club;

Agents acting for players must be paid by the player – clubs will only be allowed to pay agents through a deduction from the player's salary and only, in line with the player/agent contract;

Overseas agents will have to register with the FA (when involved in a transaction in England);

Previously 'exempt persons' i.e. lawyers and parents/siblings/spouses will have to register with the FA;

Agents will only be able to act for a club if they have not represented the player concerned, in the preceding three years;

Any agent that has represented one club in respect to a player, cannot represent any other clubs in dealings with the same player;

Agents will be expressly covered by rules on illegal approaches, mirroring those that apply to other participants (clubs, managers, club executives); Clubs will be required to deal with a player's agent and will not be allowed to induce or coerce a breach of a player's agency contract;

The subcontracting of any agency activity to unlicensed agents will be prohibited and equally, agents will not be permitted to act 'in concert' with unlicensed agents;

A blanket prohibition on agents owning an interest, directly or indirectly, in the registration rights of a player.

The Rationale

The FA Board has finally (and some might argue, belatedly) got down to tackling the role of agents in today's game. Most of the proposals are self-explanatory and are aimed at confronting the inveterate abuse of the transfer system that has built up over many years – the amount of money seeping out of the game for the benefit of the agent and the nefarious activities of certain agents that have gone un-regulated, to the detriment of the clubs, fans and the governance of the game itself.

The whiff of corruption and high-profile examples of agents manipulating the system for their own benefit have to be confronted, the question remains whether these changes (if ratified) will achieve the purpose?

We have argued for some time (WSLR October 2006) that an agent should represent only one party in any transfer or contract renegotiation and that the player only, should pay his agent. This will not eradicate those instances of transfer fee inflation that occur in order to line the pockets of the agent and club representative involved – it will however, force the player to take an interest in the amount his agent is to be paid and make it more difficult for corruption of this type to take place – better late than never! The Association of Football Agents (ASA) thinks otherwise – they would, wouldn't they?

Football agent regulations: The case for the lawyer

Football transfers and contract renegotiations take place in the 'free market' and the proposal to bring agents under the umbrella of the 'tapping-up' provisions (as all other participants in the game) will not put an end to 'tapping-up'. Put it this way, if you were Jose Mourinho and you wanted to sign Ashley Cole, how would you do it? You have to talk to the player somehow to find out if he wanted to play for Chelsea and the level of his financial demands, otherwise what's the point of starting contract negotiations with Arsenal? A preliminary contact with the player's representative has to be made somehow. It seems that discreet enquiries are tolerated but blatant ones are not - the new regulations will not eradicate 'tapping-up', they will merely ensure that players' representatives are more careful in the future.

The regulation of un-licensed, un-qualified and foreign agents who can operate outside the jurisdiction of the FA is long overdue – but do the new proposals throw the 'baby out with the bath water' by insisting that lawyers also have to be registered with the FA?

The role of the Lawyer

Hitherto, lawyers have been exempt from registering with the FA – for good reason – we are qualified, regulated by the Law Society or Bar Council, cannot operate having previously been made bankrupt and abide by a set of ethics more stringent than currently imposed by the football authorities.

Rather than insist upon us having to register with the FA in order to represent a player, there is a strong argument for insisting that all players seeking representation are in fact represented by lawyers who specialize in football! We would say that wouldn't we? – but that's how it happens in the United States and we would argue, how it should happen here!

The new proposals may be viewed as an attempt to oust the jurisdiction of the Law Society and Bar Council in favour of the FA and the insistence upon our registration with the FA is potentially a restraint of our trade. Why should our experience and the security of our regulation by our governing bodies not be enough? Doubtless the Law Society will be urging these matters upon the FA at the forthcoming review stage.

Financial Transparency

The Football League (FL) has taken a lead over the Premier League (PL) by making public, their payments to agents. Twice yearly, the FL publishes a list of what each of its clubs spends on agents in an effort to

improve transparency in the game. The PL will not follow this lead on the grounds (it argues) that PL clubs need agents more than FL clubs and that such a course would give an unfair advantage to foreign clubs who do not have to reveal such payments.

Although the FA is entitled to know what is spent, why aren't the fans? Even if a competitive advantage is handed to foreign clubs (arguably), isn't about time that England took a lead for the whole of Europe on the issue of clubs' relationships with agents?

The role of the Agent

The new proposals bring to the fore the role of the agent in today's game. Clearly, the days of the 'Arthur Daley' type characters that have operated for so long and so successfully are numbered. Certain agents operate under the guise of highly polished professional outfits (SFX, First Artists, SEM and ProActive) with in-house lawyers, accountants and PR-men. But how many of their founders are qualified professionals?

The shiny suits may have been replaced by the trappings of corporate identity, but questions remain unanswered.

There is clearly a need in today's game for highly accomplished player representation – footballers' egos are notoriously fragile and for many young players it is easy to be overawed by the flash characters that still prowl the halls of football clubs – but agents and agencies receive large sums of money for their services that are questionable in what is actually provided.

A successful, wealthy young player needs a lot of solid advice including:-

- Contract advice
- Financial advice
- Personal guidance
- Honest career advice, not lip service
- Media advice
- Post- career advice

This is a specialized form of work – the new proposals will not provide it, merely make it more difficult for the unscrupulous agent to become involved. Rather than make it more difficult for lawyers to represent players, hasn't the time come for those of us who specialize in this field, to be welcomed to the party? 

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Analysis



After Bosman: The Rise of the Bos(wo)man?

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June 2005 saw a significant step forward for women's football in England, with the hosting of Euro 2005, the women's European Football Championships, in the North West. The event was a far cry from the early days of the women's game when, in 1921, the Football Association banned women from playing on affiliated grounds. Indeed, the women's game has now developed to such a standard that the traditional separation of the male and female versions of the game is increasingly subject to question.

However, the ideology provoked in the football film *Bend It Like Beckham* was confirmed as fantasy in December 2004 when football's world governing body, FIFA, refused to allow Mexican female soccer star Maribel 'Marigoal' Dominguez to sign a two year contract with second division club Celaya, a men's team. Dominguez had hoped to "pioneer a change" for women entering into men's football. Yet FIFA confirmed that "there must be clear separations between men's and women's football" and "no exceptions."¹

Sex Discrimination Legislation

In almost any other walk of life such open discrimination premised on gender would be considered unlawful; in the United Kingdom such treatment is generally prohibited under the terms of the Sex Discrimination Act 1975. However, in certain circumstances derogation is permitted under section 44 of the Act, making single-sex pursuits acceptable where certain conditions are satisfied. In the United Kingdom sport has made use of this exception to continue separation on the grounds of sex.

Justifications for this are largely underpinned and reinforced by ideological assumptions about femininity and masculinity.² It is presumed that only men possess characteristics suited to sport, such as strength, speed, large muscle mass, aggressiveness and competitiveness.³

The principle of equality is one of the fundamental principles of European Community law.⁴ Similarly, sex discrimination laws in the UK are a direct result of Community legislation.⁵ The Sex Discrimination Act 1975 prohibits discrimination on grounds of sex when a

woman is treated less favourably than the treatment of a man.⁶ The Act offers equal opportunities to women, particularly in employment cases. In relation to sport, section 44 of the SDA restricts females from competing with males where the physical strength, stamina and physique of the average woman would put her at a disadvantage as compared to the average man. In passing the Act, Parliament clearly opined that whilst "men and women should be equal", it is hoped that "they will always remain different."⁷

The use of the average woman as comparator for the law lends credence to the suspicion that legislators were keen to protect the status quo in respect of sporting competition and permit the continuation of the entrenched position of separation. This has been further endorsed through litigation. In the case of 11 year old Theresa Bennett, the Football Association (FA) prohibited her from participating in a boys' football team as they did not encourage mixed teams to compete in organised league matches. Bennett was therefore debarred the chance to compete on grounds of her sex. A challenge to this restriction was rejected at first instance and in the Court of Appeal. The appeal judges went so far as to reject medical evidence showing that, below the age of puberty, the strength, stamina and physique of girls and boys is not markedly different and there are at least as many physiological differences within the sexes as there are between them.⁸ However, they refused to allow exceptions as it would "spoil the game if girls played in boy's games".⁹

This judgment emphasises the difficulty of breaking down the rigid notion of sexual divisions in sport. Lord Denning in particular argued:

"It is plain as can be ... that football is not within the Sex Discrimination Act ... If the law should bring football within it, it would be exposing itself to absurdity ... The statute would be 'an ass – an idiot' if it tried to make girls into boys so that they could play in a football league."¹⁰

That such a view was prevalent a quarter of a century ago may be unsurprising, that it remains the case in the twenty-first century should be cause for alarm. FIFA's ruling on Dominguez reveals that such attitudes remain widespread in football today.¹¹

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Where no rules exist for the protection of men of lesser "strength, stamina and physique", then it seems illogical to apply a blanket exemption to women on the basis of 'average' characteristics.

Justification for separating men and women in football on this basis. This discriminatory separation essentially comes down to stereotyping; socially constructed gender differences, rather than any scientifically defensible biological distinction, govern the separation of the two games. Where no rules exist for the protection of men of lesser "strength, stamina and physique", then it seems illogical to apply a blanket exemption to women on the basis of 'average' characteristics. Managers and coaches of teams legitimately discriminate between individual players on these bases each time they select a team. A woman without the appropriate "strength, stamina and physique" would simply not be selected where a more able alternative existed, in the same way as a male player would be judged for selection on the basis of his individual capacity to fulfil a given role within the team. It is clearly arguable that the ability to play the game should determine selection, not subjective perceptions about gender.

Dominguez contended that she would have been the "first to admit it if it didn't work" but she merely wanted the "chance to try" and compete with men and against them. She realised that it would be a challenge to equal the "physical force of the men, but the technique, the desire, the will power, those are things I already have."¹³ However, with such masculine attitudes in the most prominent positions of football¹⁴, her chances of success seemed slim.

Justifications based on differences between men and women in respect of size, weight, strength and stamina are questionable when such differences amongst men are accommodated by measures such as weight divisions in combat sports or, in the case of football and many other sports, not at all.¹² It is arguable that if football does not need to account for these differences between men as a group, then there can be little

Such gender stereotyping is further evidenced by the comments of FIFA President, Sepp Blatter, who proposed "a more female aesthetic". Put simply, the wearing of tighter shorts.¹⁵ This is perhaps not surprising given that he heads an organisation which specifically outlaws racial, religious and political discrimination but which makes no such provision for that based on gender.¹⁶

The high quality of play in Euro2005 demonstrated the nonsense of section 44 of the Sex Discrimination Act 1975. The law has been able to combat sex discrimination off the pitch, overturning the FA's refusal to award a coaching qualification to a female coach¹⁷ and the barring of female registered FIFA agent, Rachel Anderson, from attending the Professional Footballer's Association annual awards dinner at a 'men only' venue.¹⁸ However, on the field of play the Act continues to reinforce the rigid sexual stereotyping already too prevalent in the game.

While discrimination law may be considered "dead law"¹⁹ in respect of the amateur game, despite some encouraging Australian case law,²⁰ recent events have prompted fresh thoughts as to the law's role in the integration of the women's and men's games at a professional level. The president of Italian Serie A team Perugia raised the prospect of signing a female footballer for his men's team. Luciano Gaucci made high profile overtures to two of the stars of the women's game, Birgit Prinz and Hannah Ljungberg; German and Swedish internationals respectively. Gaucci saw no problem with signing a female player on the basis that both were EU nationals. Ultimately the attempt to sign a female player never came to fruition, with many regarding the exercise as a thinly veiled publicity stunt. Gaucci probably did not have the furtherance of women, in the men's game or more generally, in mind, commenting of Prinz, "she is very beautiful ... she has a great figure".²¹ Nevertheless the episode raises interesting questions concerning the possible use of European Community law to facilitate such integration.

The epochal shift brought about by the Bosman²² case is familiar territory for all those with an interest in football; the case brought a partial end to restrictions on the constitution of teams based on nationality and in relation to player movement at the end of a playing contract. Quite how this might extend to requiring gender integration in football may not be immediately

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clear. However, the following analysis suggests how Community law may be applicable in these circumstances.

Free Movement of Persons

Article 39 of the European Communities Treaty prohibits discrimination based on nationality, both direct and indirect, in respect of access to, and conditions in, employment. However, the European Court of Justice has adopted a broad approach to Article 39 EC such that any measure which is “likely to constitute an obstacle to the free movement of workers” is likely to be considered by the Court to be a *prima facie* breach of the free movement principle.²³

That a prohibition based on sex, rather than nationality, might fall foul of the free movement provisions of Article 39 EC seems less than obvious however. The most apparent instance of discrimination in sport resulting in a breach of Article 39 EC is undoubtedly Bosman. Nonetheless, the direct discrimination suffered by Bosman, under the restrictions imposed on the number of foreign players in a particular team, was one based on nationality, not sex. It is the second element of the Bosman judgment, that the restrictive nature of the transfer system constituted an impediment to free movement and was thus a breach of Article 39 EC, which has most relevance in the present scenario.

In Bosman the Court of Justice determined that any rule prohibiting or, more broadly, discouraging a national of a member state from exercising their right to freedom of movement within the Community, acts as a limitation on that freedom, even where it takes effect irrespective of nationality – an indirectly discriminatory restriction.²⁴ On the facts in Bosman the requirement that a transfer fee be paid by a player’s new club, to his existing employer, before the player was able to take up employment in another member state, represented just such an obstacle to the free movement of workers and was considered unlawful.²⁵ On this basis it seems likely that the outright ban on women participating as professionals in the men’s game constitutes a restriction that should be considered, at least *prima facie*, a restriction on their capacity as workers to exercise the right to freedom of movement secured by Article 39 EC. It would seem perverse if this were not the approach adopted, particularly in light of the determination of the ECJ in Bosman that similar restrictions on domestic transfers also constituted a breach of Article 39 EC.²⁶

Competition Law

Similarly, it seems that the prohibition placed upon women participating in men’s football could also be construed as a breach of competition law. Articles 81 and 82 of the EC Treaty prohibit cartel-type activity and abuse of a dominant market position respectively. The restriction may also be considered to be contrary to UK competition law provisions which, under the Competition Act 1998 (CA 1998) largely replicate the terms of Community law; Chapters I and II of the CA 1998 operate at national level in parallel with Community law, which regulates intra-Community trade.

Article 81 EC and Chapter I Competition Act 1998

It has not always been clear that the rules and regulations of governing bodies constitute either “an agreement between undertakings” or “a decision by an association of undertakings” as required by Article 81 EC and Chapter I CA 1998. The issue was raised in Bosman and discussed at length in the opinion of Advocate-General Lenz, though the Court of Justice felt able to dispose of the case under free movement provisions and did not make reference to competition law. In a more recent case before the Court of First Instance of the European Communities (CFI), *Piau v Commission*,²⁷ the CFI considered that FIFA’s rules relating to the regulation of player agents could constitute a decision of an “association of undertakings”.²⁸ The European Court of Justice has given further succour to these claims in a more recent case, *Meca-Medina and Majcen v Commission*,²⁹ - where it, albeit obliquely, accepted that the International Olympic Committee was to be considered as an undertaking or association of international and national associations of undertakings for the purposes of Article 81 EC.³⁰ Further, the Court in *Piau* also considered that the regulation of player agents might also be construed as an agreement between undertakings involving FIFA and each of the national associations involved in the implementation of the rules.³¹

On these bases, it is further arguable that the prohibition on the participation of women in men’s football falls within Article 81 EC and/or Chapter I CA 1998. These require that an agreement must “affect trade between Member States/within the UK” and “have as [its] object or effect the prevention, restriction or distortion of competition within the common market/UK”. That FIFA’s strict rule of gender separation fulfils these criteria seems clear. Even if the ‘objective’ of the separation is genuinely in order to protect women from the risks of participating against men, the

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law can take account of the effect, irrespective of the intention of the rule. Even were the restriction not to satisfy the 'object' element of the test, the effective prevention of competition appears inherent in the rule. These are independent, not cumulative, criteria.³²

In the same way as the nationality rules set out in Bosman were considered to "restrict the possibilities for individual clubs to compete with each other by engaging players",³³ it seems at least arguable that this outright prohibition realises a similar outcome in respect of female players. Similarly, Advocate-General Lenz also considered the requirement that a transfer fee be paid, even for an out of contract player, to be anti-competitive; an outright ban seems substantially more restrictive. However, case law supports the view that "reasonable regulatory rules" might not be considered to breach Article 81 EC.³⁴ In *Wouters* the ECJ took the view that it is possible to for non-competition objectives to outweigh competitive restrictions.³⁵

Article 82 EC and Chapter II Competition Act 1998

In *Piau* the CFI also considered that FIFA held a dominant position in the market for players' agent services, even though it did not participate in the market itself. FIFA was perceived as a representative of professional clubs which could, collectively, be characterised as dominant in the market. Such a characterisation could equally be made in respect of FIFA's position in respect of the market for professional footballers, whatever their gender. Advocate General Lenz made a similar characterisation in his opinion in *Bosman*, but suggesting that it was the clubs collectively that held the dominant position, rather than the associations.³⁶ Article 82 EC prohibits behaviour by dominant actors in a market which is considered abusive of that position by placing restrictions on intra-Community trade. In the UK, Chapter II CA 1998 performs the same role in respect of the UK market. In *Hendry v World Professional Billiards and Snooker Association Ltd*³⁷ the English High Court held that the WPBSA was dominant in the market for the organisation of professional snooker tournaments given its almost monopolistic control over professional players and tournaments. FIFA, at a global level, and the home nations' football associations domestically, must be considered to be in a similar position in respect of the market for professional footballers. FIFA is the sole regulator of football, professional or otherwise and including women's football, at a global level, and the four national associations in the United Kingdom control all football within their respective national boundaries. It

seems likely that an absolute prohibition on the participation of women in the men's game would constitute an abusive act under Article 82 EC / Chapter II CA 1998; though both contain a list of abusive practices, neither is exhaustive.

Indeed, in relation to the regulation of player agents, the Commission has previously criticised the restrictive and exclusionary nature of previous versions of the rules set out by FIFA.³⁸ In approving the amendments introduced in response to its intervention, the Commission recognised the need for FIFA "to regulate the profession in an attempt to promote good practice, as long as access remains open and non-discriminatory."³⁹ It is perhaps arguable that a similar approach ought to apply to the present scenario; however, this would undoubtedly be subject to the conditions set out below.

The Law in Context

That the restrictions on women playing in the men's game are likely to be prima facie in breach of Community law relating to the free movement of persons and both Community and domestic competition law seems clear. What is less clear is whether the courts would consider that FIFA's rule is justifiable or even one which should be regarded as falling within the scope of legal scrutiny. At this juncture it is worthy of note that justifications for departure from the free movement principles under Community law can broadly be considered to apply to the application of competition law too. In determining the applicability of Community free movement and competition laws the courts have been primarily focused upon the nature of the sporting activity and the desirability of the application of law, over and above a detailed legal analysis. The key issue in a discussion of the likely treatment of an 'equality' claim in professional football is likely to be whether the situation benefits from a 'sporting exception' or, if not, whether the rules can be justified on the basis of a 'rule of reason' type approach.

The 'sporting exception'

From its very earliest involvement with football in the case of *Dona v Mantero*,⁴⁰ the Court of Justice has accepted that proportionate rules of a non-economic nature placing restrictions upon, or excluding 'foreign' players could be acceptable where they related to the particular context and nature of such matches and were thus of only sporting interest. This 'sporting exception' is more broadly relevant and was recently applied in the case of *Meca Medina & Majcen*;⁴¹ the CFI considered that Community law was not applicable to a ban

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imposed following a positive drugs test, as the rule related purely to the conduct of the sport itself and was not economically oriented; this despite the significant financial implications for the banned athletes. This decision is unmistakably of consequence in the context of a discussion of the potential penetration by women of men's football. It may be the case that the Community courts could consider the traditional separation of the sexes in football in a similar light. However, given the significant economic opportunities denied to women as a group, and the generally pro-free market jurisprudence of the Court, this may be questionable.

In any case, on appeal to the European Court of Justice the analysis of the CFI in this respect was overturned, the ECJ determining that the Court was incorrect in its determination that the anti-doping rules fell outside of the scope of Community law as being 'purely sporting', and thus non-economic in nature.⁴² The Court noted the difficulty of severing the sporting and economic aspects of sporting activity, determining that such rules and regulations were economic in nature, but could still be objectively justified based on the legitimate needs of the sport itself.⁴³ This judgment has significant implications for restrictions imposed in relation to all and any aspect of sporting activity which attracts the scrutiny of Community law and is certainly of relevance in an instance such as that under discussion. The impact of the judgment is not to abolish the 'sporting exception' completely, but to significantly narrow the scope of its application. This will mean that rather than simply exempting a sporting rule or regulation from scrutiny, those with economic implications are likely to be subject to the detailed examination prescribed by the aspect of Community law to which it relates.⁴⁴ Thus any female footballer wishing to challenge their exclusion from the men's game seems unlikely to fall at the first hurdle and the restrictions are liable to be measured against the requirements of free movement and competition provisions.⁴⁵

The 'rule of reason'

Ultimately, the Court of Justice considered that while the anti-doping measures in question in *Meca Medina Majcen* did not fall without the Treaty completely they nevertheless could be justified as being in pursuit of proper sporting objectives. Such an approach is not a novel one, in adopting the approach that it did in *Meca Medina & Majcen* the ECJ was effectively following its own case law which suggests that it is possible to justify restrictions on the basis that, though they are limiting, such constraints are necessary in order to facilitate other desirable outcomes. In the sporting context the use of transfer windows⁴⁶ and the

The football authorities might claim that such separation is appropriate in order to ensure that the best female players remain within the women's game, maintaining the standard and raising its profile.

application of selection policies for national teams⁴⁷ have been considered to be legitimate restrictions on the basis that they are necessary to allow the sport as a whole to function properly. It is difficult to see what positive outcomes result from the strict separation of the men's and women's games. The football authorities might claim that such separation is appropriate in order to ensure that the best female players remain within the

women's game, maintaining the standard and raising its profile. This is certainly a strong argument; however, even though the football administration has placed a growing emphasis on the women's game it seems unlikely that a court would consider that sufficient resources had been invested in the development of the women's game as a whole in order to justify the imposition of such a burden upon suitably talented individuals. Similarly, it is equally arguable that female participation in the men's game would undoubtedly be high profile and be more likely to raise encourage female participation in the sport, whether on a single sex or mixed basis.⁴⁸

It is difficult to predict what the outcome of any challenge of this kind might be when the 'rule of reason' is applied. As suggested above, domestic courts have been particularly reluctant to allow the law to be used in such a way as to defeat single-sex rules. It is notable that the approach adopted has not always been overtly objective and the possibility exists that a free movement or competition law claim might suffer the same fate as its discrimination predecessors. While the balancing of sporting and economic objectives is clearly necessary to allow the proper functioning of sporting activity, there is an inherent danger that the concept of proper sporting objective can become twisted if assigned inappropriate weighting.

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A two-way restriction?

A common response to suggestions that women should be permitted to participate in men's sports is that such an approach should operate inversely; that men should, on the same basis, be permitted to participate in women's sports. It has been argued that the 'one way' approach is unfair in that women participating in the men's game are denying men the chance to make a living, without the existence of reciprocal opportunities in the women's game.⁴⁹ Such an approach is not necessarily unreasonable. Much of the discussion above focuses upon women's access to the men's game; might the reverse constitute an equally valid claim?

The rejoinder to such a claim is unsurprising. The aim of sex discrimination law and the rules and regulations of governing bodies that differentiate between men's and women's football, is twofold: the prevention of harm to women occurring through physical mismatch with stronger men; and the preservation of opportunity to participate for women. The utilisation of average characteristics of the sexes as a means of justifying separation may unfairly exclude some exceptional women from the men's game. However, the authors do not anticipate that the professional game would suddenly be overrun by women should football's divisions be lifted. Conversely, it is arguable that the women's game could be swamped by male players with the result of women's participation reducing significantly. Here the question of the 'average' characteristics of

Conversely, it is arguable that the women's game could be swamped by male players with the result of women's participation reducing significantly. Here the question of the 'average' characteristics of each sex is highly relevant.

each sex is highly relevant. It is accepted that, on average, women do not possess characteristics desirable for participation in football, such as speed, strength and stamina, to the same degree as men. The likelihood is that, were there no protection for the women's game, opportunities for women to participate in football would vanish almost entirely.⁵⁰ The same cannot be said of permitting women to play in men's football, which would diminish the almost limitless opportunities for men to

participate only in the most minor fashion.⁵¹ If we are to accept that men are so naturally advantaged to begin with, we should be prepared to recognise that, as a group, this position of strength negates the need for any further protection.

Conclusions

This article does not seek to propound that allowing women to participate in the 'men's' game is of necessity a desirable outcome; we have no agenda in this respect. What we do seek to argue is that the legal support given to this separation by the Sex Discrimination Act 1975 is unjustified and that there is a compelling case that such restrictions are a breach of European Community law. Though the two areas of law may appear to be largely distinct, both demand that any restrictive discrimination is objectively justified.

In the absence of an objectively justified rationale for this restriction, it should be considered illegal. BASL

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- 22 *C-415/93, Union Royale Belge Des Societes de Football Association v Bosman* [1995] *ECR I-4921*
- 23 *Case C-224/01, Köbler v Austria* [2003] *ECR I-10239* at para 77.
- 24 At para 96.
- 25 At para 100.
- 26 At para 103.
- 27 *Case T-193/02 Piau v Commission* [2005] *ECR II-209*.
- 28 At paras 69-75. See generally *Re National Sulphuric Acid Association Ltd* [1980] 3 *CMLR* 429; *Institute of Independent Insurance Brokers v Director general of Fair Trading* [2001] *CAT* 4.
- 29 *Case C-519/04 P*, judgment of 18 July 2006.
- 30 At para 38.
- 31 See also *Office of Fair Trading, Trade Associations Professions and Self Regulatory Bodies* (2004)
- 32 *Case 56-65 Société Technique Minière v Maschinenbau Ulm* [1966] *ECR* 235.
- 33 *Opinion of Advocate-General Lenz*, at para 262.
- 34 *Case C-309/99 Wouters v Algemene Raad van de Nederlandsche Orde van Advocaaten* [2002] *ECR I-1577*.
- 35 See R. Whish, *Competition Law* (2005: 5ed) Oxford: OUP, p 121.
- 36 Para 281 et seq.
- 37 [2002] *UKCLR* 5
- 38 *Commission press release, IP/99/782*, 21 October 1999.
- 39 *Commission press release, IP/02/585*, 18 April 2002; see generally A. Lewis and J. Taylor, eds, *Sport: Law and Practice* (2003) London: Butterworths at paras B2.184-B2.186.
- 40 *Case 13/76* [1976] 2 *CMLR* 578.
- 41 *Case C-519/04, Mecca-Medina and Majcen v Commission* [2006] 5 *CMLR* 18.
- 42 At para 33.
- 43 As to which see discussion of the 'rule of reason' below.
- 44 At para 28. See generally I. Blackshaw, 'Meca Medina: ECJ ruling redefines "sporting exception"' [2006] 4(8) *WSLR* 4; G. Infantino, 'Meca Medina: a step backwards for the European Sports Model and the Specificity of Sport?' (2006) 13(5) *SLA&P* 1.
- 45 At para 28.
- 46 *Case C-176/96 Jyri Lehtonen & Castors Canada Dry Namur-Braine v Fédération Royale des Sociétés de Basketball and Ligue Belge-Belgische* [2000] *ECR I-2681*.
- 47 *Case C-51/96-191/97 Deliège v Ligue Francophone de Judo et Disciplines Associées ASBL* [2000] *ECR I-2549*
- 48 This 'top down' approach can be contrasted to the view adopted by Bradford, M 'Sex, Gender and Law' (2005) 1-2 *ISLJ* 78.
- 49 Cornelius, S 'Merely Giving the People what They Want or Differentiation Based on Sex?' [2004] 3-4 *ISLJ* 68, 72.
- 50 Though see the discussion of New South Wales Rugby Union age-determined teams permitting older but smaller players to play in a younger age group in Bradford, M 'Sex, Gender and Law' (2005) 1-2 *ISLJ* 78, 80.

“The WADA Code is fundamentally flawed.” Discuss.

By Neal Hooper

Introduction

On Friday 13th July 1967 Tommy Simpson was riding stage 13 on the 13th day of that year’s Tour de France. The riders were climbing the treacherous 6000ft. Mount Ventoux, with a recorded temperature of 55C beating down on the stark, rocky mountain landscape. In the film of what happened that day Simpson is shown wobbling and weaving on his bike in the last few seconds of his life. He is being helped uphill but falls off and collapses to the right hand side of the road after pushing himself beyond the levels of human endurance. He “lay white, inert and ghastly by the roadside”¹ and was probably already dead despite attempts to resuscitate him on the spot and his subsequent airlift to hospital. The autopsy showed traces of amphetamines in his blood² and more were discovered in his jersey and hotel room.

Although drugs or doping in sport was a much older phenomenon (ancient Olympians reputedly ate animal hearts and hallucinogenic mushrooms to increase their aggression before competition³) perhaps the modern day impetus for the WADA Code (the “code”) can be traced back to that fateful day in 1967, for, largely because it was televised, Simpson’s death sent shock waves across the world. It bought the issue of doping in sport to the fore – it has remained there ever since.

This paper will approach its subject matter in two parts. The first will address the question of whether we should have or want the code at all. In other words is the code flawed in its very inception because we should actually simply allow performance-enhancing drugs to be used? Secondly it will ask whether the code is flawed in basic terms of legality, morality and fairness, and whether technically it is lacking in terms of workability. This essay does not set out to discuss each provision of the code, but rather to refer to selected code provisions where necessary to highlight actual or perceived flaws. In some instances WADA and its code are not strictly divorced. It is also noted that the CAS and the code are inextricably linked (the former interpreting the latter) but CAS case law is only referred to where required. This is not an examination of CAS case law.

In terms of national law, where relevant to the discussion, this will be considered in terms of UK law unless otherwise stated.

The Code

The code was established on 1 June 2004. Sports organisations and governments were obliged to sign up to it by the first day of the Athens summer Olympics⁴. The code has an impressive list of signatories and the vast majority of sports have now acceded to its provisions. Its stated objectives in summary are; (i) to protect athletes’ right to participate in doping free sport and (ii) to ensure harmonised, coordinated and effective anti-doping programmes at international and national level. In asking whether the code is flawed then, we must also of necessity consider who it is intended to serve – the athletes themselves, paying consumers or sport as a whole – or a combination of them?

Is the code flawed in its inception?

In their article ‘Why we should allow performance enhancing drugs in sport’⁵ the authors, J Savulescu, B Foddy and M Clayton, make perhaps as persuasive a case as can be made for the ‘legalisation’ of drugs in sport.

Their arguments are that (i) humans are creative and, unlike animals, can exercise reason and judgement in maximising performance and that we should want to include the application of judgement in sporting excellence. They suggest that ‘to choose to be better is to be human’ and that this in fact reduces the ‘genetic lottery’ of sport; elite performance then results from human creativity and choice; (ii) that other methods of enhancing performance with exactly the same results⁶, are not banned and yet are perhaps only accessible to richer athletes and nations. In this case legalisation would go further to achieve the much-vaunted ‘level playing field’; (iii) that we should focus on safety: Partly as it is fairer, so that provided a drug is safe or used safely, honest athletes should not have to miss out on the advantage that cheats enjoy; (iv) testing for safety removes the questions of liability and responsibility, will prevent trafficking and use of drugs going underground and reduce the cost and resources used to wage the fight. Testing itself would become more rigorous and accepted and excluding athletes at unsafe drug levels would act as a disincentive to them to administer unsafe doses, and finally; (v) if it is the ‘climate of cheating’ that we oppose then we should draft rules to which athletes are willing to adhere.

“The WADA Code is fundamentally flawed.” Discuss.

These arguments are persuasive. After the 1988 Seoul Olympics, the most systematic and reliable evidence of doping in elite sport concluded that ‘the problem is widespread...around the world’ and that the ‘evidence [showed] that banned performance-enhancing substances...are being used by athletes in almost every sport.’⁷ There is no evidence that this has lessened since and so there is a strong case for saying that the authorities are losing the fight.

Furthermore, for the consumer, sport is ultimately entertainment and as consumers we appreciate elite sport for its competition but also for extraordinary or superhuman performance. It is very probable that for the most part the consumer experience is not affected by any thought or considerations of doping.

These arguments probably ultimately fail however. Drug users will always attempt to bend any rules in existence (testing would presumably still be required to ensure legitimate levels based on safety considerations were not being breached) and the lines must be drawn somewhere. It is acceptable to allow altitude training but to ban injecting recombinant human EPO. This is simply a ‘value’ judgement, but these judgements, though arguably arbitrary, are necessary; for example ‘riding a motorbike would not be a creative solution to winning the Tour de France’⁸. There is also a ‘floodgates’ argument here. Blanket legalisation subject only to certain safety requirements would encourage a sporting drugs industry all of its own and one would only have to hope that knowledge of what constitutes safe and unsafe use would keep up. Furthermore, accepting drug use would send out the wrong message to those, often the young, starting out in sport,

At the present time the code in itself is welcome, not necessarily just for reasons of morality though, but if only as some sort of check on what might otherwise be rampant, uneducated and dangerous abuse.

particularly if we recognise that doping in sport has begun to assume some of the darker characteristics of drugs in the social context. Perhaps most important of all, accepting drug use in sport also penalises those who want to remain ‘clean’, despite safety becoming the paramount consideration; and, financially, it would surely also result in private sponsors fleeing sport.

So in conclusion, at the present time the code in itself is welcome, not necessarily just for reasons of morality though, but if only as some sort of check on what might otherwise be rampant, uneducated and dangerous abuse. Maybe the last word should go to Dick Pound, chairman of WADA who puts it bluntly when he says that parents will not want their children to ‘become chemical stockpiles’ in order to succeed at sport⁹ (the same phrase used by another WADA official¹⁰). As discussed below however, the problems associated with amongst other things, measuring the effectiveness of the code make this a fragile conclusion to reach.

Is the code flawed?

To put the code in more context, at the time WADA was formed in 1999, the 1998 Tour de France revelations were still reverberating, contributing to a feeling that until that point, doping control had been ineffective. In that year the tour deteriorated into farce after the arrest of Willy Voet of the Festina team who was found to be in possession of illegal prescription drugs. Police raids on other teams began, with the TVM team also found to be holding doping products. News of such raids led to many riders and teams abandoning the tour (after initially holding a strike) and only around half the riders who had started that year’s race actually finished (after riding without race numbers and at a leisurely pace). A succession of IOC corruption scandals had also surfaced, leading many to question its right to ‘moral leadership’ in the area. WADA therefore drew up its code independently of the IOC. The code has several key mandatory articles including the definition of doping, anti-doping violations, proof of doping, automatic disqualification of individual results and other sanctions. The overall rationale is that it is ‘critical to harmonisation that all signatories base their decisions on the same list of anti-doping violations, require the same burdens of proof and impose the same consequences for the same....violations’¹¹.

We turn now to deal with a critique of the code in terms of fundamental principles and in terms of its workability. We are only concerned with essentials, flaws that go to the very heart of the code, not merely problematic or contentious provisions themselves.

“The WADA Code is fundamentally flawed.” Discuss.

Is the code fair?

This has sub-questions within it; for example, does it pursue legitimate aims? Does the code distinguish adequately between ‘cheats’ and those who are innocent? Do the punishments fit the crimes? Perhaps most strikingly the code adopts a principle of strict liability (Article 2.1), namely liability without necessarily culpability. Whilst this is now an established legal principle it is naturally problematic. In the UK the vast majority of strict liability legal application concerns criminal offences created by statute, developed for the purpose of protecting the public. Generally the more serious the offence the less easily the courts are persuaded that no mens rea is required¹².

With the code however, we have strict liability applied to non-criminal violations yet which carry with them a similar stigma and with consequences which inhibit the right to work. Furthermore, where the UK criminal law has evolved so that usually statutory defences are provided¹³, the crucial difference and difficulty compared to the code is that the standard to be reached by an athlete to show ‘no fault or negligence’, and the difficulties of proof, may be so high that they will be unable to prevent the imposition of the limited sanction in circumstances where compared with strict liability in the criminal law they would be able to mount a defence.

The BOA's concerns here mean they would have preferred the higher standard of proof of ‘beyond reasonable doubt’ to apply at the outset. They say that ‘given the strict liability nature of the offence and the harsh application of the sanctions it is imperative that there is no doubt that the charge against the athlete is proven’.¹⁴ Coupled with all of this it is doubtful whether the public interest/policy drivers behind strict liability are valid in terms of anti-doping. There is good UK authority that states that a presumption that no mens rea is required should only be in circumstances where legislators are concerned with ‘an issue of social concern, and public safety is an issue’.¹⁵

Article 10 contains the sanctions to be applied for anti-doping violations¹⁶. What is immediately clear is that those sanctions are draconian. It must be right that disqualification in the relevant competition (as defined in the code) must ensue regardless of blame. This ensures fairness between all the relevant athletes competing in that event. But the fairness of a subsequent ban is much more controversial and in Michael Beloff's opinion should ‘depend on degree of fault’.¹⁷

The recent case of Puerta,¹⁸ which was appealed to the CAS, highlights this. The peculiar circumstances of that

case meant, that as a second offence, and despite a finding of ‘no significant fault or negligence’ Puerta's reduced ban of eight years under the code rules, as a twenty-seven year old, effectively finished his career. This despite the finding that his violation would have had no effect on performance. The tribunal's judgement in that case contains some extraordinary passages. At para 98 it is admitted that they have a ‘very uncomfortable’ feeling about the severity of the sanction, and at para 104 that the period of ineligibility is imposed ‘with a heavy heart’. Unsurprisingly, on appeal the CAS imposed a reduced period of ineligibility of two years, finding (somewhat conveniently) that there was a lacunae in the code rules where an athlete was guilty of two non-significant offences. The crux here is that the inflexibility of the code's provisions has simply not accommodated the legal principle of proportionality, which despite uncertain origins now finds its way into both national and international jurisprudence. For example in *A v Secretary of State for the Home Department* ([2004] QB 329-486, 335), the House of Lords held that while derogation from Article 5 of the ECHR was a necessary course of action regarding the terrorist threat posed to the UK, the preventive detention of terrorist suspects was not proportionate to the exigencies of the situation and was accordingly unjustifiable. In the UK case of *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*¹⁹ the Privy Council adopted a three-stage test in respect of it. The court should ask itself in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective. The code may even fall foul of (i), in that it limits, even takes away, a man's right to work, to pursue an arguably unattainable aim, namely drug free sport, in circumstances where under the laws of most countries no criminal act has even been committed. It is of course argued that the athlete has, by way of his participation in say a professional tennis event as in Puerta's case, agreed to the rules governing it (and this ‘consensual’ aspect is dealt with in more detail below) – but has he thereby ‘contracted out’ of his right to be punished only as is ‘necessary and proportionate’? The answer must be no. It is not possible to ‘pre-prescribe’ proportionality, as the code, by default, appears to have tried to do. At the very least it is open to challenge on this ground and the confusion caused by the code's relative silence on the matter is evident in the CAS case law. In ‘Squizzato’²⁰ at paragraphs 10.24 through to 10.27 the

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judgement clearly leaves open the possibility that despite the adoption of the code by an international federation (“IF”) and that to an extent proportionality may have been built-in to the code rules in terms of reducing sanctions through no or no significant fault or negligence, this ‘does not force the conclusion that there is no possibility for greater or less reduction [in] a sanction’, certainly where the punishment were to be ‘serious and totally disproportionate to the behaviour penalised’.²¹ In *Puerta* itself the ITF tribunal accepted (para 93) that ‘that there could be a case where... proportionality requires a tribunal ...to reduce or disapply sanctions provided for by the code’ and more pointedly that ‘it would be contrary to the rule of law if the code were able to substitute itself for the principle of proportionality’. This inflexibility in the code encourages the CAS to find ways of reducing the punitive effect of the sanctions on a case-by-case basis – exactly the kind of inconsistency the code is intended to stop.²²

What this leads to is the dilemma that although harmonisation is the key, this can’t be achieved without consistent respect for sensible rules, which same ideal then mitigates against fixing rules before the fact, which may then not easily be applied in any given future set of facts. It may have been better to include in the code a ‘third way’; namely a further option for truly exceptional circumstances where it was clear that the punishment did not fit the crime. This would reconcile it with CAS case law and provide a bridge between the two whilst assuaging the concerns of those who fear that purporting to override the principle of proportionality is contrary to the rule of law. And as counsel for Mr *Puerta*, Adam Lewis, put it; ‘unless the severity of the sanction could be tempered by consideration of the individual circumstances of the player and of the offence, the code would not survive long because the fragile consensus upon which it was built would shatter’.

The code’s compatibility with fundamental principles of law and human rights

What must be appreciated from the outset (and indeed in the context of this whole essay) is that ‘contractual consent is the foundation of the doping rules and there is no public law power, without such consent to invade the privacy of the athlete or to penalise his conduct’²³ (whilst recognising that the due process required of a doping tribunal will be virtually the same as the duty to act fairly imposed on a public body anyway). However the reality of an athlete’s consent to submit to international doping conventions, is founded upon necessity. Any elite athlete simply has to impliedly agree to them to be able to compete at world-class

level. It is now also probably the case that ‘through the law of arbitration, doping control in sport adjudicated by properly constituted private arbitral tribunals will be practically immune from control by English courts decisions, and administrative and human rights law will have no significant role to play.’²⁴ Furthermore, whether based on consent or otherwise the code’s provisions are effectively penal or quasi-criminal. What we are left with then, with the submission by IF’s and athletes to the private law realm of arbitration, is an unhappy marriage between a private law legal framework, with criminal law characteristics and consequences. In this context the question is then whether a sportsman accused of a doping violation can rely on fundamental rights or principles of law to override the private law structure of the code. In terms of which rights, the Human Rights Act is the obvious source. It is unlikely however that an article 6 complaint will succeed as jurisprudential indications are that having voluntarily submitted to arbitration and waived the rights to court, ‘an appeal to CAS will in the eyes of an English court offer access to an independent and impartial tribunal’²⁵ (allowing as well for the limited rights of review of arbitral decisions in UK courts). The real test though is whether the strict liability regime or the mandatory periods of disqualification are open to challenge; and ‘if a decision truly infringes fundamental rights – such as the right to property guaranteed by article 1...- then the possibility of a challenge in the English courts to the regime cannot be excluded’²⁶. The consequences for the code in such a case could be catastrophic with conflicting precedents being set in differing legal regimes.²⁷

In a dramatic recent development, it appears that such a challenge has been successfully mounted before a Swiss civil court in the case of German cyclist Danilo Hondo whose doping suspension was increased to two years on appeal to CAS in January 2006. An interim judgement annulled that decision pending a further hearing. That took place in the Swiss courts on 6th June when that decision was confirmed and Hondo’s suspension overturned. Since then Hondo has been free to race again and has in fact signed a new contract with Lamonta to do so. It remains to be seen whether this will be challenged. According to Hondo’s lawyer, ‘the way in which these sports trials are held – a two-year suspension with a reversed onus of proof... – can’t be upheld in front of civil courts’²⁸. The case could have a huge impact on anti-doping regulations. There are of course also legal jurisdictional issues here, which it is not the remit of this paper to explore. Suffice to say that the waters are further muddied by the fact that the code seemingly does not stipulate the proper law to

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govern its provisions, nor does it oblige IF's to provide in their rules that athletes are precluded from bringing a claim before a national court.

Innocent until proven guilty? Proof of guilt and WADA Accredited laboratories

The question can legitimately be asked as to whether, in terms of the burden and standard of proof for doping offences enunciated in it, the code infringes upon an inviolable rule of UK law; that of the presumption of innocence. Article 3 of the code deals with 'proof of doping'. Under 3.2.1 WADA accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the 'international standard' for laboratory analysis. It is possible for the athlete to rebut this presumption, but if the relevant 'anti-doping organization' can then show that despite a departure from the international standard these had no causal effect on the finding then the laboratory results are not invalidated. The code might therefore be said to take the infallibility of laboratories and scientists as a guiding principle, but is this right? Certainly the recent high-profile case of Marion Jones suggests not. Jones' 'B' sample tested negative for the banned substance Erythropoietin (EPO), but not before her positive 'A' sample result had been leaked to the media. Both tests were conducted by the same laboratory using the same sample. Nonetheless, whilst EPO is notoriously difficult to test for and doubts are being raised about reliability of the results in such cases, Jones' clearance also suggests differences of opinion within the scientific community about the correct interpretation of the same test results. UK Sport's comments on the code²⁹ in relation to 3.2.1 state that 'it is not fair to have an assumption that the laboratory [is] presumed to have conducted the analysis and custodial procedures in accordance with the International Standard'. Their view is firmly that the laboratory should have to demonstrate this by presentation of their evidence package.

It is also likely that for any athlete who does manage to shift the initial presumption, it will then often be the case that the anti-doping organization will be able to show no causal effect. That all being so it is worrying that Professor Christiane Ayotte, director of the IOC accredited laboratory in Montreal concedes that 'it will not be possible for all of us, the [laboratories], to be totally equivalent, i.e. that all of us will always report the sample positive no matter which lab is involved. It could be positive in labs A, B, C and D and negative in other labs.'³⁰ Moreover she also admits concern over possible conflicts of interest. Most laboratories are affiliated to

universities or are state-funded. Neither WADA nor the IOC pays for them. So, she says, 'if my main source of money is the government of my country and if the government is not pleased that I report positive the star athlete of my country, I may be in a tough situation to comply with requirements of either WADA or the IOC'.

In a particularly detailed and worrying article, article³¹ Dr Brent Russel³² and Max Jones³³ dissect WADA and the code, and heavily criticise it, in terms of its scientific foundations. In very brief summary they forcefully suggest that; some substances on the prohibited list are not based on scientific evidence; collection and testing of samples are clandestine operations, and that the substances on the list do not correspond with all substances which enhance performance. They conclude that the 'collection of samples, chain of custody, and standards of analysis ...should be questioned' and that drug testing and classification is not the scientific affair it should be, especially in terms of independent objective research. Has the code plumped for convenience at the expense of due process here? Despite the fact that a conflict of interest such as that described above may actually favour an athlete, once an athlete manages to show that a deviation from the international standard occurred, surely the code should follow the approach taken by English criminal law in cases of technical faults or faults in continuity of evidence and award the athlete the benefit of the doubt.

Additionally, although the code makes clear who bears the burden of proof, and when, clarity as to the standard of proof is more elusive. This is most pronounced in 'non-analytical positive' cases. These are those that do not involve a positive laboratory test but rely instead on other evidence (including circumstantial) such as witness testimonies and physical evidence (for example, used syringes). Without such a test the benefit of strict liability is not available to the entity 'prosecuting' the case. Although at article 3.1 the code states clearly that the relevant anti-doping organisation must prove its case to the 'comfortable satisfaction' of the tribunal (bearing in mind the seriousness of the allegation made) in the words of Richard McLaren the code 'missed the opportunity to clarify the standard... and has left the confusion of the pre-wada jurisprudence in place'³⁴. Why is this so? The post-code case law (mainly the cases of 'Montgomery'³⁵ and 'Gaines'³⁶) suggests that the 'comfortable satisfaction' standard can move to become either a very high or very low standard depending on the facts. It may even become indistinguishable from the criminal standard. In his paper Professor McLaren argues that the 'range in the standard of proof may well turn the WADA code into the variation of sanctions experienced with differing standards when the IF's rules

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were the anti-doping regime’.³⁷ What is perhaps of more concern is that whilst a standard of proof below the criminal standard may be applied, the sanctions resulting once guilt is established are potentially more severe. As the CAS stated in *Montgomery and Gaines*, quoting from a preliminary hearing relating to the standard of proof applicable: ‘In some criminal cases, liberty may be involved; in some it may not. In some civil cases...the issues may involve questions of character and reputation and the ability to pursue one’s chosen career that can approach, if not transcend in importance even questions of personal liberty’.

This paper will now move on to discuss the clarity of the code in certain areas and consider whether it is as workable as it could be.

Therapeutic use exemptions (“TUE’s”)

Here the relevant provision of the code is article 4.4, allowing athletes with a documented medical condition requiring use of a prohibited substance or method to claim an exemption based on therapeutic use. TUE’s have been described to the author by Nicole Sapstead of UK Sport as an, ‘absolute nightmare’³⁸. She is concerned about the inconsistency between when they are recognised and when not. Professor Waddington also puts it strongly: ‘There are real grounds for concern about the likely abuse of TUE’s’³⁹. The problem is that it is for each IF to decide individually whether an athlete should be granted a TUE (although WADA does reserve to itself the power to review such grants). When coupled with the fact that the claimed incidence of, for example, asthmatic conditions in top-level athletes may be as much as six times higher than in the general population, it is difficult to avoid the conclusion that some athletes are using TUE’s as back-door route to obtaining the benefit of certain performance-enhancing drugs without the accompanying sanctions that unauthorised use of those substances would ordinarily bring. Professor Waddington takes it further. He states that it is now ‘well established that sports physicians and team doctors are often key players in what has been called the ‘doping network’’. Drawing on the example of the now notorious doping scandal surrounding the 1998 Tour de France and in light of the difficult relationship between cycling’s governing body, the UCI, and WADA, he opines that ‘it is not difficult to imagine a situation in which team physicians will be more than ready to sign TUE’s which will then be accepted all too readily by the relevant international federation’.

Performance measurement and objectives

What does the code strive to achieve? The elimination of all drug-use in sport, a reduction in use, or merely containment at present levels? The code is silent on this and without answers to those questions it is difficult to measure its effectiveness objectively.

It is suggested by Professor Waddington that the code represents ‘no real advance’ in terms of consistency and clarity regarding the aims of anti-doping policy. It is therefore difficult to know what criteria to use in measuring the success of the code. The code does not set out any performance measures and therefore the continuing trend has been simply to look at the incidence of positive test results as an index. This is unsatisfactory. For example in terms of illegal social drug use, public authorities usually cite large seizures (e.g. by customs and excise) as evidence of success of their strategies. However traditionally, anti-doping authorities have quoted the small number of positive test results as evidence of their success.

WADA and the International Federations

In a sense this area may potentially be the biggest practical weakness in the code. The code allows the IF’s to retain important responsibilities. In terms of doping control, it is the federations who will remain largely in charge, some of whom he says, ‘have singularly unimpressive records’ in this regard. It is easy to focus on the UCI, and use the example of the 1998 tour, but during that race the 108 drug tests carried out all proved negative. This is an astonishing statistic; and as has been publicised, since that time drug hauls in professional cycling have been considerable and frequent.

Presently the differences between WADA and FIFA highlight the same point and Dick Pound, chairman of WADA has admitted recently in interview that they ‘are not yet resolved’⁴⁰. At issue here is the recommended minimum suspension period for violations and the degree to which they can be reduced.

Has the code given the federations too much discretion? Nicole Sapstead suggests so and she highlights the provisions relating to an athlete’s failure to provide required ‘whereabouts’ information (article 2.4) and the concession from the prohibited list for ‘specified substances’, at article 10.3. She says these ‘lead to too much variance. WADA doesn’t cap the number of times an athlete can get a whereabouts violation and there is no increasing scale of punishment for each’. For violations of 2.4, there is a cap of two years ineligibility under article 10.4.3 and periods of

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consistency across federations, meaning that in disciplinary terms, IF's may recognise the missed test violations of some countries but not others.

ineligibility for subsequent violations are simply left to the rules of the relevant anti-doping organisation. For a ‘specified substance’ violation there is considerable discretion as to sanctions and her view is that the ‘code should perhaps list [the substances] individually and prescribe a sanction for each’. So, there is inconsistency between IF's as to what is applied. Furthermore at national level there is no

terms of restraint of trade and EC treaty freedoms and prohibitions⁴¹, it is hardly fanciful to envisage successful claims being brought in national courts that the code infringes fundamental legal rights. In this case the ‘floodgates’ will surely open and the code will have to change to survive.

Whether the code is flawed legally may be too early to decide, but that it is flawed morally is plain to see. The code punishes the guilty heavily and also fails the unlucky and unwitting. It does so by, albeit in individual cases, depriving athletes of their livelihood, for use of largely legal drugs, often unintentionally and with no performance gain. Surely the ultimate *raison d'être* of the code is to prevent the latter – WADA is not an arbiter of wider social or public morality.

Though the code must serve sport generally, it must also serve athletes individually – for without athletes there is no sport. BASL

Conclusions

The strength of the code, its uncompromising severity, is of course also its weakness. The code is a ‘one-size fits all’ offering but its strive for uniformity may yet ultimately prove its undoing. Perhaps this is simply inevitable in the pursuit of harmonisation but the code's authority rests upon its consensual foundations, and although the global nature of its acceptance is perhaps unparalleled, it relies upon the continuing adherence of its signatories. With its disregard of proportionality and parlous footing in human rights terms (surely to be tested further with more sophisticated doping techniques requiring correspondingly ever more intrusive testing methods), WADA will have to hope that the present ‘net’ weight of opinion within sport to work towards compliance, and the contractual nature of legal relationships created in sport, allow it to withstand challenge. WADA is helped in that, operating in the private law realm, in one sense perhaps a greater difficulty than the code itself is the means to challenge it.

The code has consequences that are in certain circumstances more serious than criminal offences yet the standard of proof is lower, tribunal discretion is removed and in certain cases the loss of millions of pounds to individual sportsmen and women ensues. It also stands upon dubious scientific foundations, both in its underlying categorisation of prohibited and specified substances and its use of the men of science in proving doping offences. Although the European approach has been to reject arguments that the code is unlawful in

“The WADA Code is fundamentally flawed.” Discuss.

- 1 *Cycling weekly July 1967*
- 2 www.bbc.co.uk/insideout/northeast/series6/cycling.shtml
- 3 *'The Olympics: A celebration of Sport and the role of Law'; Ent.L.R2004 issue 8*
- 4 *'The Olympics: A celebration of Sport and the role of Law'; Ent.L.R2004 issue 8. The code, article 23.5.1*
- 5 *Br J Sports Med 2004;38:666-670.*
- 6 *Such as hypoxic air machines and altitude training*
- 7 *Dubin Commission of Inquiry in Canada 1990*
- 8 *'Why we should allow performance enhancing drugs in sport' j Savulescu, B Foddy and M clayton*
- 9 *Interview with BBC sport; www.bbc.co.uk 6/3/06*
- 10 *E-mail to the author from Marie-Clause Asselin, WADA coordinator of education*
- 11 *Lecture delivered by Prof Ivor Waddington, University College Chester, 19.4.04*
- 12 *Sweet v Parsley [1969] 1 All ER 347*
- 13 *E.g. the Food safety Act 1990. This creates strict liability offences but with a defence of showing that all reasonable precautions had been taken and all due diligence exercised.*
- 14 *BOA response to the second draft of the code*
- 15 *Lord Scarman in Gammon (Hong Kong) Ltd v Attorney-General for Hong Kong [1984] 2 All ER 503*
- 16 *Generally, there will normally be a minimum of two years suspension for a first serious doping infraction with a lifetime suspension for a second offence*
- 17 *Chapter 4, 'Drugs, Laws and Versapaks', from Drugs and doping in sport:socio-legal perspectives*
- 18 *ITF, independent anti-doping tribunal; 21.12.2005*
- 19 *[1999] 1 AC 69*
- 20 *CAS 2005/A/830 G. Squizzato v Fina*
- 21 *In 'Squizzato' the court even explicitly suggests the possibility of a return to pre-code case law in difficult cases not fitting easily into the code structure, with proportionality being exercised liberally*
- 22 *By contrast, in an e-mail to the author from Joseph De Pencier, Director Sport Services/General Counsel, Canadian Centre for Ethics in Sport (CCES) he suggests that proportionality simply does not have 'any place in the interpretation and application of sport rules by tribunals and...the [code] and rules implementing it'. His reasons are three-fold; that proportionality has been fundamentally mis-applied, having been wrongly used where federation rules were clear and unambiguous and not simply to fill gaps or correct arbitrariness; that sports tribunals are not courts of law and so have strictly defined limits on their authority and as such are not competent to apply general principles of law or natural justice; and that the code, mindful of the unhelpful prior CAS case law, deliberately excluded proportionality, preferring instead to actually set out the circumstances justifying a reduction in sanctions.*
- 23 *Charles Flint QC; paper entitled 'WADA and the law' presented in Bonn, November 2003*
- 24 *Charles Flint QC; paper entitled 'WADA and the law' presented in Bonn, November 2003*
- 25 *Charles Flint QC; paper entitled 'WADA and the law' presented in Bonn, November 2003*
- 26 *Charles Flint QC; paper entitled 'WADA and the law' presented in Bonn, November 2*
- 27 *Interestingly in the summary legal opinion on the code's legality at paragraphs 5 and 6, and unlike in the remainder of the opinion, a double negative is used to assert that the sanctions in the code are 'not incompatible' with international law and human rights requirements suggesting that it's authors were less comfortable on this point. (Summary opinion on the conformity of certain provisions of the draft world anti-doping code with commonly accepted principles of international law, made in Geneva February 14th 2003)*
- 28 www.cyclingnews.com
- 29 *UK Sport response to version 3 of WADA Code*
- 30 *Article quoting Prof Christiane Ayotte, Sunday Herald newspaper 14.12.03*
- 31 *The anti-drugs-in-sport movement; Causes for concern' (International Journal of Sports Science & Coaching vol 1 number 1 2006)*
- 32 *San Diego State university and four times Canadian team Olympic psychologist*
- 33 *UK marathon coach and student of doping in sport*
- 34 *Richard H McLaren, Western Law Faculty, University of Western Ontario, London Canada; Paper titled 'An Overview of Non-Analytical Positive & Circumstantial Evidence Cases in Sports*
- 35 *USADA v Montgomery, CAS 2004/O/645*
- 36 *USADA v Gaines, CAS 2004/O/649*
- 37 *A further flaw suggested is that the code has in effect perpetuated the shortcomings of that case law, specifically the cases of Michelle Smith De Bruin (Michelle Smith De Bruin v FINA, TAS 98/211) Mark French (Mark French v Australian Sports Commission and Cycling Australia, CAS 2004/A/651) and Michelle Collins (USADA v Michelle Collins AAA No.30 190 00658 04 (2004)). Although the 'comfortable satisfaction' standard had been developed these cases failed to identify exactly what had to be proved in non-analytical positive cases. The code has not rectified matters as it has not provided instructions as to what evidence must be adduced where such cases turn on circumstantial evidence only ('Montgomery' and 'Gaines' being determined on the direct evidence of fellow athlete and whistleblower Kelli White).*
- 38 *Phone interview with Nicole Sapstead, UK Sport anti-doping programme manager 23/2/06*
- 39 *Lecture delivered by Prof Ivor Waddington, University College Chester, 19.4.04*
- 40 *Interview with BBC sport; www.bbc.co.uk 6/3/06*
- 41 *Case T-313/02 David Meca-Medina and Igor Majcen v Commission of the European Communities, European court reports, judgement of court of first instance 20/9/04*

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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:

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1. General

Conferences, meetings, lectures, courses, etc.

Consultation conference on sport in Europe

Towards the end of June 2006, the European Commission organised a consultation conference entitled "The Role of Sport in Europe". Key topics to be discussed were the societal role of sport, its economic impact and its organisation. Key speakers were Jan Figel, European Commissioner for Education, Training, Culture and Multilingualism, Odile Quintin, Director-General for Education and Culture with the European Commission, as well as various representatives from the Member States' national Ministries responsible for sport. The event was held in Brussels.

Obituaries

Kevin O'Flanagan

Few Irish sporting performers can have matched the record for all-round success achieved by Mr. O'Flanagan, who died recently at the age of 86. He represented his country not only at football and rugby, but also in athletics – as a sprinter and long-jump champion. His versatility also found expression in a distinguished medical career (*The Independent of 19/6/2006, p.32*). He was only the third Irishman to become a member of the International Olympic Committee (IOC), from 1976 to 1995, and held office on various bodies concerning themselves with sports medicine, both at the national and at the European level (*The Daily Telegraph of 16/6/2006, p.27*).

Bob Mathias

The US athletics prodigy Bob Mathias, who had died aged 75, won the decathlon title at the London Olympics in 1948 – eight weeks after taking up the event as a 17-year-old schoolboy. He courted legal controversy on the eve of the 1956 Olympics, when he was abruptly informed by the US athletic authorities that he had forfeited his amateur status by accepting various acting roles and endorsements, which caused him to boycott the event in disgust. He later became a Republican Congressman representing Fresno, California, and holding this seat for eight years.

Jamie Astaphan

Jamie Astaphan was the doctor who administered to Canadian athletics sprinter Ben Johnson the steroids which cost the latter his Olympic medal at the Seoul Games in 1988. He died after suffering a heart attack at his home in St. Kitts (West Indies) (*The Guardian of*

22/8/2006, p.S7). He had informed an inquiry, held in 1989, that he had injected Mr. Johnson with steroids between 50 and 60 times in the course of five years (*The Daily Telegraph of 22/8/2006, p.S20*).

Lawyers in sport

[None]

Digest of other sports law journals

[None]

Sport and international relations

Two Koreas to be united for Beijing Olympics?

One of the key areas in which the Cold War of the 1950s and 1960s was fought was the Far East periphery, particularly Korea, as a result of which the country was split into its Northern, Communist part and its Southern, Western-oriented part. The two countries have remained resolutely separate ever since, even for sporting purposes. However, recent developments seem to hold out some hope for a rapprochement, at least in Olympic terms. In the course of November 2005, it was learned that the two countries had agreed to send a combined team to the 2008 Games, which will be held in Beijing. However, since then they had failed to overcome difference over the manner in which the team should be selected (*The Daily Telegraph of 6/9/2006, p.S17*). Nevertheless, in late August 2006, it emerged that Jacques Rogge, the President of the International Olympic Committee (IOC), had embarked on negotiations with officials from both sides aimed at forging the joint team (*The Daily Telegraph of 30/8/2006, p.S17*).

FIFA steps in over war-damaged sports centre (Palestine)

The Middle East is an area of the world where war-fuelled tension is never far away, particularly in Palestine. In April 2006, it was learned that during an Israeli air strike on its capital, Gaza City, a missile had fallen in the centre circle of the Palestine sports stadium. The ground in question, which was built under the "Fifa Goal" project, incurred serious damage and was left with a crater covering the entire centre circle. There were no casualties, but Jerome Champagne, the Deputy General Secretary of the world governing body in football, responded by writing to the Swiss ambassador to Israel requesting an explanation.

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Mohamed Bin Hammam, the Asian Football Confederation president, described the incident as a "crime against Palestine football facilities" (*The Guardian of 5/4/2006, p.52*). The following week, FIFA announced that it would finance repairs to the football stadium in question, with its president, Sepp Blatter, commenting that:

"Football is one of the very few universal tools mankind can use to bridge gaps between nations and peoples, and to symbolise what unites our planet over what divides it" (*The Independent of 12/4/2006, p.19*).

At the time of writing, the cost of the project was as yet unknown.

Bahrain bans Amnesty fixture

In mid-June 2006, it was learned that Bahrain had prevented Amnesty International from holding a football fixture aimed at publicising its call for the release of the three Bahrainis detained in the US base of Guantanamo Bay (*The Observer of 25/6/2006, p.25*). No further details were available at the time of writing.

Serbia & Montenegro team competes in World Cup despite referendum

Another area which has experienced the ravages of regional warfare has been that which was formerly known as Yugoslavia, which has now broken up into so many of its component parts. This process took another twist in the summer of 2006, when the state of Serbia & Montenegro, itself one of these balkanised states, ceased to exist after Montenegrins voted for independence through a referendum. This vote took place on the eve of the football World Cup finals in Germany, in which the former state had gained a place. It was decided that the team would complete the World Cup programme in its old guise. In the words of Serbia & Montenegro coach Ilija Petkovic:

"We started the qualifications as Serbia & Montenegro and our obligation is to finish as Serbia & Montenegro. I will be the first coach at a World Cup with a team that represents two independent countries" (*Daily Mail of 30/5/2006, p.67*).

It was unclear at the time of writing in which country Mr. Petkovic would continue his career.

Rock stars? Gibraltar secures UEFA place

The rocky appendage to the Iberian southern coast, which has been a British colony since 1704, has long been the source of acrimony between the United Kingdom and Spain. These tensions look hardly set to abate, judging by the recent news that Gibraltar is heading for a place in next season's UEFA Cup, and for eventual inclusion in the qualifying rounds for the Euro

2012 tournament, as a result of a landmark ruling by the Court of Arbitration for Sport (CAS).

It is a little-known fact that Gibraltar is one of the oldest footballing countries in the world, boasting as it can a national side formed 105 years ago, as well as being the planet's sixth oldest national association. Supported by the British Government, and ferociously resisted by Spain, Gibraltar appealed to the CAS in Lausanne that the European governing body in football, UEFA, had no right to dismiss their application to be partakers at European football's high table. The Court found for the Rock. It dismissed the objections lodged by Spain as being "clearly and purely political in nature", and held that:

"the Executive Committee of UEFA is ordered to admit to provisional membership of UEFA the Gibraltar Football Association (GFA) at its next Executive Committee meeting – the matter will be considered at its meeting of 4-5 October 2006" (*The Daily Telegraph of 7/9/2006, p.57*).

The CAS also ruled that UEFA must place the GFA's application for full membership of UEFA before its next Congress. It is widely predicted that Gibraltar will be accepted, opening up the UEFA Cup to such minnows as Prince of Wales, Europa, Britannia and Gibraltar United. More controversially still, the Gibraltar national team, selected from a population half the size of another unfancied UEFA member, Andorra, will be ushered into the qualifying rounds for the 2012 European Championships. The GFA pointed out that the CAS ruling came at a time when the qualifying rounds for the next European Nations Cup were under way with the participation of Andorra, Liechtenstein and the Faroe Islands (*Ibid*).

Predictably, this decision drew heavy criticism from the Spanish Government, which pledged to do everything in its power to resist its implementation (*The Independent of 7/9/2006, p.25*).

Ghana apologises for waving of Israeli flag

One of the promising African sides to gain a place in the recent World Cup finals was Ghana, who confirmed their potential with a 2-0 win over the Czech Republic. However, there was controversy after the game finished when one of Ghana's players, John Pantsil, who plays for Hapoel Tel Aviv, waved an Israeli flag. This provoked considerable anger from several Arab states, and prompted an apology from the Ghanaian Foreign Minister (*The Independent of 23/6/2006, p.55*).

2. Criminal Law

Corruption in sport

Corruption scandal rocks Italian football to its foundations

Background

These columns have featured a number of scandals involving the bribing of match officials and players in recent years, including the German refereeing scandal, from which *das schöne Spiel* is still struggling to recover. However, both in scale and degree, the scandal which has been unfolding in Italy over the past few months makes the Hoyzer-affair seem relatively trivial.

Not that this is the first occasion on which Italian football has been enveloped in the stench of corruption. As early as 1927, an Italian Football Federation (FIGC) inquiry discovered that an AC Torino official had bribed Juventus defender Luigi Allemandi, causing the club to lose its league title and the player to be banned for life. Nearly 30 years ago, players from Perugia and Avellino agreed to fix a Serie A (top division) game as part of a betting coup, which included AC Milan and Lazio. The scheme was, however, discovered two years later, and both Milan and Lazio were relegated to the Serie B. As recently as last year, this column reported how the celebrations of Genoa, a club which had won promotion to the top division, were stifled when it was learned that Venezia had been bribed to guarantee Genoa a win in the final game ([2005] 2 *Sport and the Law Journal* p.54). Genoa were consequently relegated to Serie C1 (*The Independent of 8/7/2006, p.81*).

Even this sorry list omits some of the informal investigations carried out by intrepid journalists such as Brian Glanville and Keith Botsford of the *Sunday Times*. As a result, the latter, in 1974, accused Juventus of attempting to bribe Portuguese referee Francisco Marques Lobo to falsify the second leg of the European Cup semi-final at Derby County's Baseball Ground. Mr Lobo reported the attempt to his national federation – and was never again called upon to referee an international match. The UEFA tribunal which investigated the matter did not even confront the Juventus official concerned. The same journalists investigated the conduct of Internazionale Milan, and concluded that for each of their European Cup semi-final games, against Borussia Dortmund and Liverpool respectively, match officials had been bribed. For the 1966 semi-final, an attempt was made to corrupt the Hungarian referee in charge; when the latter refused their entreaties, he too was never again troubled for international duty (*The Sunday Times of 14/5/2006, p.S13*).

However, the scandal which erupted in mid-May 2006 threatened to dwarf any previous instances of corruption, as will be made clear below.

Juve Board resigns – and the investigations start

The 2006 World Cup had only four weeks to go when the news broke that the governing board of leading Italian side Juventus had resigned following revelations about telephone message interceptions involving the club's management, which concerned allegations of collusion in the appointment of referees for Juventus's matches. Antonio Giraudo, the club's Managing Director, and Luciano Moggi, its General Director, were among those who stepped down (*The Times of 12/5/2006, p.105*). The Turin side were in contention for the Serie A title, needing only a point from the final League match to secure the title yet again. The club's share price fell immediately by 10 per cent, and the case rapidly attracted the interest of the relevant Public Prosecutors' departments (*The Guardian of 12/5/2006, p.S4*).

The tapped conversations featuring Mr. Moggi and a number of important figures in the game seemed to confirm what many Italian football fans had suspected for some time. Jokes about Moggi's exaggerated power with referees and the transfer market had been common currency even before the telephone transcripts made the front pages of the Italian printed media. In fact Antonio Di Pietro, the magistrate leading the *mani pulite* team which investigated political corruption in the 1990s and caused over 4,000 people to be jailed, commented that he saw many similarities between that case and the developing football scandal (*Ibid*).

Juventus duly acquired their 29th League title, but the celebrations were distinctly muted as the club became even more embroiled in the scandal. No fewer than four separate investigations were initiated in Turin, Rome, Parma and Naples, and their scope extended beyond Juve to include AC Milan, Fiorentina and Lazio. It even extended to the national federation, whose offices were raided by police investigating the GEA management company, which controls almost 200 coaches and players. It is headed by none other than Alessandro Moggi, the son of the aforementioned Juventus general manager. This was the focus of the Rome inquiry.

The Naples investigation was also centred around telephone taps of leading officials capable of leading to charges of "criminal association" and "sporting fraud". It also involved the questioning of Mr. Moggi and Diego Dalle Valle, who rebuilt the Fiorentina club after its collapse a few years ago. The latter's brother, Andrea, was also implicated. The Turin inquiry obviously

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concerned the telephone taps which had led to the resignation of the Juventus board, whereas the Parma investigation centred on illegal betting, with Gianluigi Buffon, the Juventus and Italy goalkeeper, being named by leading newspaper La Stampa as one of the players involved. So potentially disastrous was the crisis that the incoming Prime Minister, Romano Prodi, called for the appointment of a political "commissar" to be placed in charge of the national football federation (*The Guardian of 13/5/2006, p.73*).

The sordid facts begin to emerge... and the scandal claims its first victims

Naturally, as the investigations mentioned above started in earnest, details of the unsavoury goings-on under scrutiny started to emerge. In the first instance, leading newspapers started to publish details of some of the telephone conversations which had sparked off the entire affair. One of these took place in the course of February 2005, and was between Mr. Moggi and Paolo Bergamo, of the referees' federation, who was responsible for allocating match officials to fixtures. At a certain point, Mr. Bergamo is actually heard asking the Juventus director "Let's see what matches up with what I was thinking – who have you put where?" Moggi then replies that he has "arranged" Inter v. Roma, Juve v. Udinese, Reggina v. Milan, Fiorentina v. Parma and Siena v. Messina. He also urges Bergamo to punish certain referees for alleged errors because otherwise "they will think they have got carte blanche to make whatever decisions they want" (*The Sunday Times of 14/5/2006, p.S13*).

Leading newspapers also printed transcripts of an interesting conversation which took place in November 2004, between referee's observer Pietro Ingargiola and Tullio Lanese, President of the national referees' association. This followed a surprise defeat of Juventus at the hands of Reggina. Mr. Ingargiola is reported as saying:

"I've never seen anything like it in my life. Moggi and Giraud (from Juventus) go in, and Moggi starts really threatening him, with his finger right up to the referee's eye. He was shouting at the linesman too, 'You're an absolute disgrace not giving that penalty, how dare you?' I pretended not to see anything and went to the toilet" (Ibid).

A further leaked conversation had Mr. Moggi informing an unidentified woman of the same incident, in which he says "I locked the referee and the linesman in the toilet and took the keys away with me to the airport" (*Ibid*).

As was widely anticipated, magistrates with experience of anti-Mafia judicial action was drawn into the investigation. Giuseppe Narducci, who had spent 10 years battling the notorious Camorra gangsters in

Naples, called upon the country's footballing élite to assist him in cleaning up the game, saying that the "time for chatter was over" and that the relevant people volunteering information represented the only chance for Italian football to survive (*The Independent of 15/5/2006, p.60*). Yet virtually on the same day on which he made this pronouncement, there came an intervention which also highlighted the ills of Italian football, when former Prime Minister Silvio Berlusconi called for AC Milan to be awarded the League title if the allegations against Juventus were proven (*The Guardian of 15/5/2006, p.S6*). Mr. Berlusconi owns the Milan club, and his intervention only highlighted the unhealthy relations between certain leading politicians and industrialists on the one hand, and the nation's leading football clubs on the other hand – even if they do not breach the letter of the law.

Already, the investigation was claiming its first victims. First of all, the Italian federation was placed under emergency administration – its president, Franco Carraro, and his deputy, Innocenzo Mazzini, having already resigned. The country's national Olympic committee appointed Guido Rossi, the 75-year-old former head of the national stock-market regulator Consob, to take charge on a six-month renewable mandate (*The Independent of 17/5/2006, p.53*). This followed police raids on Mr. Carraro's offices and home, as well as the seizure of documents at the headquarters of the national referees' federation (*The Guardian of 17/5/2006, p.S6*).

The following day, it was learned that the host of the nation's most popular television football show, Aldo Biscardi, had resigned after allegations that he had collaborated with Mr. Moggi in boosting the club's image. The investigation into match-fixing had revealed a number of telephone calls, published by the Italian media, in which Moggi was heard to pressurise the TV host in question into favouring Juventus. Mr. Biscardi was the long-serving host of Il Processo, a Monday night programme in which matches are analysed. Although he denied any wrongdoing, Mr. Biscardi stated that he had decided to leave because of "all that is happening in the soccer world" (*The Independent of 18/5/2006, p.66*).

Juventus's financial fortunes also declined – to the point where the club's future was placed in dire peril. On 16 May, it was announced that shares in the club were suspended, ironically within days of the club winning its 29th League title. As was reported earlier, the club's share price had already taken a pounding on the stock market, and at a certain point they had declined in value

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by 26 per cent. It was then that the shares were suspended, having lost more than a quarter of their value over the three previous trading days (*The Independent of 16/5/2006, p.68*).

The taxman cometh – and the national coach sweateth!

Another near-inevitability of the intensifying scandal was the prospect of fiscal irregularities, and on 18 May Italian tax police searched the offices of Juventus, as well as the homes of the latter's top players, Swedish international Zlatan Ibrahimovic and the Italian team captain, Fabio Cannavaro. It was also learned that the home of Mr. Moggi's son Alessandro had also been raided as part of the probe into the operations of his football management company, GEA World (see above) (*The Daily Telegraph of 19/5/2006, p.S6*).

A further bombshell to be released in this continuously developing saga came when it was learned that Rome magistrates had interviewed no lesser person than Marcello Lippi, the national team coach, just five days before his side were due to depart for the World Cup in Germany. Further wiretaps had suggested that he may have permitted the business interests of Mr. Moggi to dictate which players were called up for international duty. Since Mr. Lippi was not under formal investigation, he was called into the inquiry as an "informed witness" Following intensive questioning that lasted three hours, the investigators pronounced themselves satisfied with the witness's responses (*The Observer of 21/5/2006, p.S17*). However, this did not appear to tell the full story.

Sources from inside the Naples police force claimed that Mr. Lippi was himself a client of the GEA World company, i.e. the sports agency which, as has already been mentioned earlier, is at the heart of the current scandal. GEA represents over 200 players as well as 29 coaches. The sons and daughters of the great and the good in Italian football and finance featured on its board – and these included Mr. Lippi's son, Davide. Lippi Sr. flatly contradicted the accusations emanating from Naples. When he was appointed as national coach two years previously, he publicly attempted to quash allegations that he was under a conflict of interests, stating that he had told his son "not even to think that I'll ever pick any of his players". Yet it remained a disturbing fact that, of 63 players called up for international duty, nine had been GEA players, including Giorgio Chiellini – who interestingly is also a client of Davide Lippi (*Ibid*).

The GEA allegations in fact intensified the pressure on an increasingly isolated Mr. Lippi. The officials who had

appointed him had already been compelled to resign, and he had also been the Juventus coach at the time when many of the facts alleged under the investigation had taken place. One television poll found that a clear majority wanted him to stand down as national coach – a call echoed by one of the nation's leading newspapers. Leaks also revealed that investigators' files describe Mr. Lippi as playing a "subordinate" role to the disgraced Mr. Moggi, whose complex web of contacts were revealed to have included not only GEA and Italian FA officials, but also chiefs of the automobile company Fiat, bank chairmen and even Government ministers (*Ibid*).

Although Mr. Lippi resisted these calls for his resignation, the accusations against him were growing in intensity and specificity. Once again, these allegations arose from a number of telephone taps, which, according to critics, proved that his national side had merely become an extension of Mr. Moggi's power base. In several conversations, Moggi was heard to request that Lippi should omit Juventus players – captain Cannavaro because he was "tired" and Del Piero because of a club trip to the Far East – and the coach's team sheets suggest that there may have been some compliance with these wishes (*The Independent of 22/5/2006, p.61*). Even more damaging were further allegations arising from Lippi Jr's involvement with GEA. According to some reports, Davide Lippi informed Juventus player Manuele Blasi that he would obtain a regular place in the national side if he dismissed his agent, Stefano Antonelli, and joined GEA – allegedly telling the player that Lippi Sr. had a "soft spot" for GEA players. Again, Mr. Lippi resisted calls for his resignation and denied any wrongdoing (*Ibid*).

In the event, Mr. Lippi remained in post for the World Cup, eventually leading his side to victory, and the magistrates have not troubled him again – for the time being. However, many in the media believe that the full story has yet to emerge into then open.

The investigation draws to a close – and clubs are charged

As the investigation continued, those accused naturally attempted to exculpate themselves, and enlisted the media for this purpose. Prominent amongst these was, inevitably, Mr. Moggi, who claimed that, far from seeking to secure the appointment of referees favourable to his club's cause, he merely wanted to assure himself that referees whom he described as "enemies of Juventus" did not take the field, and that all fixtures would be overseen by serious professionals who were impartial. He also claimed that other clubs

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were also involved in lobbying over refereeing appointments, stating:

"I will tell you one thing – for years, every day of the week, the refereeing selectors received calls from the presidents and directors of clubs at all levels, starting from [the Milan official Leonardo] Meani and [the Internazionale president Giacinto] Facchetti (....) These certainly weren't friendly calls because everyone always has something to complain about. It wasn't me who invented this football, it is the system that has always worked like this (The Independent of 23/5/2006, p.52)

It appeared that, on this issue at least, Mr. Moggi may well have been speaking the truth, since within the next few days a leading newspaper published telephone taps suggesting that AC Milan had also attempted to influence the appointment of referees. According to one of the transcripts, the aforementioned Mr. Meani had communicated with the official responsible for assigning linesmen in the course of April 2005 and complained about a linesman after Milan had lost a fixture to Siena. During the call, he was heard warning the official "to be careful", adding that the Milan Vice-President, Adriano Galliani – who is also the Italian Football League president – was "furious". However, in a statement, Milan's lawyer Leandro Cantamessa steadfastly denied any involvement by Milan in this affair (*The Independent of 26/5/2006, p.60*).

Another leading figure in Italian football to enter the fray was Giuseppe Gazzoni Frascara, who until recently was the owner of top team Bologna. He claims that his team were relegated from the Serie A the previous season after he had refused to join what he described as "Moggi's system". He claimed that Italian football was controlled by four or five people, and that "there is a lot of temptation here" (*The Mail on Sunday of 28/5/2006, p.121*).

Gradually, the investigation was drawing to a close, and magistrate Francesco Borrelli submitted the results of six weeks' interviews with referees and officials from the football federation and from leading clubs to the Public prosecutor, Stefano Palazzi (*The Guardian of 20/6/2006, p.56*). Within days, Mr. Palazzi had brought charges against four clubs – Juventus, AC Milan, Lazio and Fiorentina (*The Daily Telegraph of 23/6/2006, p.55*). The charges related to "sporting fraud" and violations of fairness and probity, for which a wide range of penalties were available. All four clubs faced the prospect of relegation if found guilty (*The Independent of 23/6/2006, p.58*).

The trial begins – amidst new allegations and further drama

By legal standards, the affair was scheduled to proceed to a conclusion within a relatively short space of time. The trial commenced on 26 June, and was expected to deliver judgment within the next two weeks (although this timetable was subsequently altered – see below). However, between the time of bringing the charges and the opening of the trial there was more drama and controversy to come.

First of all, it emerged that, although the relevant charges had been brought against the leading clubs referred to above, this was not by any means to be the end of all enquiries into the general issue of football corruption in Italy. A few days after submitting his report, magistrate Francesco Borrelli announced that he would continue his investigation – this time to include some of the nation's lesser fancied clubs. First of all, officials from three other Serie A clubs, Reggina, Siena and Empoli, were called in for questioning, once again on the basis of tapped telephone conversations. The leading sports newspaper *La Gazzetta dello Sport* also announced that three Serie B (Division 2) teams, Messina, Lecce and Arezzo, had also come under investigation (*The Guardian of 27/6/2006, p.59*). The results of this investigation were not yet known at the time of writing.

There was more drama when it was learned that the man who had been appointed by Juventus to help restore the club's fortunes following the scandal had attempted suicide. Gianluca Pessotto, a former Juve player, had climbed to the top of the club's headquarters in Turin clutching rosary beads, and jumped 50 ft from a window. He survived largely because he landed on parked cars, and was taken to hospital with multiple fractures and internal bleeding (*The Guardian of 28/6/2006, p.5*). It was unclear whether this attempt was directly connected to the charges hanging over the club, but it naturally added to the dramatic intensity in which the entire affair was enveloped.

The trial itself eventually got under way on 29 June (*The Independent of 30/6/2006, p.20*). However, proceedings were abruptly adjourned on the first day of hearings, which raised the almost inevitable prospect of a delay in the final verdict. This was significant because any delays could leave the Italian federation struggling to meet the 27 July deadline for submitting its list of teams for the following season's Champions League and UEFA Cup competitions (*The Guardian of 1/7/2006, p.10*). Once the hearings got under way, it appeared

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that the public prosecutor was inviting the tribunal to take a hard line approach, calling as he did for Juventus not only to be stripped of its current and previous year's titles, but also to be relegated to the Third Division and have six points deducted. He also called for Fiorentina and Lazio to be relegated to the Second Division with a 15-point penalty each, and for Milan also to be demoted to the Serie B with a three-point penalty. In addition to the clubs, 25 individuals, consisting of club and Italian Football Federation officials – as well as referees and linesmen – faced a variety of charges relating to match-fixing and unfair practices (*The Daily Telegraph of 5/7/2006, p.S5*).

The second major surprising development came when, one week into the hearings, Cesare Zaccone, the lawyer acting for Juventus, declared that the club would accept relegation to Serie B the following season by way of punishment (*The Independent of 7/7/2006, p.58*). Previously, the club had distanced itself from the activities of Mr. Moggi which had been the main factor behind the prosecution. Mr. Zaccone's statement was therefore a clear admission of guilt. It was felt that this change in strategy was the result of the stiff penalties demanded by the Public Prosecutor, which had inspired the fear that relegation to the Serie C1 would have bankrupted the club. Juventus may be Italy's richest club, but (contrary to popular belief) they receive no financial support from their patrons, the Agnelli family (who own the Fiat motor vehicle company). Approximately 80 per cent of its income comes from television rights and sponsorship (*ibid*).

In the meantime, the national side was giving Italian football a necessary lift on the field by coming through the group stages and eventually reaching the final. There had been suggestions that, if Italy beat France to gain the title, this would be followed by an amnesty for the clubs involved in the trial. However, sources close to the trial judges discounted such rumours. This made the fixture even more important for the club's players representing their country, who would have an extra incentive to play well in order to enhance their employment prospects if their clubs were relegated and they wished to continue in the top flight of football (*The Sunday Telegraph of 9/7/2006, p.S12*). As the entire football world knows, the Azzurri emerged victorious from the final against France, and even the corruption scandal was unable to dampen the celebrations of a nation. Even the tribunal itself was moved to postpone sentencing until later that week, in order not to spoil the triumphant atmosphere. This was not entirely to the taste of the clubs' supporters, who felt that this was merely prolonging the agony (*The Guardian of 12/7/2006, p.S3*).

The verdict – and its immediate aftermath

Eventually, sentence was pronounced on 14 July (by a strange twist of fate the national holiday of World Cup opponents France). The four clubs were all found guilty, but there were considerable variations in the penalties inflicted upon them. Predictably, Juventus were the hardest hit, being relegated to Serie B, ordered to start the following season under a 30-point deduction, and stripped of their last two league titles, thus disqualifying them from the Champions' League. Lazio and Fiorentina were also demoted to the Second Division for the following season, which they were to start with a minus-seven and minus-twelve points deficit respectively. AC Milan were the least affected and were not relegated, but even they were stripped of 44 points for the previous season – which also put them out of contention for the Champions' League – and forced to commence the current season under a 15-point handicap. Luciano Moggi was banned from football for five years, whereas Franco Carraro (the former Italian Football Federation president) was issued with a 4 year ban for having failed to take action in order to "stop the rot" (*The Guardian of 15/7/2006, p.4*).

The serious nature of the implications this verdict had for the clubs concerned hardly requires any guesswork. In the first place, it was expected that many of the clubs' players would cast their eyes elsewhere for future employment (although in the event this did not happen to the extent predicted). Secondly, the clubs faced heavy losses, particularly in their income from media rights deals – especially Juventus, who could only expect to return to the Champions' league by 2009 at the earliest (*ibid*).

Although Milan had suffered the lesser penalty, the fact that it had been penalised at all aroused strong feelings from those who believed that the accusations made against the club had been politically motivated (it should be recalled that the club's owner, Silvio Berlusconi, had been ousted as the nation's Prime Minister by the Centre-Left at a general election held three months previously). Roberto Formigoni, the governor of the Lombardy region which accommodates Milan, even went so far as to describe the trial as "a disgrace". There were angry scenes involving supporters from the other clubs as well. In the case of Lazio, things threatened to turn ugly when around 400 supporters vented their feelings outside the hotel where the tribunal had convened to announce its verdict. Initially they restricted their protests to anti-Juventus chants, but the mood soon changed and defence lawyers were threatened as they attempted to leave after the verdicts were announced (*ibid*).

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The appeals and their outcome

The clubs concerned had the opportunity to appeal against these verdicts, but had only three days in which to do so and make their case in support of it. All four clubs did in fact appeal. This was in spite of Juventus's aforementioned statement that they would accept relegation to the lower division. However, their lawyers had added the qualification that they would only do so as long as their punishment was proportionate to that faced by the other accused clubs (*The Daily Telegraph of 15/7/2007, p.56*).

The appeals were successful – up to a point. Juventus remained relegated to Serie B, but they were to start the following season with a “mere” 17-point deficit as opposed to the 30 points initially stipulated. Lazio, who had also been relegated, were reinstated in the top division – albeit subject to an 11-point deficit. Fiorentina were also spared demotion, but were to commence the following season with a 19-point penalty. AC Milan, for their part, had their 15-point penalty reduced to a mere 8. Crucially, their disbarment from the following year's Champions League was also overturned – they were to enter the competition at the third qualifying round. The ban imposed on Mr. Moggi was upheld (*The Independent of 26/7/2006, p.53*).

Unsurprisingly, this outcome provoked an angry reaction from Juventus. The club Chairman, Cobolli Gigli, predicted that his side would pursue the matter in a civil court, adding:

“We absolutely cannot accept this sentence. Worst of all, we have been given a penalty which seriously prejudices next season. For this reason we have decided to push our case in every possible forum” (Daily Mail of 26/7/2006, p.71).

The clear winners of the appeal process were undoubtedly AC Milan. They appear to have convinced the appeals tribunal that the activity of its referee's assistant Leonardo Meani (see above) was something for which the club could not be held responsible – hence the Champions League reprieve. The club's managing director, Adriano Galliani, had his initial one-year ban reduced to nine months, whereas Mr. Meani had his 3 ½-year ban reduced by a year. Another beneficiary of the appeals board's clemency was the former federation president, Franco Carraro, whose 4 ½-year ban was replaced by an €80,000 fine. It was felt that the appeal judges may have been swayed by the clubs' threats to challenge excessive penalties before the civil courts – or even the European Court of Justice (*The Independent op.cit., p.53*). The 2005-6 scudetto was awarded to Internazionale, who had finished third behind Juventus and AC Milan (*The Independent of 27/7/2006, p.53*).

The Milan club, however, was not yet entirely certain of a place in the 2006-7 Champions League, since the final word on this subject lay with a specially convened UEFA panel. In the event, Milan's place was secured at the mere cost of a severe reprimand from UEFA, which admitted in its ruling that only the lack of a sound legal basis for excluding the club had prevented them from agreeing a ban (*Daily Mail of 3/8/2006, p.84*). Juventus, for its part, doggedly refused to concede defeat, and, in mid-August, met the Italian football federation in order to contest the decision once more. Yet again, the authorities held firm (*The Independent of 19/8/2006, p.69*). Several days later, it made an attempt at exercising what some commentators believed to be unseemly pressure by offering to desist from any civil court action in return for the Italian federation rescinding its decision to relegate them. However, with a few days to go before the court case in question commenced before the Tribunale amministrativo regionale (TAR) of the Lazio area (*The Independent of 29/8/2006*), the Italian football authorities once again refused to bow. The outcome of the TAR case was not known at the time of writing.

It may also be that the fall-out from this entire unsavoury affair is not confined to Italy, since the public prosecutors involved in this case have, in the course of their investigations, also discovered certain facts which have caused a number of player transfers to be investigated – some of these involving clubs outside the country. This will be returned to below, p.45.

The biggest toutfest ever? World Cup ticket scandal casts shadow over 2006 tournament

Background

There is obviously nothing new about “ticket touting”, i.e. the questionable practice of buying coveted tickets for key spectacles and then selling them at many times their official value. (The English composer Henry Purcell, living in the 17th century, was disciplined for doing just that for the Coronation of Queen Mary.) Most of us who have ever attended major sporting events have not failed to notice the presence of shady individuals shiftily offering their wares (sometimes unauthentic) to gullible and obsessive members of the public. Even this year, the extent to which fans are prepared to pay over the odds for major events was underlined when it was learned that tickets for the European Cup final between Arsenal and Barcelona, in May, were changing hands at more than 20 times their face value, with unscrupulous vendors charging over £1,700 for tickets originally

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priced at £82 (*The Independent of 18/5/2006, p.69*). European governing body UEFA made brave noises about their intolerance towards “abusive and uncontrolled” sales of tickets, and solemnly proclaimed that it would cancel tickets sold in this manner. However, such threats seem to have had little effect on the determination shown by touts and customers alike (*ibid*).

It was this ambivalent attitude displayed by the game’s governing authorities – and even by the public authorities at large – which lay at the root of the World Cup ticket scandal, the various unsavoury details of which are related below.

Official ticketing policies: an invitation to cheat and be cheated

The football World Cup being what it is, this event was always going to attract the unwanted attentions of such “traders”. The measures taken by the relevant footballing authorities, faced with this prospect, were not universally admired. On the one hand, the German government had ordered the most stringent rules yet to be put into practice for this showpiece competition. These included an order that entrance to every match would only be allowed by means of a ticket containing the bearer’s name and address, passport number, nationality and date of birth. Should any of these details be missing, the ticket would be automatically rejected at the computerised entry gate. Any damaged ticket would also fail the security check, with the holders of any such ticket having to proceed elsewhere in the stadium to solve the problem. Provision was also made for numerous spot checks aimed at ensuring that the data featured on the ticket related to the person bearing it – which could be altered in advance, but only if the changes were registered 72 hours before the start of the game (*Daily Mail of 27/4/2006, p.87*). However, this ran into obloquy from FIFA, whose President Sepp Blatter met the German Chancellor Angela Merkel in order to discuss fears that the checks would take up too much time and that therefore fans could still be queuing outside the grounds when the matches kicked off. In the event, by the time the tournament ended the had organisers conceded that they were in effect no longer checking these details, since only a small minority of fans were being rigorously monitored (*The Daily Telegraph of 14/6/2006, p.S5*).

In addition, there was one element of official policy which was always likely to throw a spanner in the works, to wit the fact that reselling tickets is not illegal in Germany. Before the tournament commenced, there had been calls from FIFA to introduce appropriate

legislation by the time the event took place, but to no avail. This was widely predicted to create the conditions for what one senior football official described as a “toutfest”, as sponsors, national federations and FIFA flooded the market with unwanted tickets (*The Daily Telegraph of 7/7/2006, p.S6*).

Indeed, there were other ways in which the public authorities of the host nation were assisting the likelihood of a flourishing black market. On 19 May, the German government revealed an oversight relating to “VIP” tickets which presaged dire consequences. It appeared that tickets sold to companies or issued to sponsors would be exempted from the obligation to provide the data specified above (*The Guardian of 30/5/2006, p.S7*). Given the indecently large proportion of such tickets (see below), this blunder – charitably assuming that this was indeed a blunder – had the potential for trouble, as will be described later.

To make matters worse, the ticket allocations stipulated by the tournament organisers also seemed to constitute an open incentive to ticket corruption. In fact, the system devised by world governing body FIFA and the 2006 Organising Committee could almost be described as a Touts’ Charter, mainly because FIFA’s policy benefited sponsors and the wealthy, but disadvantaged those fans who are the life blood of the game. The sheer iniquity of the official ticket allocation policy can be seen from its more detailed aspects:

- sponsors such as Budweiser, Coca-Cola and McDonald’s received one-sixth of all tickets – i.e. 490,000 in all. In addition, the 15 World Cup sponsors were given up to 25,000 tickets each, and a further six German domestic backers shared the remainder;
- the total allocation for these “partners” of FIFA amounted to 16 per cent, whereas the original share for the competing nations was 8 per cent;
- a further 11 per cent of the 3.1 million available tickets was reserved for the corporate hospitality market (i.e. those who could afford to pay up to £1,659 per match for a good seat, fine food, a glass of champagne and “a personal gift and exclusive access to the Hospitality Village”)
- hospitality tickets were counted as “public sale tickets” even though the prices meant that only companies and wealthy individuals were able to acquire them (*The Observer of 16/4/2006, p.S8*).

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This had the double effect of driving the latter into the arms of unscrupulous vendors, and gave rise to the temptation, on the part of the beneficiaries of these privileged ticket holders, to dispose of them in a similar manner – as will be described below.

There was also embarrassment for the host nation when it was learned that an official sponsor had allocated hundreds of free tickets to leading German politicians. In fact, public prosecutors announced that they were investigating whether the German energy company EnBW had breached the law by offering match tickets to regional and national parliamentarians. The question which exercised them was whether the MPs who had accepted the tickets had received preferential treatment. This only added to the widespread criticism which the official ticket allocation policies had invited thus far (*The Guardian of 9/5/2006, p.19*).

This mismatch between the ordinary fans on the one hand, and the sponsors, corporate clients and politicians on the other hand, understandably gave rise to widespread indignation among the supporters of the qualifying countries. This was particularly the case because it was never clear that the competition sponsors needed so many tickets in the first place, and would have been pleased to provide their sponsorship even on the basis of a less generous ticket allocation. The relative scarcity of fans' tickets led to a widespread expectation that the football enthusiasts who made it to Germany but without a legitimate ticket would easily fall prey to the touts. These expectations were entirely fulfilled, as can be seen below.

Black market gets more encouragement – the Frankfurt court ruling

The bumbling attitude of the tournament and other authorities in their handling of the sale and availability of World Cup tickets, which is highlighted above, was not the only aspect of the ticketing fiasco. There were also some contractual aspects to this question, which were highlighted, even before the tournament kicked off, when a German court ruled that a spectator who bought tickets on internet auction site eBay was entitled to use them, even though his name was not printed on the ticket face.

In the case under review, the tournament organisers had insisted that German citizen Björn Kracht had acquired the tickets unfairly. However, the matter came before the judiciary in Frankfurt, and the latter disagreed with this view. Mr. Kracht, from Essen, had applied for tickets during the first stage of the World Cup ticket sale, which took place in April 2005. Having failed to

obtain any, he purchased two €110 tickets for the quarter-final tie at Gelsenkirchen from another fan via eBay, paying a much higher sum (€880) for the privilege. FIFA refused his request to have the tickets transferred to his name, causing Mr. Kracht to take court action against the German football association. The Frankfurt court added that its verdict could only apply to those who bought tickets on eBay before October 2005, when FIFA announced that it was setting up its own international ticket site. Fans having acquired tickets after this date could transfer them to members of their family, or sell them back to FIFA, but were not allowed to sell them on to third parties. Although the Court stressed that the ruling only applied in this particular case – the German courts conform to the codified law tradition which prohibits them from setting judicial precedents – it was regarded as a clear signal that fans could obtain tickets on the black market.

The tournaments kicks off – and so does the touting...

The extent to which ticket touts were cashing in on the world tournament was evident even from the group stages – particularly those involving countries enjoying a large and enthusiastic following, such as England. This was already evident in relation to a fixture as unremarkable as that which saw the latter take on Paraguay (see below). Naturally, matters got a good deal worse once the knock-out stages had been reached. According to an investigative journalist reporting for a British newspaper (*The Observer of 25/6/2006, p.S12*) the going rate for desperate England fans wishing to see the match against Ecuador was anything between £650 and £890. It transpired that many of these tickets had been acquired from Germans selling with huge profit margins seats which they obtained through FIFA's Internet ballot. However, the newspaper investigation revealed many other alarming breaches of the world governing body's allegedly strict ticketing rules:

- Many black market tickets had been issued to the English Football Association (FA) and some of FIFA's 207 member states worldwide, including France, Japan and Brazil. A large proportion had come from ticket allocations given to the tournament's 15 sponsors;
- Two men, together with football officials and civil servants from Ghana, were seen by journalists selling tickets at rates well above their official value before the Ghanaian side's victories over the Czech Republic and the US;

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Some touts, who were selling large volumes of tickets stamped with the name of a sponsor, claimed that they were working with that company in order to offload seats for which they had no use.

Paraguay ticket allocation: one-off scandal or one of many?

It has already been mentioned earlier that the black market in World Cup tickets was flourishing from the very group stages, particularly when it was aimed at the keenest fans. In the case of England's first opponents, Paraguay, the suspicion was that many of these tickets had emanated directly from that country's footballing authorities. More particularly Paraguay were suspected of having sold more than half of their ticket allocation to "unofficial vendors", who were charging fans up to £645 per seat. It emerged that at least 1,500 of the Paraguayan FA's allocation of 3,300 tickets for the group B opening fixture had disappeared, amid claims that they had found their way to black market agencies in Britain and Europe (*The Daily Telegraph of 5/6/2006, p.S8*).

The main trigger for these suspicions came from Paraguay itself, more particularly from the four travel companies in the capital Asuncion who were selected to market most of the tickets, and who complained bitterly that they had been short-changed. Siboney, one of the agencies in question, claimed that, whilst it received between 200 and 300 tickets for Paraguay's other matches, against Sweden and Trinidad & Tobago, it received a mere 40 for the England game in Frankfurt. Yet despite this shortage in Paraguay, tickets were readily available in Europe, at vastly enhanced prices. One British journalist discovered a list of prices for tickets available from the Milan-based "Few Limits wholesale tour operator", which included a ticket-and-hotel deal costing ?940 (*The Observer of 4/6/2006, p.S1*). The same journalist also learned that, after a South American student residing in London – who had ordered tickets for the match with one of the said agencies – was left disappointed, he was instructed to pursue his quest by phoning a British mobile number, which proved to be the contact number for a leading internet-based black market operation (*ibid*).

The sales manager at Amitour, another Asuncion agency officially entrusted with the sale of tickets, maintained that the Paraguayan FA had provided no explanation for the shortfall in their allocation, commenting:

"They just told us they were sold out. We have no way of knowing what really happened, but it's strange that with the other two we got all the tickets we wanted, but not with the England game" (*ibid*)

Further evidence of the untoward disposal of these tickets appeared to come from the leading German news magazine *Der Spiegel*, which alleged that the Paraguayan federation sold tickets for the England and Sweden matches to a US ticket agency. This caused FIFA's auditors, Ernst & Young, to examine the relevant documents, although at the time of writing the results of their investigation had not yet emerged (*The Daily Telegraph of 6/7/2006, p.S6*).

In the event, FIFA cleared the Paraguayan association of the charge that is unlawfully passed on the tickets in question (*The Observer of 18/6/2006, p.S12*). Nevertheless, the questions raised by the incidents referred to above are extremely difficult to explain away. It may be that this particular saga was just an exceptional glitch. However, there is also the possibility that this was merely the top part of the proverbial glacier which had only been exposed to public view because of a series of coincidences, and that other national federations may have engaged in black market practices. One thing, however, is certain: this was not the only instance of football officials being suspected of black-market involvement – as can be seen from the contents of the next section.

Caught in the act: Botswanan official expelled for ticket profiteering

Given the flaws in the organisers' ticket allocation policies described above, it was only a matter of time before some senior figure was caught taking advantage of his/her ticketing privileges, and this moment duly arrived when Ismail Bhamjee, a long-standing member of FIFA's Executive Committee, became the subject of an undercover operation by a British newspaper. The latter discovered that he has sold England tickets at three times their official value, and was immediately requested to leave the tournament and return to his native Botswana. A FIFA statement quoted its president, Sepp Blatter, as being "very disappointed" at such conduct, adding later that he was "furious" about this development. (*The Sunday Telegraph of 18/6/2006, p.S7*). In a written statement, Mr. Bhamjee conceded that he had in fact sold tickets for England's fixture with Trinidad and Tobago in Nuremberg on 15 June at inflated prices, confirming that he had unlawfully sold 12 Category One tickets for £205 each. He added that he deeply regretted this "incorrect act" (*ibid*).

It may be that being expelled from the tournament was the least Mr. Bhamjee's concerns, since it was widely expected that further disciplinary action would follow, which could see him dismissed from his Executive Committee post and its annual £54,000 salary and

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£270-per-day expenses when on FIFA business. He could even forfeit the £16,000 annual pension which is awarded to former executive committee members (*Daily Mail of 9/6/2006, p.84*). At the time of writing, however, there was no further news of any such action. What has, however, emerged is a detailed version of the events which led to the Botswana official's exposure. According to *The Mail on Sunday*, which had first reported Mr. Bhamjee's actions to FIFA, he met a group of England fans in an Indian restaurant in Frankfurt. After he had informed them that he was a FIFA official, one of the fans asked whether he could obtain tickets for the Trinidad & Tobago fixture. The fans are then understood to have contacted the newspaper, which sent a reporter to buy the tickets from Mr. Bhamjee's hotel (*The Independent of 19/6/2006, p.57*).

Jack Warner affair refuses to die down...

It will be recalled from the previous issue (*[2006] 1 Sport and the Law Journal p.29*) that in mid-February 2006, FIFA vice-president Jack Warner had been accused of a conflict of interests after his family's travel agency were awarded the rights to sell the entire World Cup ticket allocation given to Trinidad and Tobago. The ethics committee of FIFA had ruled that Warner, who is also the president of Concacaf, the Caribbean football federation, was indeed involved in such a conflict, but the Executive Committee disagreed on the grounds that, since then, he had sold his shares in the firm and removed his name, along with those of his wife and two sons, from the company register.

However, Mr. Warner may find that his impunity is but short lived, since new facts seem to have come to light which may once again cause him to be the subject of official investigation. In mid-September, it emerged that FIFA's auditors, Ernst & Young, had traced a large number of World Cup tickets purchased by Warner as having been rapidly resold through a Florida-based agency at almost three times their official value. In their confidential report to the world governing body, the accounting firm stated:

"We can confirm that tickets included in orders under customer reference 201498572 [Mr. Jack Warner] were transferred or resold into the secondary market in breach of the 2006 FIFA World Cup Germany ticketing general terms and conditions" (The Guardian of 15/9/2006, p.S6).

It will be the first task of the a new independent 18-man FIFA commission set up for the purpose of combating match fixing, corruption and mismanagement in football, which will be discussed more fully below, to investigate this matter. The author pledges, as ever, to continue monitoring this matter for the benefit of his readership.

Other consequences of the ticket fiasco

Potential for crowd trouble. The relative lack of control over the circulation of tickets had raised concerns on the part of some national authorities that this could be reflected in trouble among spectators. When Richard Caborn the British Sports Minister, wrote to FIFA President Blatter expressing his concern that English fans would only receive eight per cent of the total allocation of finals tickets, Urs Linsi, the FIFA General Secretary, replied that, if a national association of a country paired with England returned any tickets, the English FA would be notified. However, the organisers then decided that tickets returned by national associations would be made available for general sale on the tournament's official website. This meant that there would be no effective segregation of fans, thus raising fears of increased hooliganism (*The Daily Telegraph of 14/6/2006, p.S5*). Indeed, there are some indications that some of the disturbances which disfigured the Germany v. Poland match (see below) may have found their origins in this development.

Cost to FIFA: £90 million. Once the last ball of the tournament had been kicked, and the last chest head-butted, it was possible for the world governing body and the host nation to count the cost of the latter's over-relaxed attitude to ticket touting. Although it was naturally the true fans who were the biggest losers – especially those with forged tickets – FIFA estimated that it had forfeited £90 million in revenue from this failure to control the black market (*The Daily Telegraph of 7/7/2006, p.S6*). One of the main reasons for this was the failure of the German authorities to introduce legislation making ticket touting an offence (see above).

Legal action against eBay? Yet another consequence of the lack of control which the organisers had over ticket sales was that many transactions were inevitably going to be conducted through the popular internet auction operator eBay. However, just as the tournament was about to start, the British Government introduced a change in the legislation governing the sale of World Cup tickets which were not authorised by FIFA. Under the 1994 Criminal Justice and Public Order Act, it was already an offence to sell tickets for any of the matches in England's group at the World Cup finals. However, in June 2006 the Government introduced an amendment which widened the definition of a "designated match" covered by the legislation, and which made it unlawful to sell tickets for any World Cup games. This change was aimed chiefly at touts who use the Internet to peddle their wares, and particularly on sites such as eBay. The latter immediately stated that they agreed to comply with this amendment, and promptly removed

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from their site all tickets being sold by its customers who were based in Britain (*The Daily Telegraph of 14/6/2006, p.S5*).

However, in a challenge to the new legislation and to FIFA's demands, eBay did not stop the sale of tickets placed on the site by customers based in other countries or on their websites which were based overseas. In a statement, the company stressed that the sale of World Cup tickets on ebay.co.uk or by UK registered sellers was not permitted under its policies, and that it had updated its football ticket policy to fall in with the new legislation. However, FIFA officially wrote to eBay informing them of the need to comply with the legislation in full, which would mean the wholesale banning of any World Cup tickets. FIFA have consulted their lawyers in London, who approached eBay once again to challenge them on their decision to allow non-UK ticket sales (*ibid*). Court action could follow if the Internet auctioneer's reply proved unsatisfactory. No further details were available at the time of writing.

FIFA gets tough on corruption – but how pristine is the organisation itself?

One does not need to be a devoted reader of this column to have arrived at the conclusion that the financial state of "the beautiful game" is not all that it should be. Even if they do not all agree with the apocalyptic description used by FIFA president Sepp Blatter about individual club owners "throwing pornographic amounts of money at the game" and the "wild west style of capitalism" which has invaded football (*The Guardian of 7/6/2006, p.S4*), many observers are extremely concerned that, in the trade-off between sporting and financial values, it is the latter which seems to have come out on top in a very big way. This is why, as was reported in the previous issue ([2006] 1 Sport and the Law Journal p.76), the world governing body FIFA has recently established a specific Committee in response to these growing concerns. This committee, which is headed by Mathieu Sprengers, president of the Netherlands FA and includes English Premier League chief executive Richard Scudamore, has called for increased financial transparency in the sport. It has also recently produced a report under the heading "Good of the Game" in which it formulated a set of proposals which were accepted by FIFA's Congress in Munich on the eve of the 2006 World Cup.

Initially, the reaction of some commentators who had been voicing their concerns about this state of affairs for some time tended to be on the low side. After all, the recommendations in question seemed to be on the

modest side: there were no proposals on ways of limiting players' earnings or on restricting wealthy patrons' freedom to purchase clubs – nor indeed anything much to redress the "football society of haves and have nots", another one of Mr. Blatter's choice phrases (*ibid*).

However, the report did contain a list of sensible measures which, according to most impartial observers, should do football no harm. These concern:

- the recommendation that player transfers should be more transparent, with payments and even bank details being disclosed to the governing bodies,
- the proposal that agents be paid by players, not by clubs, and in accordance with recognisable rates for services rendered, not just sizeable round figures,
- measures aimed at protecting against corruption through gambling,
- a recommended club licensing system, similar to that developed by UEFA, the European governing body, in order to improve the organisation of clubs worldwide.

More controversial issues such as rich clubs having too much money and thus being able to dominate competitions appear to have been "kicked into the long grass". This was in contrast to the findings of the Independent European Sport Review, initiated by British sports minister Richard Caborn, and which produced a body of recommendations strongly advocating salary caps, a more equal distribution of money, and increased involvement by the supporters – all of which was aimed at preventing the game's "true values" from being eroded. Unfortunately, these proposals have received but a frosty reception in some of the more crucial quarters – including the English Premier League. Nevertheless, there is a definite feeling that change is afoot and increased regulation in the air (*ibid*). (For the proposals made by UEFA to end some aspects of football corruption, see below p.44)

This kind of seriousness of intent was also in evidence in mid-September 2006, when FIFA announced that it was to appoint "a leading British lawyer" as the new head of an independent monitoring committee whose task would be to combat match fixing, corruption and financial mismanagement in the game worldwide (*The Guardian of 15/9/2006, p.S6*). More particularly it would police a set of ethics which were based on the recommendations referred to above (*The Daily Telegraph of 15/9/2006, p.S7*). The appointment of this

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high-profile figure to head this watchdog – who in the end turned out to be British sports administrator Lord Coe (*The Independent of 25/9/2006, p.57*) – was intended to demonstrate that the world governing body had embraced transparency after years of criticism that their previous bodies monitoring the game's ethics were virtually toothless (*The Guardian of 15/9/2006, loc. cit.*).

Unfortunately, just at the time when these ambitious plans were being announced, fresh doubts were cast on the internal probity of the world body itself – and we are not only referring to the ticketing machinations described in the previous section. Early May 2006 saw the publication of a book by investigative journalist Andrew Jennings entitled *Foul! – The Secret World of FIFA* – at least in the United Kingdom. FIFA president Sepp Blatter had acted to request and obtain an injunction which would prevent publication of this book in Switzerland. More particularly the head of FIFA wished to prevent Mr. Jennings from spreading his allegations that football's leading administrators operated rackets, pocketed bribes, fixed elections and touted World Cup tickets. He had also requested the court in Meilen, Switzerland, to prevent dissemination of the claim that Blatter and his supporters had “misappropriated their position at the head of the world game” in their desire for power and a lucrative pay-off. Although the injunction was initially denied, Mr. Blatter continued frantically in his attempts to ban the book in Switzerland, in which endeavour he finally succeeded. At the time of writing, attempts were also being made to extend this ban to Germany and Austria (*Daily Mail of 1/5/2006, p.68*).

It will be recalled from previous issues of this Journal (*[2002] 1 Sport and the Law Journal p.34 et seq; [2002] 2 Sport and the Law Journal p.15 et seq.*) that FIFA, and more particularly its president, had increasingly become the focus of accusations – made by, amongst others, investigative journalists from the British newspaper *Daily Mail* – that the latter had become involved in a series of affairs redolent of far-reaching corruption. These accusations concerned more particularly the financial losses incurred by FIFA during the first six months of the year 2001; the role which Mr. Blatter played in the bankruptcy of FIFA's marketing company ISL, as well as various allegations of bribery and similarly dubious practices aimed at keeping both himself and his henchmen in power. Although no conclusive evidence was ever produced, there was a universal feeling among the British sources mentioned above that proceedings at FIFA headquarters were not as they should be.

One of the key figures in bringing this unease to light had been Mr. Jennings. It was he who had already uncovered corruption at the heart of the Olympic movement (Journals *passim!*) in his book entitled *Lord of the Rings*. At a certain point he was issued with a five-day jail sentence by a Swiss court, but was later vindicated when his revelation that members of the International Olympic Committee were soliciting bribes from bidding cities was confirmed by the Salt Lake City scandal (also well documented in these pages). In fact the US Senate invited him to testify to their official investigation into the affair. He then turned his attention to FIFA and was disturbed by what he found. Three years ago, he revealed that Mr. Blatter had paid himself a secret bonus. The FIFA President threatened to sue him, but has never actually done so. He did, however, succeed in having Mr. Jennings banned from all FIFA events (*Daily Mail loc. cit.*).

FIFA's reputation for financial probity received another setback when, in early June 2006, the British broadcaster BBC, through its investigative programme *Panorama*, also made allegations of financial impropriety against FIFA and its president, suggesting that they had been the subject-matter of a bribery probe by Swiss police. The world governing body strongly denied these allegations, calling them “completely false and defamatory”, in the words of a spokesman (*The Independent of 13/6/2006, p.67*). However, the UK broadcaster appeared to be vindicated when it emerged that a leading FIFA official was accused by Swiss judges of receiving bribes as a result of an investigation into the collapse of ISMM, the former marketing partner of the sport's governing body. Nicolas Leoz, a member of FIFA's Executive Committee and a long-standing President of Conmebol, the South American football confederation, was alleged to have received bribes totalling £90,000 in two separate payments in January and May 2000 (*The Guardian of 26/9/2006, p.51*).

The money was allegedly paid by an entity linked to ISMM, whose collapse in 2001 created a major hole in FIFA's finances (*see [2002] Sport and the Law Journal p.17*). Before its bankruptcy, ISMM oversaw the distribution of television rights for the 2002 and 2006 World Cups (with the exception of Europe and the US) on FIFA's behalf, whilst the related company ISL Worldwide administered global distribution of marketing licences for the two tournaments. The legal document in question refers to payments made between 1999 and early 2001 from a Liechtenstein bank account in the name of Sunbow SA, an entity said to have been set up in 1997 in the off-shore finance centre of the British Virgin Islands. It claims that Sunbow was 100 per cent

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owned by the Nunca foundation “which in turn can be characterised as a financial/commercial unit of ISMM AG”. It also states that Nunca gave directions for Sunbow to be dissolved in May 2001. Focusing on the £7.75 million deployed for “payments for the acquisition of rights”, the document states that these payments were “inducements (i.e. bribes) to third parties having a direct or indirect relationship” with agreements negotiated by the ISMM group (*The Guardian of 26/9/2006, loc. cit.*).

As regards the payments allegedly made to Mr. Leoz, the Swiss investigators said that:

“the qualification of these payments as bribes is based on the statements made by Jean-Marie Weber himself (...) and statements made by Hans-Peter Wolf” (ibid).

The latter are former ISMM/ISL executives who were among six individuals being investigated by the Office of the Examining Judge in the Swiss canton of Zug, on charges of fraud, fraudulent bankruptcy and damage to creditors’ interests by reductions of assets. The results of these investigations have been transmitted to local prosecutor, although at the time of writing no court proceedings had as yet been initiated. All those involved deny the accusations.

European transfers under the spotlight – UEFA plans life bans amid murky developments

UEFA urges life bans for transfer corruption

Another aspect of sports corruption which has been well documented in these pages is that which accompanies the murkier areas of the transfer market, particularly in football. This has especially exercised the minds of those in charge of the game at the European level, more particularly the continent’s governing body UEFA. In late September 2006, the latter put forward a proposal that anyone found guilty of taking an unlawful payment from a transfer should be banned from the game for life. The organisation’s Director of Communications, William Gaillard, believes that such payments – known as “bungs” in the vernacular – are common across Europe, and expressed his frustration at the current impotence of the football authorities to prevent or penalize such practices. He stated:

“At UEFA we suspect bungs are being paid, not only in England but everywhere else. But under the current rules as they are set up by the European Union, there is really nothing we can do to make sure transfers are clean, that ownership of clubs and players is transparent. This is why we are asking for a lot more financial transparency. People

who behave in an unsporting fashion should be excluded from the game. They have no place in the game – for ever. I believe this is what most fans would like to see. They shouldn’t be in the game any more” (The Independent of 25/9/2006, p.57).

However, some difficulties may arise at the level of enforcement. Thus the head of the new independent FIFA monitoring committee, referred to earlier, expressed the view that there would be legal complications attached to a life ban. However, he did recognize the urgency of the current situation. The UEFA proposal came as it was reported that the English Premier League inquiry headed by Lord Stevens had found that 50 of the 362 transfers examined required “further clarification”. Investigators had discovered that large parts of the transfer fees had simply disappeared, or that unusually large commissions had been paid to agents. The enquiry also established fraud and tax offences, and was expected to call in the relevant authorities (*ibid.*).

As if this development was not adequately indicative of the need for change, a number of individual cases at the European level, which have come to public attention over the past few months and are detailed below, should be sufficient to convince any doubters of the need for drastic action.

Tal Ben Haim and Idan Tal

English Premiership side Bolton recently added yet another international dimension to the nation’s top flight in football by their signing of two Israeli internationals, Tal Ben Haim and Idan Tal. However, this move has also attracted controversy because of the involvement of an unlicensed agent, which has prompted an investigation by the Israeli Football association. The latter has warned its clubs not to deal with David Abu, an Israeli citizen who divides his time between his homeland and Britain. According to Yftach Even Ezra, a lawyer acting for the Israeli FS:

“We have been after him for a very long time. We have warned teams about dealing with unlicensed agents and him. Once we have enough hard evidence to bring teams to justice for this kind of behaviour we will do that” (The Guardian of 23/9/2006, p.S5).

Mr. Abu played a part in the transfer of Tal Ben Haim from Maccabi Tel Aviv to the Reebok Stadium in 2004. He established the initial contact between Bolton and the Israeli defender, and assisted Mr. Ben Haim with the move, but claims that he did not receive any money for his services, and threatened to sue the player. Two years later Mr. Abu brokered the deal between Bolton

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and Idan Tal, to the fury of the latter's previous agent, Ronen Katsav. Craig Allardyce, the son of the Bolton manager, was also involved in the transfer. Mr. Katsav is now suing Mr. Tal for breach of contract, and has criticized Mr. Allardyce's involvement in deals with Bolton. (In fact, Mr. Allardyce has in the meantime discontinued his activities as an agent.) Mr. Katsav alleges that Abu and Allardyce Jr. were involved in an attempt to take another Israeli player, Yossi Benayoun, to Bolton last year. The transfer fell through when Mr. Benayoun decided to join English Premiership side West Ham (*ibid*).

When asked to comment, Mr. Abu seemed untroubled by the statement by the Israeli FA concerning him. He said:

"I'm not an agent but a contact man. I'm a go-between who gets the money from the player when I find a team for a fee. They can look into the deals at Bolton and see that the agents who signed the Ben Haim transfer were Jamie Hart and Craig Allardyce. I'm not bothered by the Israeli FA or Katsav. They can't do anything because I'm not a FIFA agent" (*ibid*).

As for Bolton, a club spokesperson stated the club was making its own inquiries into the affair whilst awaiting the outcome of the English FA into the matter. The latter had not yet produced its own findings at the time of writing.

Real Madrid accused over "illegal" approaches to Arjen Robben and Van Nistelrooy

Part of the current concerns by the European football authorities over the probity of certain transfer deals is the "tapping up" controversy, whereby clubs make illegal approaches to players whom they target for possible transfers. One leading European side which has recently found itself in the metaphorical dock following allegations of such practices is Real Madrid. In early July, English Premier League side Chelsea – who themselves have at times been accused of such practices – accused Real of having made an illegal approach for Dutch international forward Arjen Robben, which the reigning English champions have requested world governing body FIFA to investigate.

The new president of the Spanish side, Ramon Calderon, had already made public his interest in signing the player – as indeed he had in Arsenal's Spanish midfielder Cesc Fabregas – as part of his election campaign. However, no sooner had Mr. Calderon settled into his new position than Chelsea announced that they would lodge a formal complaint to FIFA about what they regarded as an unlawful attempt to unsettle a

player under contract at Stamford Bridge (The Independent of 6/7/2006, p.54). Peter Kenyon, the London club's chief executive, was explicit in his club's stance:

"We note that Mr. Calderon confirms Real Madrid spoke to Arjen. The Robben situation could not be any clearer. There have been no meetings between the Real Madrid sporting director, Pedrag Mijatovic, and any Chelsea officials, or anyone mandated to act on Chelsea's behalf or owner Roman Abramovich about Arjen's future. Any indication that a transfer is possible is completely untrue. We will not be entertaining any offers for Arjen. He is not for sale" (*ibid*)

Mr. Calderon conceded that had dealings with both Robben and Fabregas when he discussed the players on a television channel the day before. As regards the former, he claimed that Real official Mijatovic had approached Mr. Abramovich, and reported back to the Real management that an agreement could be reached. He added that he was "70 per cent sure" of signing Arsenal's Cesc Fabregas (*ibid*).

However, Chelsea were not the only English club to protest about Real's dealings with players contracted elsewhere. A few weeks after the Chelsea imbroglio, arch-rivals Manchester United indicated their disquiet over reports that a verbal agreement had been reached on a three-year contract between Real and Rodger Linse, an agent acting on behalf of their unsettled Dutch international forward, Ruud Van Nistelrooy (*The Times of 20/7/2006, p.79*). They felt that they had reason to regard this as an illegal approach. However, at the time of writing it seems unlikely that United would follow the example of their Southern rivals in making a formal complaint, since the impending transfer of the Dutchman was considered to be beneficial to all parties. Nevertheless, it has added to the unease which the leading football authorities, both at the national and at the international level, are experiencing on this topic.

Edwin Van de Sar and Zinedine Zidane

Under the rubric dealing with the Italian corruption scandal (see above, p.37), we stated that the prosecutors investigating this affair may have uncovered some evidence of untoward dealings in the transfer market. Thus the £5 million transfer of current Manchester United goalkeeper Edwin Van de Sar from Juventus to Fulham in 2001 was one of 41 transfers being investigated as part of the wider corruption scandal which eventually saw Juventus banished to lower division football (*The Daily Telegraph of 25/5/2006, p.10*). In late May 2006, public prosecutors in Turin ordered the seizure of documents concerning these transfers, which included the move of French

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international Zinedine Zidane from Real Madrid to Juventus for a record-breaking £46 million. In addition, 71 Italian clubs – from the top division down to amateur levels – also received requests for information from investigators inquiring into Juventus’s transfer dealings. The object was to establish whether they had entered lower amounts for the sale of players in order to avoid paying higher taxes (*ibid*).

Arsenal links with “feeder club” Beveren to be investigated at the insistence of FIFA

One of the more interesting recent development in the way in which players move from team to team has been the “feeder club” phenomenon, under which a major team enters into an arrangement with one of the lesser fancied, but nationally prominent, clubs in order to provide them with a regular supply of youthful talent. One such arrangement is between leading English premiership club Arsenal and Belgian First Division side Beveren. According to a report featured in the BBC current affairs programme Newsnight in early June 2006, opaque investments made by the North London club in Beveren in the course of 2001 attracted the attention of Christian Du Four, the investigating judge in the Flemish region of Dendermonde. Suspecting that the money in question – initially a one-off payment of £1 million – was derived from mafia sources, Mr. Du Four started an investigation into its provenance. He considered it particularly bizarre that a “company with no name” wished to invest such a sum in the club (*The Guardian of 2/6/2006, p.S1*).

In the course of his enquiry, it became clear that it was Arsenal, rather than any criminal fraternity, from whom the investment emanated. The latter had, in August 2001, agreed to make a £205,000 payment to a person called Raoul De Waele in the shape of an interest-free loan. The loan agreement, a copy of which was in the possession of the news programmer’s editors, provided that the cash would be used to incorporate a company called Goal, which in turn was to establish another company which would purchase the Beveren club. It was signed by Arsenal vice-chairman David Dein. Although there was no suggestion that Arsenal had acted unlawfully, FIFA have ordered the English FA to investigate the matter. The English premiership club, for its part, insisted that it did not own any shares in Beveren and had no influence over the operation of the club, in the following terms:

“Arsenal confirms that it has never owned, directly or indirectly, any shares in Beveren or had any power whatsoever to influence its management or administration. It did in 2001 provide funds of £1,077,855 by way of loan to a member of a consortium who used the money to assist in

stabilizing the finances of Beveren. At no time has anyone at Arsenal been contacted by any regulatory or investigatory body with respect to its relationship with Beveren. Arsenal and all its staff have acted properly throughout, in accordance with all the applicable rules and regulations, and in the best interests of Beveren, Arsenal and the broader footballing community” (ibid).

According to a statement attributed to Mr. Du Four, the Beveren chairman, Frans Van Hoof, has asserted that Arsenal is the Goal company’s chief shareholder – even though there is nothing in the loan agreement to indicate this.

What cannot be denied is that Arsenal have benefited largely from their association with the Flemish side. They purchased Emmanuel Eboué from them in 2005 for an undisclosed amount, and the Ivory Coast international, one of a number of players recruited from that country by Beveren, has become a reliable figure in the defence of the “Gunners”. However, FIFA appear to be preoccupied by this link with the African country. More particularly its President, Sepp Blatter, has expressed concern about the number of Ivorian players who played for Beveren after the investments were made. Under the guidance of Jean-Marc Guillou, the former French international, who had formed an association with Arsenal manager Arsene Wenger since he had acted as the latter’s assistant during a spell at Cannes, Beveren recruited players from the Ivory Coast, and Mr. Guillou has established an academy for young players in the Ivory Coast capital of Abidjan. Mr. Van Hoof claimed that the majority of the profits made by Beveren from sales of Ivorian players were supposed to be passed onto Mr. Guillou and to Goal. During the first year of the company’s involvement, according to Van Hoof’s statements to Newsnight, profits were to be shared by allocating 60 per cent to Goal, 30 per cent to Guillou, and only 10 per cent to Beveren. The latter proportion was set to rise after the first 12 months of the relationship, with 30 per cent being allocated to the club and 40 per cent to Goal.

Mr. Blatter is now seeking to ensure that such practices are not possible in the future. He pointed out that, just as at Beveren there were 11 players from Africa in the same team, at Dynamo Moscow there were 10 players from Brazil or Portugal. He called these “deviations in football” (*ibid*). Arsenal, for their part, dismissed the BBC programme in question as “irresponsible journalism”, and described its relationship with Beveren as “technical”. However, their spokesman, Keith Edelman, refused to state whether the 2001 loan had been repaid or whether the entire board had known

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about it. He also refused to comment on the fact that manager Arsène Wenger was one of 10 people who supplied the money aimed at funding the “source academy” in the Ivory Coast during the late 1990s (*The Mail on Sunday of 4/6/2006, p.104*).

The outcome of the resulting English FA investigation into this matter was not yet known at the time of writing.

Beijing Olympics preparations hit by corruption scandal

In June 2006, the Chinese capital’s preparations for the 2008 Olympics were thrown into disarray as a corruption scandal threatened to overwhelm plans for the construction of the venues for the various Olympic events. The nation’s president, Hu Jintao, was reported to have taken personal charge of the relevant investigation after a third senior official was called in for questioning. According to Beijing-backed media based in Hong Kong, Jin Yan, the deputy director of the city’s Olympic venues construction office, was the latest official to be summoned from his duties. Although this is the first occasion on which an official attached to the Beijing Olympic Committee has been targeted in the investigation, others directly involved in the Games have already fallen victim to official probes into corruption. Thus the Vice-Mayor of Beijing in charge of town planning, Liu Zhihua, has already been dismissed, whilst it was recently confirmed that the Chairman of Capital land, the city’s largest state-owned development company, was being interviewed by officials (*The Daily Telegraph of 24/6/2006, p.8*).

This case raises major questions over the possible misuse of the £22,000 million budget which Beijing has allocated for the construction of bridges, stadiums, roads and other public works. Swaths of traditional hutong alleyways have been demolished in the headlong rush to modernize the city. The construction boom is expected to peak this year, when the municipal council will undertake no fewer than 44 major infrastructure projects, including the “bird’s nest” Olympic stadium in the North of the city. Auditors discovered irregularities in the spending – which was supposed to have been supervised by Mr. Liu’s commission. If found guilty of the charges brought against him, he could face the death penalty. A Beijing Government spokesman played down the connection between Mr. Liu and the Olympics, stating that the Vice-Mayor had forfeited his position because of his “decadent” lifestyle (*The Guardian of 13/6/2006, p.20*).

Drut suspension lifted (France)

It will be recalled from a previous issue of this Journal (*[2005] 3 Sport and the Law Journal p.88*) that former Olympic sprinting gold medalist Guy Drut was issued with a suspended 15-month jail sentence by a French court for misdemeanours connected with the misuse of public contract funds. Mr. Drut was also suspended from the International Olympic Committee (IOC). However, in late June 2006 this suspension was lifted and replaced by an order banning him from chairing any commissions for five years (*The Daily Telegraph of 24/6/2006, p.S22*).

Formula 1 championships “fixed” according to team principal

September 2006 witnessed an epoch-making development in Formula One motor racing, to wit an announcement, in the course of the Italian Grand Prix at Monza, that the multiple world champion Michael Schumacher was about to retire from the sport. However, this announcement was overshadowed by a remarkable outburst from the Renault team principal, Flavio Briatore, who accused officials of the world governing body, the FIA, of attempting to fix the outcome of this year’s world championship.

Michael Schumacher won the Italian Grand Prix after the Renault driver Fernando Alonso was demoted by five places in the grid when it was ruled that he had impeded Ferrari’s Felipe Massa whilst qualifying. This prompted Mr. Briatore’s controversial observation, made on Italian television, that the manner in which Formula One racing was managed compared with the match-fixing scandals in Italian football (see above). He thus risked a charge of bringing the sport into disrepute and could well be summoned to an extraordinary meeting of the World Motorsport Council. He told the Italian broadcaster RAI:

“What happened on Sunday isn’t the problem. It is what happened before the race which was strange. This is a world championship which has already been decided at the table. We have understood how things go. It has all been decided (...) they have decided to give the world championship to Schumacher and that is what will be” (*The Guardian of 11/9/2006, p.S1*).

In fact, Mr. Briatore had already previously made similar statements, notably on the occasion of the Hungarian Grand Prix in August, when he expressed his anger at seeing his team’s mass-damper system, which improves tyre performance, suddenly outlawed (*The Mail on Sunday of 6/8/2006, p.103*). An FIA representative confirmed that Mr. Briatore’s comments would be investigated (*The Guardian loc. cit.*).

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Cricket corruption scandal – an update

Although the corruption scandals which caused considerable disruption at the top level of this sport seem to have abated in intensity, some of its aspects continue to linger on. This was the case in relation to Mohammad Azharuddin, a former Indian captain banned for life on match-fixing charges in 2005 (*[2005] 2 Sport and the Law Journal p.86*). There was some consternation when, in mid-April 2006, he arrived in Karachi to compete in a senior series between India and Pakistan. Policemen escorted him as he left the airport, and local officials refused to prevent him from playing with the Indian team.

The Chairman of the Pakistan Cricket Board (PCB), Shaharyar Khan, merely commented that Mr. Azharuddin had been invited by the Pakistan Senior Cricket Board, and that it was for the Indian cricket authorities to stop him or allow him to play. He added that the Seniors Board “operated on its own” and that the PCB had merely supported them by using the facilities at various grounds (*The Sunday Telegraph of 23/4/2006, p.S13*). It is not clear on what grounds it was considered that senior cricket was not included in the ban.

Police start investigation into Gaydamak activities

It will be recalled from a previous issue of this Journal (*[2006] 1 Sport and the Law Journal p.77*) that Alexandre Gaydamak, co-owner of English Premiership side Portsmouth, had recently attracted the interest of the Israeli police because of his suspected involvement in various money-laundering activities. Matters seemed to take a decisive turn in this affair in early April 2006, just as Portsmouth were making a gallant and ultimately successful bid to avoid relegation to a lower division, when a Hampshire police unit followed up complaints made against Mr. Gaydamak by Global Witness, an independent investigative organization. This is an international campaigning group which was formed in 1993 and provides evidence of alleged corruption or human rights abuse which affects a country’s revenue streams, calling for appropriate action from the relevant authorities. They were nominated for a Nobel Peace Prize in 2002.

The allegations made by Global Witness follow an investment of £15 million made by Mr. Gaydamak in early 2006, which took the form of purchasing a 50 per cent share in Portsmouth, followed by the funding of a transfer-window spend of £12 million which brought nine players to the club. It remains unclear how Mr. Gaydamak, a French national, has amassed a fortune from property and stockbroking, since one of his

companies, Fiduciary Limited – of which he was the sole director – was wound up in June 2000, owing £260,000 in VAT (*Daily Mail of 18/4/2006, p.79*). There is currently an arrest warrant which has been issued in France against Mr. Gaydamak’s father, Arcadi, over an alleged arms-for-oil deal with Angola, although Mr. Gaydamak Sr. insisted that his involvement was part of a legitimate agreement between the governments of Russia and the African state. Jean-Christophe Mitterrand, the son of a former French President, was given a 30-month suspended sentence for his part in the affair. It is also somewhat disturbing that the English Premier League, who had announced that Mr. Gaydamak jr. would be subject to the FA’s “fit and proper person” test, have, since then, failed to raise any questions about his ownership agreement at Portsmouth (*ibid*).

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

Jockey Egan faces Hong Kong ban for skipping bail

Four years ago, champion jockey John Egan was arrested in Hong Kong on suspicion of having sold information for reward. He was released on bail, but never fulfilled the relevant conditions. This incident could cause him considerable embarrassment if, as he has been invited to do, he attempts to take part in a meeting in Hong Kong in order to ride his horse Les Arcs to victory. Winfried Engelbrecht-Bresges, the Executive Director of racing in Hong Kong, warned:

“Because he broke bail here four years ago, John Egan must first talk to the law enforcement agency if he wishes to ride in Hong Kong again. If he does not do that, I assume that he might be arrested if he returns. He was alleged to have sold information for advantage but he was not charged at the time of his arrest. Until this problem of jumping bail has been cleared up we would not even process a licence application from John because we do not want to see headlines saying a jockey we have just licensed has been arrested on arrival at Hong Kong airport”
(*The Mail on Sunday of 6/8/2006, p.101*)

Mr. Egan has steadfastly maintained his innocence. At the time of writing, the outcome of this particular saga was as yet unknown.

Football betting scandal erupts in Vietnam

Betting scandals are not normally associated with hard-line Communist regimes, but the Far Eastern state of Vietnam may be an exception judging by the scandal which has recently gripped the sport of football in that country, and which may have profound political implications.

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It all erupted in early April 2006, when Phan Van Khai, the country's Prime Minister, requested the ruling Communist Party to suspend his Transport Minister because of a scandal over public money used for football betting. According to the country's television broadcaster, Mr. Khai wrote to the politburo asking for the temporary suspension of Dao Dinh Binh, who is a member of the powerful Central Committee of the Party. It is alleged that officials at the Transport Ministry's now notorious Project Management Unit 18 misappropriated state monies – most of them from Japan and other foreign donors – and staked some of the cash on top English and Spanish League football fixtures. Others are alleged to have creamed money off public construction projects, taken backhanders from lucrative state contracts, and used official cars as gifts for business contacts (*The Daily Telegraph of 3/4/2006, p.17*).

The scandal erupted with a confession made by a certain Bui Tien Dung. Before he was arrested in January of this year, Mr. Dung served as general director of this project management unit. In a single month-long losing streak the previous year, he placed bets worth £1 million, including £180,000 on a Manchester United v. Arsenal fixture, and £150,000 on a Barcelona v Betis match. Earlier winnings had apparently been lavished on mistresses. An office computer log revealed that nearly 200 ministry employees followed suit and placed bets online using government funds earmarked for bridges and roads. Mr. Dung took pride in loaning out his department's luxury vehicles his friends. He has since been gaoled on charges of gambling, deliberate wrongdoing and offering bribes (*The Independent of 20/4/2006, p.31*).

Meanwhile, the country's highways remain as full of holes as are the excuses raised by Mr. Dung in his attempts to explain away the disappearance of the aid money entrusted to his care. He had personally controlled 70 per cent of the country's transport budget and frittered much of it away. Eventually, he confessed to betting government money amounting to £4 million on football alone. A top public security ministry investigator, Major General Cao Ngoc Oanh, insisted that anti-corruption officers spurned the proffered bribes. It has emerged that sports betting has become an obsession in the country – and not just in Government offices. It has become so widespread that the national Ministry of Sport may introduce a legitimate system for football betting, in order to remove the lucrative trade from the hands of cyber-bookmakers and touts, and in order to generating funds for the state (*ibid*).

“Take the money” Nigerian referees are told

Different countries have differing traditions and cultures, and the same applies to sporting activity. However, many will find it difficult to accept a recent directive issued to Nigerian referees, under which they are allowed to accept bribes from clubs but should not allow these to influence decisions on the pitch. Fanny Amun, acting Secretary General of the Nigerian Football Association (NFA) said that referees should “pretend to fall for the bait”, but make sure that the result did not favour those offering the bribe (*The Daily Telegraph of 1/4/2006, p.S14*).

Democrat leader admits to accepting free boxing tickets (US)

Although most sporting corruption takes the form of performers accepting or offering bribes, access to sporting spectacles can themselves be offered as an unwarranted inducement. This may well have been the case with the leader of the Democratic Party in the US Senate who admitted to having accepted free tickets to boxing contests in Las Vegas. Senator Harry Reid, a former boxer himself, claimed he had done nothing wrong and was seeking to learn more about the sport in his home state. The three tickets were provided between 2003 and last year – the very year in which Mr. Reid championed legislation aimed at imposing Government controls on the sport. One ticket had the face value of \$1,400 (*The Daily Telegraph of 31/5/2006, p.S14*).

Asked by the Associated Press whether he would do anything differently, he replied that his only concern was the willingness of the Press to “take these instances and try to make a big deal out of them”. Congressional rules on ethics enjoin senators to be particularly careful about accepting gifts where these might be seen as an attempt to gain influence (*ibid*).

Leading Australian jockey faces bribery investigation

In early July 2006, it was learned that one of Australia's best-known jockeys, as well as six others, were arrested in Hong Kong in the context of a bribery investigation. Mr. Chris Mince has been accused of supplying tips to unlawful bookmakers and bettors, according to the country's Independent Commission against Corruption. In exchange the jockey “received bets placed by the illegal bookmakers and punters” as well as dividends generated from those bets. The other persons arrested included four suspected illegal bookmakers and two others who allegedly acted as middlemen (*The Guardian of 5/7/2006, p.22*).

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Football fraud investigated in the Netherlands

To the sorry list of countries recently tainted by football corruption, it may soon be necessary to add the name of Holland, given that in mid-May 2006 Netherlands prosecutors announced that they had commenced an investigation into possible football fraud. De Telegraaf, a leading newspaper, reported that public prosecutors were looking into match-fixing allegations and the bribery of players. The newspaper claimed that the inquiry was initiated after the prosecutors discovered that some players' spending habits were out of kilter with their income (*The Daily Telegraph of 19/5/2006, p.S6*).

Henk Kesler, Director of the Netherlands football federation (KNVB), welcomed the probe, stating that prosecutors had already spent six weeks investigating possible embezzlement in the top two football divisions (*ibid*).

Montgomery arrested over money-laundering claims (US)

The career of Tim Montgomery, the US athlete who is the former 100 metres record holder, has recently met considerable setbacks. Not only is he currently serving a two-year suspension for doping as a result of his involvement with the notorious BALCO affair (*Journals passim!*), but in late April 2006 he was arrested on charges that he was connected with a multi-million dollar bank fraud and money-laundering operation. A Grand Jury indictment in New York charged Mr. Montgomery, his coach Steve Riddick, as well as 11 other people. According to the United States attorney, all defendants were charged with taking part in a conspiracy to defraud banks by depositing around \$5 million in stolen, altered or counterfeit cheques. Some of the money was laundered through a coffee business owned by a New York couple (*The Guardian of 29/4/2006, p.S12*).

Mr. Montgomery is alleged to have deposited three fraudulent cheques worth a total of \$775,000, as well as receiving a \$20,000 fee for brokering the transaction. Earlier Mr. Riddick, who was a member of the US 4x100 relay team which won a gold medal at the 1976 Olympics, was also charged in Arkansas with bank fraud. He was accused of depositing two forged cheques totaling \$825,000 into a bank account of his business. It is claimed that one cheque was originally for \$55 and was changed to \$375,000 (*ibid*).

No further details are available at the time of writing.

Hooliganism and related issues

World Cup-related hooliganism

Background

When ultimate judgment on the behaviour of fans during the 2006 World Cup comes to be delivered, the verdict will probably be "satisfactory". In spite of some of the less savoury incidents – particularly centred round certain games which were always going to be flashpoints – the tournament succeeded in avoiding the wilder excesses which had disfigured its predecessor in 1998 or the Euro 2000 event. The deeper causes for this abatement of crowd violence appear to be many and complex – a combination of preventative administrative action, sensitive policing, and a general weariness on the part of most travelling supporters with drink-fuelled battles with opposite fans and police.

It could be that, somewhat perversely, it was the widespread expectation and fear of a resurgent hooliganism – particularly from eastern Europe – which contributed to the relative orderliness of the event, concentrating as it did the minds of the relevant authorities on the need for preventative and deterrent action. Thus it was with some of the wilder followers of Polish football, whose violent tactics have now been responsible for several deaths during the past few years. One particular "fan" of First Division side Cracovia explained to a British reporter:

"Ten years ago people used their arms and fists to fight. Now kids just use knives. Most kids carry a knife to provide victory if necessary. They are reacting against authority. Kids want to be involved in this family, so they carry knives to impress others. They keep a knife to make victory possible" (The Independent of 31/3/2006, p.70).

This growing culture of spectator violence in a city such as Krakow has already meant that eight young supporters of Cracovia and their near neighbours Wisla have been knifed to death within a space of 12 months. Much of it had extreme political overtones, as fascist and Nazi symbols are increasingly on display amongst the violent followers of top Polish sides. The dangers that this presented to a tournament organized in the country which had given rise to Nazism were obvious. Already there had occurred a fight between Polish and German fans near the border town of Briesen, which had been organized by the use of mobile phones. Both Polish and German authorities also were aware of the existence of an unofficial European Hooligan league (*ibid*).

These overtones of political and racial extremism were

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clearly not confined to Polish hooligans. Many others of that ilk were planning to use the competition for the promotion of their dubious ideologies. Thus in mid-April, it was learned that a neo-Nazi group in Germany had plans to attach themselves to Iran during the tournament in order to further the dissemination of anti-semitic propaganda. The NPD, an extremist German right-wing party, intended to march around the city of Leipzig on 21 June, when Iran were due to play Angola in Group D (*The Guardian of 12/4/2006, p.S1*). The NPD admires the Iranian president Ahmedinejad for referring to the Holocaust as “a myth” and calling for Israel to be “wiped off the map”. (More about the presence of the Iranian head of state at the Finals can be found below, p.88) The Portuguese far-Right group Frente Nacional also intended to demonstrate during the match between Angola and Portugal in Cologne on 11 June (*ibid*).

The racist agenda of these extremists who intended to flaunt their proclivities in Germany naturally raised fears about the safety of fans from ethnic minorities. These fears were compounded by a series of racist assaults which occurred in Germany, such as that perpetrated against Turkish-born politician Giyasettin Sayan, and which caused a former Government adviser to enjoin non-white fans to avoid certain cities, particularly those in the Eastern part of the country (*The Guardian of 22/5/2006, p.S4*).

The authorities prepare for battle

Naturally, all these threats – whether real or exaggerated – did not pass unnoticed by the relevant authorities, particularly in the host nation. Security at the tournament was taken so seriously that, in late March 2006, 280 officials from 40 countries attended a two-day conference on the subject, held in Berlin. Whilst this was taking place, Wolfgang Schäuble, the German Minister of the Interior, unveiled a series of security measures aimed at combating spectator terrorism. Some 7,000 soldiers were to be deployed across the country to be in readiness in the event of major incidents. Germany also temporarily suspended the European Union’s Schengen agreement which provides for the free movement of persons across Europe. This was in order to enable border checks on fans (*The Guardian of 31/3/2006, p.S4*).

In addition, Mr. Schäuble announced that he would not tolerate any fans displaying Nazi symbols – which are illegal in Germany – or giving the Hitler salute. Knowing that fans from one particular country were perhaps more prone to the latter kind of provocation, he added:

“I know that these gestures are often associated in England with a kind of humour. But Charles Clarke (the former

British Home Secretary) has made it clear that the use of such symbols will lead to prosecution and that he will support Germany in this. We have different sensitivities here. The vast majority of football fans who come to Germany are not interested in this” (ibid).

Twenty-one matches in the tournament were identified by the nation’s main security agency, the BND, as “high risk” events in including the opening match between Germany and Costa Rica and the final in Berlin. All police leave was cancelled for the tournament, and around 40 British police officers were also available to assist with the handling of the many English fans expected. Their main function was to help the German police to identify hooligans prepared to use violence (*The Guardian of 22/5/2006, p.S7*). [It is perhaps interesting to note that the German authorities consistently praised Britain for the way in which it dealt with the problem of hooliganism, and particularly the banning orders on 4,000 known hooligans – a circumstance which might be borne in mind by some of the “liberal” detractors of banning orders in this country, some of whom regularly air their views in the pages of this Journal.]

With a few days to go before kick-off, the German prosecuting authorities gave details of the type of penalties which would be issued to spectators stepping out of line during the tournament. They could expect to receive fines ranging from £100 for breaching the peace to £280 for bodily harm. The intention was to deal with any foreign troublemakers “without long-drawn-out legal proceedings”. Using the symbols of banned organizations (including the use of Nazi insignia referred to above) would attract a fine of £410 (*The Daily Telegraph of 24/5/2006, p.S5*). Also, on the very day on which the World Cup started, Berlin police raided the headquarters of the far-right NPD party and confiscated around 3,000 World Cup guides which were alleged to carry racist overtones. These guides warned of foreign infiltration into the German team, according to Michael Grunwald, a spokesperson for the Berlin prosecutors. The raid had followed a criminal complaint lodged by the German football federation (*The Guardian of 10/6/2006, p.S12*). Ten fans were also banned from the World Cup after German police found that they were carrying a “large amount of pyrotechnics and other banned items”. They were sent back to Croatia (*The Guardian of 13/6/2006, p.S8*).

Not all the measures, however, were punitive and repressive. In the expectation that over one million fans would travel to Germany for the event, and that the vast majority would not have tickets for any games,

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arrangements were made for 300 free public viewing areas to be set up in towns, villages and cities across the host nation. However, fans entering such areas would also be subject to security checks (*The Guardian of 31/3/2006, p.54*). Cities such as Nuremberg also took a number of initiatives aimed at housing foreign fans, including "The World on your Sofa". This sought to encourage families to offer their guest bedrooms to foreign football supporters (*The Independent of 16/4/2006, p.39*).

So the scene was set. The appropriate preventative and repressive measures had been adopted, and the authorities appeared to be well equipped and motivated to deal with any problems that could arise. However, despite their very best endeavours, trouble did erupt in various quarters, and had to be dealt with.

The incidents themselves

The first World Cup visitors to feel the iron resolve of the authorities to stamp out unacceptable behaviour were – predictably enough – England fans, when they were arrested for allegedly wearing Nazi insignia during the England opener against Paraguay in Frankfurt. The two "fans" in question, Kristopher Dunn and Gordon Thomas were returned to Britain, and were detained when they landed at Leeds Airport. They appeared at Leeds Magistrates Court the next morning, and an application has been made for them to be issued with a football banning order (*The Independent of 14/6/2006, p.51*). That very same day, a 20-year-old fan from the host country was attacked by four men and stabbed in a town near Hamburg, apparently because he had painted his country's flag on his cheeks. The man was leaving a disco when he was set upon by four men, also around 20, according to Jürgen Gramsch, a spokesman for the local police force. Two of the attackers then pulled knives and stabbed the victim in the hands, which he had raised in defence (*The Guardian of 14/6/2006, p.58*).

The first serious trouble, however, occurred during and after the Germany v. Poland match in Dortmund. Police arrested 429 people, either because they were known hooligans or their behaviour was aggressive and threatening. Of these, 64 were later charged, although by the following morning all but three had been released. Approximately 2,000 police officers had been deployed for the fixture, which, as has been mentioned above, had been expected to constitute a focus for hooliganism. In the worst incident, German fans pelted police with beer bottles, and fireworks, as well as chairs and tables from restaurants located near the city's Alte Markt after hundreds of riot police had attempted to

clear a group of intoxicated hooligans, according to an eyewitness (*The Guardian of 16/6/2006, p.56*).

There were also other, lesser clashes between groups of Polish and German fans. Before the trouble started, police had detained around 70 Polish supporters known to the authorities as "problem fans", some armed with metal bars and other dangerous objects. FIFA's director of communications, Markus Sieglar, praised the German police, stating that they had shown themselves to be "totally in control". Poignantly, one of the guests of honour at the match was Daniel Nivel, the French police officer who nearly died after being assaulted by German hooligans at the 1998 World Cup. He remains unable to speak properly because of the injuries which he sustained as a result (*ibid*).

England's next match, against Trinidad & Tobago, in Nuremberg, passed off reasonably peacefully, although there were 28 arrests. In the city centre there had been 12 arrests, including six for assault and one for being drunk. The next flashpoint was expected to be England's fixture against Sweden in Cologne – not because of any potential trouble emanating from clashes with Scandinavian supporters, but because the police had received intelligence reports that known local troublemakers were planning to confront England fans after the fixture. Swift intervention by the police prevented any serious trouble, and around 50 German fans were held under the preventative detention powers conferred on the police. This did not, however, serve to quell all the trouble, and arrests took place both in Cologne and in neighbouring towns. Eighteen people were arrested by police wearing full riot gear in the city's main square. Once again, there was praise for the professionalism shown by the German police – on this occasion by their British colleagues (*The Guardian of 22/6/2006, p.59*).

Similar preventative tactics were deployed by the police at the next England game, which was against Ecuador in Stuttgart. However, the fixture was not entirely trouble-free. Over the weekend in which the match was played, 500 fans were arrested, the majority of them England supporters. On the Friday, 122 fans had been arrested after chanting England supporters and Germans emerging from a big-screen area showing World Cup matches began hurling objects at each other, injuring passers-by. This scene was repeated on the Saturday, as a result of which 400 people were taken into custody. Ten people (seven English and three German fans) faced prison sentences after facing charges of throwing bottles and chairs which injured nine people prior to the match (*The Guardian of 29/6/2006, p.52*).

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As was said earlier, if a balance sheet had to be drawn up regarding the entire tournament, the overall outcome would be quite favourable. However, as an indication of how low our expectations have become in this field, an observation by Franz Beckenbauer, the former German international who became the president of the World Cup Organising Committee, is quite instructive. Commenting on the preventative and other measures being taken by the authorities to avoid trouble, he observed that security at previous tournaments had not always been strict. He added:

"I remember the 1966 World Cup in England. There were very few policemen there. The only ones I saw were directing traffic. It was the same in 1970 in Mexico. There was only one policeman on duty wearing a sombrero and clutching an ancient machine gun. During the siesta period he fell asleep" (The Guardian of 31/3/2006, p.54).

It occurs to the present writer that Mr. Beckenbauer was viewing history in the light of subsequent developments rather than on its own merits. If most of the police at the 1966 Cup were indeed directing traffic, it meant that there was simply no need for them to keep violent warring factions apart. The fact that the commentariat showered praise on fan behaviour during an event which featured hundreds of arrests and at which there were more police on hand than there are currently British troops fighting in Afghanistan shows, sadly, how far we have come since then...

Article on Euro 2000 hooliganism in international sports law journal

As was recalled in the previous section, the Euro 2000 football tournament was notorious for a number of highly unsavoury and violent incidents. In an article entitled "Euro 2000 and football hooliganism", the author, Hans Mojet ([2006] 1/2 ISLJ, 88-89, 99) discusses the legal framework for the combating of hooliganism in the Netherlands during the tournament. He describes the co-operation agreement between the Netherlands and Belgium (being the two host countries), the involvement of Netherlands ministers in the preparations and establishment of a Euro 2000 Centre. It also considers the use of the Schengen Agreement on the Gradual Abolition of Controls at Common Frontiers 1985 to reintroduce border controls, the conclusion of the Treaty of Bergen-op-Zoom on cross-border police intervention during the tournament as well as the issuing of Joint Statements with non-EU member states. He also reviews Netherlands visa policy, the use of stadium bans, the collection of information about football fans, stewarding arrangements and the detention of football hooligans (*European Current Law* 8/2006, p.195).

Cricket internationals on Indian sub-continent marred by off-field disturbances

Cricket hooliganism, that most unwelcome of recent additions to the modern game, reared its ugly head again during a one-day international fixture between India and England in Guwahati, played in April 2006. The trouble was prompted by the abandonment of the fifth one-dayer between the two sides without a ball being bowled. The absence of any effective public address system resulted in the crowd being unaware that the waterlogged run-ups constituted the problem. All they could see was the umpires making various fruitless visits to the wicket on what was a perfectly dry day. Before the trouble had erupted, a military helicopter had been brought in to assist with the drying of the outfield, but all to no avail (*The Daily Telegraph* of 10/4/2006, p.523).

The players had been escorted back to the safety of their hotel rooms before an excitable crowd turned violent. Whilst the teams were at the ground, fires had been lit on the concrete terraces and plastic water bottles thrown onto the outfield (*The Independent* of 10/4/2006, p.65). However, the violence only truly erupted once the two teams had executed a rapid exit from the ground. Fans tore down the fence surrounding the outfield and turned the resulting rubble into missiles. The police responded with canisters of tear gas. Following a brief exchange of hand-to-hand fighting, which left two men lying unconscious on the grass, the ground was successfully cleared. Two policemen were later taken to hospital (*The Daily Telegraph loc. cit.*).

Incredibly, P.K. Deb, the Vice-President of the Assam Cricket association, chose to blame the umpires, Rudi Koertzen and A.V. Jayaprakash, for this riot. Most other observers, however, felt that, even though it had not rained all day, the decision was entirely justified. Mr. Koertzen pointed out that rain which had fallen during the preceding five days meant that the pitch would not have been playable for at least a further 24 hours, but that did not prevent Mr. Deb from claiming that "the game could have been played and the situation avoided" and that the umpires had therefore made a wrong decision which was to blame for the disturbance (*The Guardian* of 10/4/2006, p.514). This was a somewhat gratuitous comment, but fortunately neither of these two experienced officials suffered any adverse consequences as a result.

Days later, Bangladesh's fledgling reputation in the Test arena was seriously dented when a savage brawl involving journalists and the local police delayed the

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second Test against Australia by almost half an hour, and raised some doubts about the right of the city of Chittagong to stage future matches. The journalists had staged a protest on the field before the start of play, after the beating administered to photographer Samshul Haq Tanku, who represents the Bengali-language newspaper Daily Prothom Alo. He was punched and kicked to the ground by local security police after a disagreement over the use of transport in the restricted vicinity of the stadium (*The Guardian of 17/4/2006, p.S13.*)

The media contingent of around 50 sat on the field of play demanding an official apology. Play commenced after a 10-minute delay, but fighting erupted once again during the lunch interval, thus causing a further delay of 20 minutes. Journalists, including 65-year-old photographer Zahirul Haq, were repeatedly beaten with lahti sticks and rifle butts. Several of them received injuries, and at least two were left bleeding from the head. They left the ground soon afterwards after an agreement between all local media outlets to boycott the series (*ibid*).

Football fans block railway line after Zeffirelli call for action

Franco Zeffirelli is one of Italy's most admired cultural figures, having directed many famous films such as "Jesus of Nazareth" and "La Traviata". Born and bred in Florence, he has supported the local Fiorentina team all his life, and was naturally disappointed when, as was reported earlier, the team in question were penalized for their part in the Italian football corruption scandal (above, p.32). He called the decision to relegate his side to the Serie B and saddle them with a 12-point handicap was an "injustice", and that the relevant tribunal's ruling had been too light on individuals and too heavy on the clubs. However, Mr. Zeffirelli did not intend to restrict his disenchantment to mere words, but appealed to other supporters of the club to "cut Italy in half". Many fans took this instruction to heart, and invaded a station in Florence, where they sat on the rails, thus threatening to block North-South railway traffic throughout Italy (*The Guardian of 18/7/2006, p.16.*)

Nor was this the only manifestation of the ire displayed by some elements of the Fiorentina support. Earlier that day, a substantial crowd had gathered at the Artemio Franchi stadium, which accommodates Fiorentina. Then a further 3,000 angry supporters marched to a training ground owned by the Italian federation and surrounded it. Traffic was reported to be at a standstill in the area. Mr. Zeffirelli even hinted that, if the punishment were not revoked, the supporters of I viola could take even more drastic action... (*ibid*).

Internazionale coach Mancini "will leave Italy" because of hooligan attacks

When much-fancied Internazionale Milan were eliminated from the European Champions league by Spanish outsiders Villareal, their supporters were naturally upset. However, for a minority of their "fans" such disappointment assumed a violent form when both the Internazionale captain, Javier Zanetti, and Italian midfield star Criatiano Zanetti were punched and kicked by hooligans at Malpensa airport as the Milan team returned from a home fixture at Ascoli. The incident occurred in the early hours of that Sunday morning as Inter players left the airport terminal building, where they were met by 50 unruly fans. Most of the latter restricted themselves to hurling insults, but the situation degenerated in the car park, where the violence began. Neither player was seriously injured (*The Independent of 11/4/2006, p.69.*)

For the Internazionale coach, this incident appears to have been the last straw, and he announced that it has accelerated his decision to seek his fortune abroad after finishing his stint with the Milan side, commenting that it was no longer possible to "play and enjoy yourself" in Italian football. His comments came after the president of the Italian Footballers' Association called for a change in the culture attending the nation's favourite sport, in the following terms:

"This was an episode of barbarity, intolerance and stupid violence fuelled by the hysteria that surrounds football in Italy. We need to learn to lose gracefully. But it will take a generation" (*ibid*).

Unfortunately, this has not been the only case of Italian hooliganism during the period under review, as can be seen below.

Other cases (all months quoted refer to 2006 unless stated otherwise)

Hasselt, Belgium. Belgian hooligans turned on each other in late May, when a summit aimed at forging unity ahead of the World Cup turned sour. The hard-line hooligans, representing ten different domestic teams, attempted to put club loyalties aside in anticipation of clashes with other nations in Germany. However, fighting broke out as they watched their national side draw 3-3 with Turkey in a Hasselt (Limburg) bar. Ultimately, they did unite in order to round on the police, who made 12 arrests (*The Sunday Telegraph of 28/5/2006, p.S6.*)

Belgrade, Serbia. In late July, a young football fan was killed following a massive brawl between Serbian

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hooligans. Aleksandar Panic, aged 17, was stabbed to death in the fracas – said to have been prearranged – in a suburb of the Serbian capital Belgrade, between dozens of fans of the city's two most popular clubs – Red Star and Partizan. Twelve people were arrested after a fight which involved sticks, knives, stones and fists, according to local police. Several men were slightly injured. It was not clear why the hooligans fixed the brawl for that Thursday night near a local football stadium during the off-season. However, such brawls have been known to be staged before between supporters of the two teams (*The Guardian of 29/7/2006, p.S9*).

Amsterdam, The Netherlands. In mid-July, the public prosecutor of an Amsterdam criminal court demanded a 15-year sentence for a Dutch national accused of stabbing two Middlesbrough fans in November 2005, killing Brendan O'Conner and wounding Howard Bouville. The suspect, Iwan Vyent, denies murder and attempted murder, and pleaded self defence (*The Independent of 20/7/2006, p.22*). The outcome of this case was not known at the time of writing.

Rosario, Argentina. In mid-April, 121 fans of Argentinian sides Boca Juniors and Rosario Central were arrested after a bizarre brawl which left 16 injured. Police reported that a "sick, stupid" fight had erupted near a toll booth where the rival fans' buses happened to cross paths, 300 km north of Buenos Aires. One police source said that "first, they threw rocks, then pistols, and started firing". Feuding between rival football gangs has caused 138 recorded deaths since 1939 (*The Observer of 16/4/2006, p.S23*).

Rostov-on-Don, Russia. In another bizarre incident, which occurred in mid-June, Russians playing rugby were arrested by police who mistook the match for a mass brawl. A police spokesman of the Southern city of Rostov-on-Don said that a report had been received that there had occurred a "fight involving a lot of people" on some waste ground just outside the town. Nearly 100 players and supporters were taken to the police station but were later released without charge (*The Independent of 13/6/2006, p.19*).

Rome, Italy. In mid-April, a fixture between Roman side Lazio and Livorno turned sour when sections of the crowd started shouting "Duce, Duce". Il Duce – "the Leader" – was the title of the Fascist dictator Benito Mussolini, and many Lazio fans espouse the cause of the far Right (*The Guardian of 17/4/2006, p.S6*). Rotterdam, The Netherlands. Also in mid-April, local police arrested around 250 Feyenoord supporters during and after their team's play-off defeat by arch-rivals Ajax

to decide the Netherlands League. The arrests were for "violence, vandalism and disregarding regulations and police orders" (*The Independent of 24/4/2006, p.74*). Several months later, there was more trouble in the same city when two Sheffield United fans had to be taken to hospital after having been stabbed before a game against Sparta Rotterdam. However, it was hooligans from Sparta's rivals Feyenoord who were blamed for the attack, after having been seen in the area armed with knives, stakes and chains (*Daily Mail of 7/8/2006, p.73*).

"On-field" crime

"Rumble in the Jungle" Mark II collapses amid fraud claims (South Africa)

If any ranking order amongst the "fights of the 20th Century" were to be drawn up, the "Rumble in the Jungle" in 1974 between Mohammad Ali and George Foreman in Kinshasha would certainly be very close to the top. More than 30 years later, Mr. Ali's daughter, who is a world super-middleweight champion herself, was billed to fight Gwendolyn O'Neill in Cape Town for the relevant WBC title, with many commentators – somewhat fancifully – likening this contest to that epic bout of the 1970s. However, it was not to be, since both contestants packed their bags as the bout collapsed amidst claims of fraud and incompetence against the promoter, as it emerged that the organizers would not be able to pay her the pledged £283,000 fee (*The Guardian of 27/7/2006, p.22*).

From the moment that Ms. Ali arrived a week before the contest, it was being rumoured that the South African promoters were overstretched and were unable to meet their obligations. Her fears were confirmed when a local newspaper reported that a letter from Sta-Trade Promotions used a forged signature from the South African Sports Minister, Makhenkesi Stofile, in an apparent attempt to raise the cash. The Minister's spokesman, however, stated that the forgery was illegal and required an investigation. The owner of the promotion company, Joe Manyathi, accepted blame but added that he was not fully responsible, and that an unnamed partner caused the collapse. However, even before the Ali fiasco, Mr. Manyathi had acquired a reputation for making empty promises about staging bouts in South Africa – including a Mike Tyson v. Lennox Lewis clash which never materialized. Boxing South Africa, the domestic regulator, once removed his licence over an unpaid debt, but restored it later (*ibid*). Irish manager threatened with gun outside team hotel

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In mid-August, it emerged that Steve Staunton, the manager of the Republic of Ireland football team, was threatened at gunpoint outside his team's hotel near Dublin. He was not injured as a result of the incident, which occurred at around 8pm, after he had been approached by a man in the hotel car park whilst making a mobile phone call. The man is believed to have become abusive before pulling a gun on Mr. Staunton, who escaped and fled back to the hotel. The alleged assailant, a man in his 30s, ran off but was pursued by hotel staff and the local police (Gardai). He was subsequently arrested on a nearby beach (*The Independent of 15/8/2006, p.60*).

It was not thought that Mr. Staunton himself had been targeted in the incident, and was merely unfortunate to be outside the hotel at that particular time. Sources reported that the man detained had a history of mental problems. This is not, however, the first time that criminality has marred the Irish team's stay at this hotel, since in November 2003 there occurred an armed robbery whilst the Irish squad were having their evening meal (*ibid*).

Police call time on Cannonball Run "crazies" (France)

The Cannonball Run is an annual event in which high-powered cars cross Europe, often at very high speeds. Named after the film of the same name which featured Roger Moore and Burt Reynolds, this event boasts a website and requires a £4,500 entry fee. Organisers claim that it is a family event, but their publicity contains the boast that over 700 entrants have enjoyed "the madness and the mayhem" in the past four years. However, there are some signs of public weariness with this type of event, and in one country in particular – France – the police are actively reining in what they describe as the "crazies behind the wheel" (*The Observer of 16/7/2006, p.35*).

Recently, two drivers competing in this "race" were stopped dead in their tracks by police on the A26 road just outside Calais. The public prosecutor of Bethune, where the two men were convicted of dangerous driving, has stated that his department "simply cannot accept what they are doing", and called drivers of this type "irresponsible". Both accused were British and described by the French press as "super-rich estate agents". In addition to the seizure of their vehicles, they each received a £660 fine and a suspended three-month prison sentence. Kent police had tipped off their French colleagues that 30 cars competing in the event were heading across the Channel, thus allowing a speed trap to be set up outside Calais (*ibid*).

"Off-field" crime

US college lacrosse players on charge of rape
The manifold universities and colleges of the US boast a fine and vast sporting tradition. In fact, some commentators have become somewhat alarmed at the sheer scale of the sporting activities engaged in at institutions whose primary purpose is, or should be, the pursuit of academic excellence. Moreover, it is not only the mainstream US university sports such as American football or baseball which have assumed such dimensions. College basketball teams are a multi-million dollar industry for which the final tournament, March Madness, is an annual event watched by the entire nation, akin to the Superbowl. Even lacrosse has now become a major earner for college sport. The main reason for this emphasis on sport is that it tends to recruit undergraduates far more effectively than does academic reputation.

However, there are signs that this culture is starting to show a number of cracks – some of which have led the exponents of these sports into conflict with the criminal law. This was very much in evidence in the spring of this year, when three students from the elite Duke University of Durham, North Carolina, were accused of raping and kidnapping a black stripper hired to dance at a student lacrosse party (*The Daily Telegraph of 19/4/2006, p.14*). The students charged are Reade Seligman and Colin Finnerty, and the lacrosse team captain, David Evans (*The Guardian of 16/5/2006, p.16*). This case looks set to become a cause célèbre across the States, particularly in the Southern part of the country. The University in question is located in an area which has strong racial sensitivities. Many believe that, if the roles had been reversed and three black students had been accused of raping a white stripper, the accused would have been jailed forthwith (*The Independent of 2/5/2006, p.22*). The fact that the lacrosse team is overwhelmingly white in an ethnically mixed University, and the alleged victim was black, has sparked a crisis at the university – and may well hold a mirror to the nation (*The Observer of 21/5/2006, p.30*).

At the time of writing, the opening shots in the legal battle to come had only just been fired. Naturally this column will monitor developments in this case for the benefit of its readers.

Swiss skiing champion shot dead

In early May 2006, the news broke that Corinne Rey-Bellet, the former Swiss skiing champion, as well as her brother, had been shot dead in their parents' home. In addition, their mother had to be taken to hospital with

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sever injuries after the attack, which took place in the Swiss mountain resort of Les Crosets. Police reported that the assailant entered the house and fired five shots. He had already fled the scene when the police arrived. The mother, in spite of her injuries, was able to alert the emergency services. The skier's two-year-old son was unhurt. Ms Rey-Bellet was considered to be one of the world's finest skiers when she was compelled to retire three years ago (*The Guardian of 2/5/2006, p.14*).

Shortly after the incident, police issued an arrest warrant for Ms. Rey-Bellet's husband, Gerold Stadler, who was seen leaving the building with a gun in his hand. The pair had separated only the previous month (*The Independent of 2/5/2006, p.23*). Two days later, Mr. Stadler's body was found lying next to a gun approximately one mile from his abandoned car (*The Daily Telegraph of 4/5/2005, p.S18*). This case has raised questions about the liberal gun rules which apply in Switzerland. It was significant that Mr. Stadler, a captain in the Swiss army, had used his service pistol to commit the killings. Every Swiss male under 42 is issued with a firearm which he keeps at home, as part of his defence duties. According the country's leading criminologists, this has resulted in a very high rate of young male suicides and more family killings than in the US (*the Observer of 7/5/2006, p.33*).

Somali Islamists shoot World Cup viewers

During the final stages of the World Cup, an atrocity was committed thousands of miles away from where the tournament was played. In Mogadishu, Somalia, Islamist militiamen shot and killed two people as they watched a banned screening of the semi-final between Germany and France. The Islamists banned television and film entertainment after they seized control of the Somali capital from warlords the previous month, in line with their fundamentalist interpretation of Islam (*The Independent of 6/7/2006, p.14*). The next day, the hard-line leader of the Islamist faction announced that the militiamen in question had been arrested, and that they would face sharia law (*The Guardian of 7/6/2006, p.13*).

Violence in Iraq affects the nation's sport

Regardless of the position which one assumes on the war against, and subsequent occupation, of, Iraq, it remains an objective fact that the levels of violence in that country, far from abating, have actually become exacerbated and have claimed thousands, if not hundreds of thousands, of deaths. The nation's sporting performers have not been left unaffected by these developments – in some cases with fatal consequences.

In late May, it was learned that gunmen had killed the

coach of the Iraqi national tennis team, as well as two of his players, whilst they were driving through Baghdad. It was not certain why these unfortunates were shot in a country where the violence is mostly based on sectarian motives or carried out by insurgents, criminal gangs or tribes. However, witnesses commented that the three were dressed in shorts, and that they were shot within days of militants issuing a warning prohibiting the wearing of such dress (*The Independent of 27/5/2006, p.32*).

Two months later, the head of Iraq's Olympic Committee was kidnapped, along with approximately 30 officials and others, when camouflaged gunmen attacked a conference centre in Baghdad. A bodyguard was shot dead during the attack after a group of 50 militiamen burst in on a meeting of the Committee which took place in the suburb of Karrada. The attack came just hours after the Iraqi Parliament had voted to extend a state of emergency and was followed by a series of bomb attacks later that day, killing seven people in a commercial area of the Southern Sadiyah district. The Olympic chief, Ahmed al-Hadjiya, as well as around 20 bodyguards along with a number of officials, were bundled into an official-looking vehicle before being driven away. A second dead bodyguard was found later, dumped in a nearby street (*The Sunday Telegraph of 16/7/2006, p.26*). No further details were available at the time of writing.

Then it was the turn of the footballing community to feel the impact of the violence. In late July 2006, Akram Ahmed Salman resigned as the Iraqi national side's coach after having received death threats against his family (*The Independent on Sunday of 30/7/2006, p.63*). Only a week previously, the manager was receiving a hero's welcome which most national coaches could only have dreamed of. Fresh from an unbeaten tour of Syria, he was being feted by the public, media and politicians as a miracle worker. It was a moment which gave hope to those who claimed that the country's most passionately followed sport could help unite the country being pulled apart by its sectarian tensions. However, this euphoria has been dissipated by the kidnapping (*The Daily Telegraph of 3/8/2006, p.17*).

Nor was it the more famous elements of Iraqi football who were singled out for such treatment. In early September, a British newspaper reported on the fate of a 34-year-old engineer who had been plucked from the street by a group of armed men, to be interrogated and tortured for five days. It appeared that his only "crime" was his refusal to play for the local football team run by members of Moqtada al-Sadr's militia. It is only because

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his family agreed to pay \$10,000 by way of ransom money that he was released – even though he was so badly beaten about the knees that he may never be able to play the game again (*The Guardian of 5/9/2006, p.16*).

Naturally, the sporting spectator is also at risk from the violence which is now an everyday fact of life in Iraq. In early August 2006, 10 spectators of a football game in Hadrha were among a group of 24 people killed when they were hit by a suicide car bomb. This attack came the day after bombs exploded on a football pitch in Baghdad, killing 11 people (*The Independent of 5/8/2006, p.30*).

American football player “stabbed by rival” (US)

Twelve years ago, a major scandal erupted in the US when skater Nancy Kerrigan was incapacitated after being hit on the knee by an unknown male. As a result, the husband of her arch-rival, Tonya Harding, was charged with conspiracy and Ms. Harding banned from participation in any future Olympics. Recently, there occurred an incident which has some uncanny resemblances to that case. In mid-September 2006, Rafael Mendoza, the lead place kicker for the University of Colorado, suffered an injury to his right kicking leg described as 1 inch wide and 5 inches deep. This injury has kept him out of the sport since.

As a result, Mr. Mendoza’s reserve team-mate, Mitch Cozad, faced charges of second-degree assault, required to find \$30,000 by way of bail, suspended from the University and evicted from his University residence. Mr. Mendoza was stabbed as he emerged from his car near his flat in Evans, a small town 50 miles north of Denver, Colorado. The local media claimed that the police had been led to the accused after a man was seen, shortly after the stabbing, removing tape which obscured the number plate of his car. It was also reported that coaches had informed Mr. Cozad that he needed to work harder if he wishes to challenge Mr. Mendoza for a first-team place (*The Guardian of 15/9/2006, p.25*). No further details were available at the time of writing.

Mother of Brazilian footballer kidnapped – yet again

It has been reported before in these columns (*[2005] 1 Sport and the Law Journal p.46*) that a worrying tendency has emerged for rising Brazilian football stars to suffer the fate of seeing their mothers kidnapped and held to ransom. Such an incident occurred yet again in early August 2006, when Noemia de Carvalho Correa, the mother of Santos defender Kleber, was rescued

unharmful almost two hours after having been kidnapped in Sao Paulo’s East Side. The kidnappers escaped after a brief chase, and Ms. Correa was found tied up in the back seat. She was the fifth mother of a Brazilian player to be thus abducted since November 2004 (*The Guardian of 3/8/2006, p.S2*).

Irish champion jockey jailed for two months

In late May 2006, Paul Carberry, whose fame as a top-class jump jockey has long been accompanied by accounts of his reckless streak, was sentenced to a term of imprisonment of two months by a Dublin criminal court, having been found guilty of setting light to a newspaper aboard a flight to Ireland in October the previous year. Mr. Carberry, who had pleaded not guilty to the charge of engaging in threatening, abusive or insulting behaviour likely to lead to a breach of the peace, was returning from a holiday on an Aer Lingus flight from Spain to Dublin, when he set alight a copy of the Irish Times belonging to Paul Condon, who was in the seat beside him. The aeroplane was then at a height of 12,000 ft and, although the flames were extinguished a few seconds later, Judge Patrick Brady informed Swords District Court that considerable distress had been caused to other passengers (*The Guardian of 25/5/2006, p.S6*).

The judge also informed Mr. Carberry that he had found the evidence he had presented to the court in order to deny the charge “contrived”, and dismissed the defendant’s claim that incident had amounted to a “freak accident”. He stated:

“Would the defendant, an experienced jockey, have acted similarly in a stable or a transporter containing straw and hay? I would suggest emphatically not. I would be failing in my duty of I did not mark the offence” (*ibid*).

Mr. Carberry was sentenced to two months’ imprisonment and a fine amounting to ?500. The jockey will be able to continue racing whilst awaiting his appeal, but if the decision is confirmed he could be declared a disqualified person for a fixed period by the Irish Turf Club and lose his licence (*ibid*).

French international footballers victims of crime

The French football team’s preparations for this year’s World Cup were marred by a series of incidents which saw some key members of the squad subjected to criminal activities.

First, in late May 2006, it was reported that burglars had pumped sleeping gas into the home of French international defender Patrick Vieira, sedating his family

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before making off with jewelry and a car. The former Arsenal player was at his villa on the French Riviera with his wife and daughter when gas was pumped into the air-conditioning system in order to knock out the family and keep them asleep. Burglars then entered the villa, located near Cannes, and stole jewelry before driving off in the footballer's Mercedes. Police reported that there should be no long-term effects from the drugging (*The Guardian of 25/5/2006, p.16*).

Five men were questioned shortly after the burglary occurred, but the outcome of these charges was as yet unknown at the time of writing. The full value of the jewelry stolen was also not disclosed (*ibid*).

In a separate incident, which occurred in March of this year, Marseille police were called upon to investigate the thefts of cars and other valuables from the home of French goalkeeper Fabien Barthez and at least three other players from the French premier Division side Olympique Marseille. The Senegalese striker Mamadou Niang, the Portuguese midfielder José Delfim and the French defender Frédéric Déhu also filed for charges. The burglaries described above highlight the growing problem of what the French describe as "le home-jacking" (*The Daily Telegraph of 5/6/2006, p.13*).

Basketball players shot at US University

In mid-September 2006, five basketball players from Duquesne University, in Pittsburgh, US, were reported to have been shot. Two had to be detained in hospital in a critical condition. The incident occurred on campus in the small hours as the victims were returning from a party at the student union – at which the gunman had been disruptive, according to police reports (*The Daily Telegraph of 18/9/2006, p.18*) No further details are available at the time of writing.

Eunice Barber loses trust in France after "assault" by police

In the early 1990s, Eunice Barber fled to France from Sierra Leone to escape the ravages of the civil war raging in her country, where a brutal trademark was the chopping off of hands. Several years later, Ms. Barber, who in the meantime won World Championship gold medals in the heptathlon and long jump events, displays the marks left on her hands by handcuffs incurred during her arrest by French police, whom she claims described her as a "cannibal". A film of the incident, shot by an eyewitness, recorded an aggressive arrest which involved a dozen white police officers. This followed an incident whereby Ms. Barber had ignored a signal from a policeman not to drive down a particular street.

The film shows Ms. Barber being flattened against her Volkswagen Golf in front of her mother Margaret and nephew Denzel. She was also wrestled to the ground, spreadeagled and handcuffed before being bundled into a van. Ms. Barber also alleges that the film missed other violence, such as a slap in the face from a traffic officer, hair-pulling, and her arms and legs being twisted and crushed. Neither does it show her lashing out to free herself or biting two officers (which she admits) (*The Sunday Telegraph of 9/4/2006, p.14*). Ms. Barber's arrest came at a time of continuing social unrest in France and occurred in one of Paris's notorious banlieue suburbs. She has brought an action against the police for "aggravated violence, threats and breaking the confidentiality of the inquiry". The police, for their part, argue that Ms. Barber was agitated and aggressive, and are prosecuting her for "deliberate attacks on and injuries to officers" (*ibid*).

The outcome of this case – for which Ms. Barber temporarily abandoned her preparations for the European Athletics Championships in Sweden – was not yet known at the time of writing.

Jail for Olympic figure skater for involvement in kidnapping (Austria)

In early August 2006, an Austrian court sentenced a former Olympic figure-skating champion to eight years' imprisonment for plotting to kidnap the daughter of a Romanian businessman and hold her for ransom. Wolfgang Schwarze pleaded guilty to the charges, having previously denied them. The public prosecutor claimed that Ms. Schwarze had been motivated by "greed and selfishness" in plotting the abduction and hiring someone to commit the crime, which was never executed (*The Independent of 8/8/2006, p.21*).

This was not the first time that Mr. Schwarze, a 1968 Olympic champion, had incurred the wrath of the criminal courts. In 2002, he was convicted of bringing young girls to Austria to work as prostitutes (*ibid*).

Former Rhodesia rugby captain in court on passport offence

In early September 2006, it was learned that John Bredenkamp, a former Rhodesian rugby captain and currently a Zimbabwean businessman, found himself in a criminal court in Harare on charges of holding a second passport, which is a crime in Zimbabwe. Magistrates heard how Mr. Bredenkamp, who owns one of the best estates in his country, had acquired a South African passport in 2001 and used it 65 times. As a result, claimed the public prosecutor, the businessman had forfeited his citizenship. Mr. Bredenkamp denied the charges (*The Daily Telegraph of 2/9/2006, p.14*).

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

Romanian footballers' union chief charged with murder

In mid-July 2006, it was learned that Alexandru Radulescu, the head of Romania's main footballers' trade union, was charged with murder after a man whom he had allegedly shot for swimming in his lake died of his injuries. Prosecutors said that the victim, a 29-year-old theology student, was shot in the head by Radulescu with a hunting rifle. He faced a maximum of 25 years' imprisonment if convicted (*The Independent of 13/7/2006, p.23*). The outcome of this case was not yet known at the time of writing.

Gatlin masseur victim of assault (US)

The case of Justin Gatlin, who faces a lifetime ban for doping offences, is dealt with fully in the relevant section of this survey (see below, p.91). However, the massage therapist who is at the centre of these doping allegations was the victim of a more serious combination of circumstances in early August 2006, when he was assaulted – allegedly by a former long jumper with business connections to Marion Jones and Tim Montgomery, whose names are also linked to various doping scandals (*Journals passim*).

Police confirmed that Christopher Whetstine, the masseur in question, was assaulted during the US National Track and Field championships in Indianapolis. This was an event from which the US athletics authorities had attempted to persuade Mr. Gatlin to withdraw after testing positive for testosterone. Mr. Whetstine was taken to hospital with concussion, a broken nose, sprained ankle, dislocated thumb and cuts and bruises following an assault outside the Westin hotel in Indianapolis (*The Observer of 6/8/2006, p.S14*). The police named as chief suspect Llewellyn Starks, a former long jumper having business connections with sportswear company Nike as well as with athletes Tim Montgomery and Marion Jones.

No further details are available at the time of writing.

Squash champion detained for "assault on woman" (Pakistan)

In mid-July 2006, Jansher Khan, the eight-times squash world champion from Pakistan, was detained at Peshawar, Pakistan, on a charge of assaulting a woman. The court in question rejected bail for the 37-year-old former player, who protested his innocence. The alleged victim accused Mr. Khan of "attacking and insulting" her (*The Daily Telegraph of 14/7/2006, p.S18*).

Security issues

Militant threat increases security for stars (India)

In late July 2006, police in Maharashtra State, India, increased security for some of the country's leading film stars and cricketers, as well as the head of the largest private sector company, following reports of a militant threat to their lives, according to a local newspaper report. Test cricketer Sachin Tendulkar was amongst a host of prominent people on a hit list kept by Islamist militants, according to a Mumbai police source. The threat was uncovered during investigations into the Mumbai bombings which occurred in mid-July (*The Guardian of 31/7/2006, p.18*).

Tamil terrorist bomb puts paid to South Africa tour (Sri Lanka)

Sri Lanka is a country which for several decades now has been racked by insurrectionist attacks from terrorist group Tamil Tigers. In mid-August of this year, these troubles caused the cancellation of an intended cricket tour by South Africa. There has been a renewed spate of bombings in the capital Colombo, one of which took place close to the hotel where the visitors were staying, and killed seven people (*The Daily Telegraph of 15/8/2006, p.S8*). This naturally caused serious concerns among the touring party, and following advice by an independent security consultancy engaged by the International Cricket Council (ICC), Cricket South Africa decided to abandon the tour (*The Daily Telegraph of 17/8/2006*).

Other issues

[None]

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Media rights agreements

Academic article on Italian football broadcasting rights

In a recent article which appeared in an international sports law journal ("*Serie A broadcasting rights: collective v individual sale*", [2006] 4 WSLR 3-5), the author, Luca Ferrari, reports on a dispute between Italian football clubs on the question whether television broadcasting rights should be licensed collectively rather than by individual clubs. He also comments on the Italian law relating to the ownership of broadcasting rights, as well as the problems facing the smaller clubs where top sides are able to conclude the best contracts. He further considers the options for the smaller clubs to lobby for law reform, lodge complaints to the competition regulator, and campaign for change in the national league (*European Current Law* 6/06, p.129).

Disagreement over broadcasting rights in Israel draws in Prime Minister

The state of Israel is not located in the most stable of regions on this planet, and therefore one might have thought that its Prime Minister, Ehud Olmert, had more pressing issues to attend to than a dispute over football broadcasting rights. But this is precisely what occurred in early June 2006, with a few days to go before the opening fixture in the football World Cup in Germany.

The disagreement in question concerns the prices charged to the Israeli public for viewing the tournament matches on a pay-per-view channel. Mr. Olmert stated publicly that he had not yet subscribed to this channel, launched by a company joint-owned by agent Pini Zahavi, as he was waiting for the price to drop. This statement definitely struck a chord with his public. Mr. Zahavi is one of the proprietors of Charlton, a media company which holds Israel's rights not only to the World Cup, but also to English and domestic football. However, during the past few years, Mr. Zahavi and his associates launched a pay-per-view channel covering the English Premier League, as well as certain Israeli league fixtures. In spite of a massive public outcry, pay-per-view television became a regular feature of the Israeli broadcasting scene – albeit with low viewing figures – and Charlton had hoped to extend its scope to the World Cup (*The Guardian* of 6/6/2006, p.S5).

Apart from a dozen matches, including the opening fixture and some of the later stages, the remainder of the action from Germany was made subject to an extra charge. Charlton had considered that around 200,000 households would buy the £150 package, but the majority of the

Israeli public boycotted the offer – even when the cost was reduced to £50. In spite of the many protests against this manoeuvre on Charlton's part, the pay-per-view system was maintained (http://en.wikipedia.org/wiki/Pini_Zahavi). This entire episode has caused Mr. Zahavi's image considerable harm.

Legal issues arising from transfer deals

Mikel affair drawn to a close (Norway/UK)

It will be recalled from a previous issue of this Journal ([2006] 1 *Sport and the Law Journal* p.54) that the transfer of the young Nigerian international footballer, John Obi Mikel, from Norwegian club Lyn Oslo to the English Premiership had become mired in controversy and legal disputes. Initially, the Nigerian player at first seemed destined for a move to Old Trafford, but then claimed that he had been falsely induced into signing the contract, which he sought to have annulled in order to be able to join Chelsea instead. Mr. Mikel's lawyers then took matter to Oslo's District Court, claiming that the contract should be set aside under Norwegian industrial law. The court, however, disagreed, ruling that the matter was not a labour dispute and should instead be brought before a court of sporting arbitration.

Since then, world governing body FIFA has taken up the matter, even though Chelsea were never formally accused of any wrongdoing, and there were only witnesses – and not defendants – to the inquiry. It took many months for the entire issue to reach a conclusion. Ultimately, Chelsea agreed to end the dispute by paying £12 million to Manchester United and £4 million to Lyn Oslo for the purpose of securing the player's signature (*The Daily Telegraph* of 4/8/2006, p.S5). Mr. Mikel admits that this has been a very difficult issue to deal with, but believes that it has made him "mentally strong" (*Ibid*).

Ibrahimovic "to take legal action" to move from Juventus (Italy)

The Italian football corruption scandal, which has been extensively documented above (p.32) resulted in top side Juventus being relegated to the Italian second division. It was always to be expected that some of the club's players would take this as a cue for their exit, and one of these was Swedish international Zlatan Ibrahimovic. In fact, a number of other players had already secured their release from the side, before the remainder were informed by their coach, former French international Didier Deschamps, that they would not be allowed to leave. Mr. Ibrahimovic is now said to be ready to take legal action in order to secure his release

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(*The Independent of 4/8/2006, p.61*). No further details are available at the time of writing.

Employment law

Togo players threaten strike action before deal is struck

One of the many African sides who have achieved prominence in football through the World Cup is Togo, who qualified to take part in the final stages of the 2006 World Cup. However, at one stage it looked as though the country would not be represented at the finals by its first-team squad, embroiled as the latter became in an industrial dispute over their pay levels. They demanded a bonus of £100,000 each for appearing in the final stages, plus an additional £20,000 per win and £10,000 for each draw. The Togo Football Association described these demands as unrealistic, hence the threat of strike action by many first-choice players (*The Times of 1/6/2006, p.87*).

The dispute was barely one day old, when Togo officials announced that "agreement had been reached" with the players. Somewhat ambiguously they announced that the players would "get their money", but that the final deal did not include the amounts initially demanded by the players (*The Independent of 7/6/2006, p.56*). However, it soon appeared that discontent continued to fester in the players' camp – precipitating a crisis which even had the country's Prime Minister flying to Germany in order to mediate in the dispute (*The Guardian of 9/6/2006, p.56*). Matters came to a head when the players threatened not to travel to Dortmund for their group match with Switzerland unless unpaid bonuses were transferred to their bank accounts (*The Guardian of 19/6/2006, p.S10*). This resulted in Togo's coach, Otto Pfister, also downing tools, declaring that the dispute had made his position impossible.

This development naturally was of some concern to the world governing body FIFA, whose worries increased when it became quite plain that the Togo players' intention not to travel was no idle threat. They accordingly spelt out to the recalcitrant players what would be the consequences if they failed to appear for the scheduled Switzerland game – including a possible ban from future tournaments and the forfeiting of revenues from the current competition (*The Independent of 19/6/2006, p.56*). In the event, the dispute was solved when FIFA agreed to pay the bonuses agreed direct to the players rather than paying their national federation first (*The Independent of 21/6/2006, p.51*).

Argentinian rugby squad threaten, then abandon, strike

Football at the international level does not appear to be the only sport afflicted with industrial unrest of late. In Argentina too, a pay dispute had arisen between the country's international rugby players and their national federation (in this case the UAR), thus casting doubt on a number of international fixtures which had been planned for late May 2006. In fact, almost 60 of Argentina's top players, including Europe-based professionals, were involved in the strike threat. The UAR, for its part, is in dire financial straits because it almost had to file for bankruptcy after losing a court case brought by a player who had become a quadriplegic after sustaining injuries during a match (*The Sunday Telegraph of 28/5/2006, p.S7*).

In the event, the threatened action was called off – but only temporarily, in order to enable the international fixtures referred to above – i.e. against Wales and New Zealand – to take place. The players insisted that the decision to make themselves available for these games did not weaken their resolve. According to hooker Mario Ledesma:

"We have agreed to play this month but we have not accepted the offer the unions have made to us. After the three Tests we will resume negotiations. The offer was unacceptable because it only dealt with the financial aspects of our concerns" (*The Guardian of 3/6/2006, p.S12*).

The players are owed nearly £175,000 in total, and those who play in Europe had to pay their own way home for the Tests. At the time of writing, it was not yet known whether the dispute had been settled.

UEFA "threatens" salary caps (amongst other measures)

One of the most frequently-voiced complaints about the modern game of football in Europe is the manner in which the power of money seems to take precedence over all other considerations in the game. Until now, there has been a good deal of handwringing at this situation amongst the game's administrators, but nothing concrete has emerged. This may be about to change, if the findings of a recent report, initiated by European governing body UEFA, are implemented.

The author of the report, Jose Luis Arnaut, the former Portuguese sports minister, said that football was not in good health and that only the direct involvement of political leaders could help to restore it on the road to recovery. More particularly, he emphasised the financial crisis enveloping the game, with wage inflation fuelled by the players' demands and encouraged by their

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agents. He therefore recommends the establishment "of an effective salary cap system in Europe", which could hit top clubs such as Real Madrid and Chelsea, who are reportedly paying their new signing, German international Michael Ballack, £130,000 per week (*The Guardian of 24/5/2006, p.S1*).

The report also contains other recommendations, such as an obligation for all clubs to have a certain number of home-grown players in their squads, a crackdown on the activities of agents, the legal obligation on the part of clubs to release their players for international team duty, and the introduction of a "fit and proper" test for those operating football clubs (*ibid*).

Whether any of these measures will ever be put into practice remains to be seen.

Sports brands "ignoring employment rights", claims Oxfam

In a report published in late May 2006, Oxfam, the international charity, claimed that major sports brands are ignoring Asian factory workers' rights to form trade unions or are obtaining their products from countries where collective bargaining is not guaranteed. The authors of the report, entitled "Offside: Labour Rights and Sportswear Production", allege that the "failure to act on human rights" has led to poorer conditions, lower wages, discrimination and violence directed at workers who attempt to unionise. Of the 12 companies under review in Indonesia, Thailand and Sri Lanka, Reebok had the best practices, with Fila applying the worst (*The Guardian of 24/5/2006, p.16*).

Court case highlights exploitation of Chinese Olympic workers

It was always expected that the Chinese authorities would allow little to stand in their way in order to make a success of the 2008 Olympics, to be held in the capital Beijing. However, it was thought that at least certain minimum safeguards for those employed in the process of preparing for the Games would be maintained. This illusion was brutally shattered as a result of a recent court case, which revealed that certain construction workers on the new subway line linking the city centre to the Olympic sites are not being paid. This has thrown into sharp focus the working conditions during the run-up to the 2008 tournament (*The Daily Telegraph of 23/6/2006, p.20*).

The court decision ordered the defendant, a construction subcontractor, to pay 260 migrant workers their outstanding wages in full, after the company had admitted that they had not yet received any of the pay

which they were promised over a year previously, when they were recruited from the rural province of Shandong. According to the local media, the wages amounted to approximately 70p per day – which is exceptionally low even by Chinese standards. The city's construction effort had won fulsome praise from the International Olympic Committee (IOC), and has attracted high-profile visitors from all over the globe (*ibid*).

Social rights in football – article in international sports law journal

In an article entitled "Labour law, the provision of services, transfer rights and social dialogue in professional football in Europe" ([2006] 1-2 *ISLJ*, p.117), the author, Robert Siekmann, reproduces a presentation which he made at the international footballers' trade union FIFPRO Conference entitled "10 Years after Bosman" held in Strasbourg in December 2005. He comments on the shift towards contracts for services and away from employment contracts in Bulgarian football, and argues that there is a relationship of authority in football which is linked to the free movement of workers. He also considers the issue of transfer rights in relation to contracts of service (*European Current Law 8/06, p.195*).

Indian cricketers join union... which pledges action on various fronts

In mid-May 2006, the international professional cricketers' trade union FICA had its hand strengthened by India's leading players deciding that they intended to join up. With cricketers from the world's richest cricket nation on board, FICA expect to persuade the International Cricket Council (ICC) to meet the insurance costs at the Champions Trophy, to be held later this year (*The Guardian of 12/5/2006, p.S2*).

Another area in which FICA is hoping to leave its mark is the actual amount of Test cricket and one-day internationals currently being played. Tim May, the former Australian test spinner who is the FICA Chief Executive Officer, has even refused to rule out a worldwide strike by his members if this does not happen. More particularly he claims that the world's best players are being "flogged" and that international cricket overkill is the one issue on which strike action cannot be discounted. The ICC has hailed its new Future Tests Programme (FTP) triumph, but, with India already packing the schedule with additional tournaments, Mr. May has labelled it "a disgrace". He commented:

"The FTP is a disaster as it puts no upper limit on the amount that can be scheduled. There are five or six guys in the five leading sides in the world who play Tests and ODIs and they are being flogged. They are the ones who make the

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difference between a 10,000 crowd and a sell-out. They are the ones whom the broadcasters and commercial partners pay for. They are exhausted and they are not going to take much more. It is a mess. (*The Guardian of 20/6/2006, p.S13*).

Jacques Kallis, the South African all-rounder, wholeheartedly supported Mr. May's views, adding that for all-rounders such as himself the schedule was definitely "too hard" (*ibid*).

Sponsorship agreements

Article in international sports journal on the resolution of conflicts arising from sponsorship agreements

In this article ("Conflicts and some possible ways of resolving them in Europe" [2006] 1-2, 100-101), the author, Ian Blackshaw, discusses the problem of conflicts with sponsorships and endorsements involving sporting performers. He reviews various methods of dealing with conflicts, including (a) restrictions in the English Football Association Premier League players' standard contract, (b) restrictions in Article 511 of the French Charter of professional Football, (c) the use of contract and legal rules in Germany, (d) the settlement of conflicts by the courts in the Netherlands, and (e) restrictions imposed by the Norwegian Football Association. (*European Current Law 8/06, p.195*).

Henry in shock move to Reebok (France)

In mid-April 2006, French international footballer Thierry Henry dealt a major blow to Nike, the US sportswear company, by announcing that he was transferring his sponsorship to their arch-rivals Reebok. In a major coup for the latter, and their German owners Adidas, Mr. Henry's lucrative deal with Nike, thought to be worth a minimum of £1 million per annum, came to an end after the World Cup tournament had ended (*The Daily Telegraph of 12/4/2006, p.S3*).

Sporting agencies

The international supply of sports agent services. Article in international sports law journal

In this important paper ("The international supply of sports agent services" [2006] ISLJ 1-2, p.20-27) the author, Andrea Pinna, reviews national legislation regulating sports agents, highlighting the French Law 92-652 of 13/7/1992, as well as the general law on

Sport of 16/7/1984 and the relevant FIFA rules. He considers the differences in the conditions of access to the profession of sports agent, focusing on the territorial scope of Article 15(2) of the 1984 Law. He further comments on attempts to simplify the regulation of the profession (*European Current Law 8/06, p.195*).

Other issues

Fifa embroiled in Visa/Mastercard legal imbroglio (US)...

In mid-September 2006, the credit card company Mastercard commenced legal proceedings before a New York court against arch-rivals Visa as well as against FIFA, the world governing body in football, over the latter's refusal to honour their right to renew their 16-year agreement with Mastercard. FIFA had signed a new deal with Visa in April of that year. FIFA president Sepp Blatter was one of a number of key witnesses required to give evidence in this case (*The Daily Telegraph of 15/9/2006, p.S5*).

Although FIFA's finances are in very good condition – having recently announced income for 2005 amounting to £397 million – this lawsuit is potentially one of the most damaging they have had to face. According to the statement of complaint filed by the credit provider, Mastercard maintain that the deal struck with Visa, which will operate between 2007 and 2014, and is worth £185 million, constituted a "blatant and deceitful violation" of a right of first refusal (*ibid.*).

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

Murray coach Brad Gilbert sued for breach of contract (US)

British tennis hope Andy Murray has thus far reached much his potential but has yet to break through to the very top echelons of his sport. It was thought that a change of coach might assist him to reach this goal, and the appointment of Brad Gilbert, a former tournament player from the US, to this position seemed the right move to this effect. However, no sooner had Mr. Gilbert settled into his new role than a fresh challenge awaited him – on this occasion in the courtroom. In late August 2006, it was learned that a management company which claimed to represent him was suing Mr. Gilbert for alleged breach of contract. Most of the claim related to the deal which the US coach had signed with the British governing body in the sport, the Lawn Tennis Association, in relation to Andy Murray (*The Independent of 29/8/2006, p.47*).

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More particularly, the claim, brought by the firm Creative Sports and Entertainment, and its President, David Bagliebter, states that Mr. Bagliebter had been the coach's "friend, manager and representative" for 20 years, and that it has "protected and represented his interests, both personal and financial". The amount for which Gilbert was being sued was at least \$788,000 – the larger part of the figure representing what Gilbert's deal with the LTA is claimed to be worth. The claimant alleges that it has an agreement under which Mr. Gilbert pays the company 15 per cent of any of his commercial deals, and that he owed Creative the sum of \$105,000 under a three-year agreement which the firm negotiated with ESPN, the US broadcaster, for the coach to act as a television analyst. Mr. Gilbert had in fact left ESPN in order to start work as Murray's coach under the auspices of the LTA (*The Guardian of 29/8/2006, p.S1*).

Mr. Bagliebter also claims that, in the course of May 2006, Mr. Gilbert requested him to negotiate with the LTA before the British ruling body contacted him. At one stage, Creative were apparently hoping to secure for Gilbert a contract which would provide him with over £4 million over a period of five years. It is alleged by the claimant that Mr. Gilbert then misled Creative by informing them that he would probably not enter into an agreement with the LTA "because it would require him to be in England for a substantial amount of time". It is further alleged that Gilbert then refused to respond to "enquiries concerning the negotiations with the LTA". Towards the end of June 2006, Creative learned from the media that Mr. Gilbert was close to striking a deal with the LTA. He then allegedly declined to pay the fees which Creative were demanding (*The Daily Telegraph of 29/8/2006, p.S12*).

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

Football supporters incur contractual liability for disrupting match. German court decision

That hooliganism in sport raises issues of criminal law is self evident. However, this unfortunate aspect of sporting activity also gives rise to contractual issues, according to a decision recently issued by a German appeal court. The latter (Oberlandesgericht Rostock, Decision 3 U 106/05 of 28/4/2006) ruled that, under Article 280 of the German Civil Code (Bürgerliches Gesetzbuch), where one party to a legal relationship which is subject to the law of obligations (Schuldverhältnis) infringed his/her duties under the contract – thereby causing the other party losses –

he/she was obliged to repay the other party for the loss incurred.

The case under review arose from a claim for damages brought by a football club against several spectators who, in the course of a game, had either invaded the pitch or otherwise disrupted the fixture. As a result of these incidents, the club had incurred a heavy fine imposed on it by the football authorities. The Court ruled that the club was entitled to reclaim from the spectators the entire amount of the fine imposed on it, even though, when calculating the amount of the fine to be paid by the club, the football association had taken into account earlier, similar instances of crowd disturbances which the club had not been able to prevent in time (*European Current Law 9/2006, p.154*).

Belgian fitness club in court case over general terms and conditions

In the case under review, the claimant and respondent had an oral agreement for the cleaning of two of the respondent's fitness rooms from June 1999 onwards. At the outset of the contractual period some invoices were paid without delay. However, the relationship between them deteriorated and two invoices were unpaid. Towards the end of 1999, the applicant received a letter from the respondent terminating the contractual relationship on the grounds that the cleaning service was inadequate. The claimant brought a court action requesting payment of the last two invoices, holding that it should receive compensation because the respondent had terminated the contract without giving the three months' notice stipulated in the general terms and conditions stated on the back of the invoice. The first court merely upheld the claim for payment of the invoice, dismissing the compensation claim. The claimant appealed the decision.

The Brussels Court of Appeal upheld the appeal in full (4Clean Power v. European Fitness Club Decision of 17/2/2005 [2006] Journal des Tribunaux 30). It ruled that, although there was no written contract, acceptance of the first invoice and the prompt payment of those invoices were signs of acceptance of the general conditions which were stated on the back of the invoice. Consequently, the refusal to pay, as well as non-compliance with the three-month period of notice stipulated in those general terms and conditions, constituted clear breaches of the respondent's contractual obligations (*European Current Law 9/2006, p.155*).

3. Contracts

“Club v. country” compensation dispute intensifies... pending outcome of Charleroi decision

Readers of this Journal have by now become fully acquainted with the increasingly virulent protestations emanating from Europe’s leading football sides over the question whether they are entitled to compensation for any injuries sustained by their players when on international duty. More particularly this column has highlighted the court action currently undertaken by Belgian club Charleroi against the world governing body in football, FIFA. This followed the instruction issued by the latter that Charleroi should allow their star player Abdel Oulmers to play for his country, Morocco, in an international fixture, during which the Moroccan tore several ankle ligaments and was out of action for seven months. The outcome of this litigation is not yet known. However, the initiative taken by the Belgian club has given encouragement to other sides to consider similar action.

Inevitably, it was this year’s World Cup tournament which was once again to the forefront of these developments. The world’s leading club sides feared, not entirely unreasonably, that some of their star players on international duty might sustain injuries which could put them out of action for some time and thus endanger their performance for their clubs. Even during the preparatory fixtures for the tournament there was talk of litigation – more particularly English Premier League side Liverpool were said to be seriously considering a lawsuit against the French footballing authorities after their international player Djibril Cissé suffered a broken tibia and fibula during a warm-up game with China. This was an injury which was a repeat of the type of injury Mr. Cissé sustained on his other leg in 2004, and was capable of putting his entire career in jeopardy (*The Guardian of 9/6/2006, p.57*).

Regardless of the outcome of the Charleroi decision, the case itself and the various complaints made by the leading clubs – in particular the powerful G14 group of European sides – seems already to have had some effect on the world governing body FIFA. Current FIFA rules state that the clubs must release their players without entitlement to compensation. Moreover, they make the clubs responsible for insurance cover against illness and accident during the entire period of their player’s release for international duty. This situation changed for the World Cup, with FIFA paying some of its proceeds into an insurance pool for player injuries. However, this has yet to be enshrined formally in the organisation’s regulations (*ibid*).

This Journal, in common with the entire footballing community, awaits with keen interest the decision in the Charleroi litigation.

4. Torts and Insurance

Sporting injuries

[None]

Libel and defamation issues

German international striker to take action over radio spoof

The football World Cup competition had its lighter sides in the media, and many of its exponents were the butt of a few hearty and at times cruel send-ups and caricatures. However, in the case of one particular German player, the joke seems to have gone a little sour. In mid-tournament, international striker Lukas Podolski announced that he was to take legal action against the German national broadcaster, ARD, over a local radio show which made fun of him in a spoof "Lukas's Diary". He duly informed ARD that he would no longer give them any interviews as long as the programme was not removed. Mr. Podolski claimed that the jokes contained in the show made him out to be an idiot and were "below the belt" (*The Independent of 20/6/2006, p.51*).

French football coach "to sue" over alleged link with mobile phone company

On the eve of the football World Cup, it was learned that French national coach Raymond Domenech was about to bring court action against a French newspaper which alleged that he had been paid £34,000 for an exclusive interview with mobile phone company SFR. Mr. Domenech denies having made any personal contract with the company in question, and announced that he would be taking legal action for defamation (*Daily Mail of 31/5/2006, p.74*). At the time of writing, it was not known whether the French manager had converted his threats into action.

Armstrong settles with Sunday Times (US/UK)

It will be recalled from a previous issue of this Journal (*[2005] 3 Sport and the Law Journal p.98*) that seven-times winner of the cycling Tour de France, Lance Armstrong, had launched a series of lawsuits for libel in various countries, arising from various passages from the book *LA Confidential – the Secrets of Lance Armstrong* which the latter had interpreted as an accusation that Texan rider had at some stage in his career enhanced his performance by means of illegal substances. During a hearing at the English High Court, Gray J ruled that the meaning of the article as a whole had implied that Mr. Armstrong had consumed drugs in

order to improve his performance. He dismissed arguments put forward by the defendants that the words conveyed no more than the existence of reasonable grounds to suspect (*The Guardian of 1/7/2006, p.S10*).

As a result, the newspaper reached a settlement with Mr. Armstrong, their lawyers stating:

"The Sunday Times has confirmed to Mr. Armstrong that it never intended to accuse him of being guilty of taking any performance-enhancing drugs and sincerely apologised for any such impression" (ibid).

The amount involved in the settlement was not known at the time of writing.

Former Austrian skiing coach sues IOC and WADA chiefs

The case of Walter Mayer, the former Austrian skiing coach who fled the 2006 Winter Olympics following a doping raid, has been extensively documented in the previous issue of this Journal (*[2006] 1 Sport and the Law Journal p.60*). Later that year, it was learned that Mr. Mayer had brought defamation proceedings against Jacques Rogge, President of the International Olympic Committee (IOC), and Dick Pound, Chairman of the World Anti-Doping Agency (WADA) over comments made in connection with this affair (*The Daily Telegraph of 1/4/2006, p.S22*). No further details are available at the time of writing.

[The strange case of Mr. Mayer is returned to later, under the heading "Drugs legislation and related issues" (below, p.103).]

Insurance

Netherlands insurance company offers "World Cup Sickness" cover

In mid-May, it was reported that a Netherlands insurance company was offering employers special World Cup Orange Influenza policies for every employee who pleaded illness during a World Cup match involving the national side. The firm pledged itself to pay out one day's remuneration for each occasion when an employee called in sick during any such game. It had been noted that, during the 1994 tournament, up to 100,000 extra days of sickness were recorded when the national team were playing. Invariably, the reasons given were "sudden influenza" symptoms (*The Daily Telegraph of 10/5/2006, p.18*).

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Other issues

US ice hockey side accused of “sports terrorism” faces compensation claim

Many an east European ice hockey player has been lured to the wealthy uplands of North American sport – sometimes without so much as a by-you-leave from the clubs that originally employed them. One such side is actually taking legal action after yet another high-profile defection. The club in question are Russian side Metallurg Magnitogorsk, who are seeking damages from Pittsburgh Penguins following the disappearance of their top player, Evgeni Malkin. Gennadi Velichkin, the Russian side’s General Director, claimed to be “in shock” after Mr. Malkin secretly fled Metallurg’s training camp in Finland after agreeing a new contract with the club. Somewhat melodramatically, he described the US club’s actions as “pure sports terrorism” (*The Guardian of 14/8/2006, p.17*).

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Sports policy, legislation and organisation

Catalonia takes first step towards abolition of bullfighting

As the advised reader will know, this column refuses to acknowledge bullfighting – or indeed any other activity involving the killing of animals for entertainment – as a “sport”, except where measures are taken to abolish it. Although generally speaking Spain, one of the countries where this activity is engaged in with full support of the authorities, does not look likely to ban it, one of its most important regions, Catalonia, recently asserted its claim to independent action by moving a step closer towards banning the Spanish national sport. Delegates to the regional parliament voted in support of a motion to extend existing animal cruelty laws to include los toros. Until now, bullfighting was excluded from legislation relating to animal rights (*The Times of 23/6/2006, p.36*).

The motion, backed by the left-wing Catalan nationalist Esquerra Republicana de Catalunya party, was supported by 74 delegates, with 51 against, and now paves the way for an outright ban. The move comes days after voters in Catalonia backed overwhelmingly an autonomy deal to give the region more independence. The campaign against what many see as a cruel facet of Spanish culture has intensified in recent years. Opponents of las corridas in Barcelona, the capital of Catalonia, had declared it an “an antibullfighting city” two years ago, after public protests and a petition signed by more than 250,000 people.

However, this measure is aimed exclusively at banning bullfighting. It does not extend to other spectacles such as “corre bou”, under which the general public chase bulls through the streets, and “bouembolat”, which involves putting lighted fires on the bulls’ horns (*The Daily Telegraph of 22/6/2006, p.S20*).

In addition, declarations such as that made by the Catalanian assembly have no legal force. Bullrings can be closed only by a change of the law. Yolanda Llambrech, a spokeswoman for Esquerra Republicana de Catalunya, commented that this move would go a long way towards halting “the torture and death of bulls in Catalonia”, adding that the region in question had advanced laws on animal cruelty and that “it makes no sense that bullfighting is excluded.” (*The Times, loc. cit.*).

Croatia adopts general Law on Sport

In mid-June 2006, Croatia adopted Law (2006) NN 71, which regulates all aspects of sport and sporting activity, including its funding and monitoring. The basic principles underlying this legislation are that sport is voluntary and should be available to all, regardless of age, race, gender, faith, nationality, social position, political or other opinion. Strengthening the development of sport is to be achieved by the construction and maintenance of sporting institutions, the promotion of education in sport, the initiation of scientific projects and the stimulation of partnerships between government and non-government organisations, private initiatives and funding by the State as well as by local and regional authorities.

The National Sport programme is a document which defines the objectives of sporting development, and lists the activities which are necessary for their achievement. The programme is to be adopted for a period of eight years, and involves three sub-programmes – to wit, (a) a programme establishing conditions for the development of sport in schools, (b) a programme laying down the conditions for achieving satisfactory results for Croatian sporting performers in international competitions, and (c) a programme laying down the conditions for engaging in recreational activities with the object of improving public health. The Programme also defines the relevant public authorities, local and regional units of self-government, national sports federations and sporting associations. The Minister for Sport will make available the funds for realising the National Sports Programme, and the principal institution in charge of developing the quality of sport is the National Sports Council (*European Current Law 9/2006, p.195*).

2010 World Cup – can South Africa make it?

When the football World Cup for 2010 was allocated to South Africa, many hailed this as a major breakthrough, representing as it did the first occasion on which this tournament was to take place on the African continent. However, since then a number of questions have started to arise as to the country’s ability to stage the event in the manner required. In the vanguard of these doubters have been the Germans, who are convinced that they staged the best World Cup ever this year and have already expressed grave doubts about South Africa’s ability to do likewise. They feel that, should their doubts be confirmed, they may be needed to step in – as indeed was the case in 1986, when Mexico had to fill the gap left by originally designated hosts Columbia when the latter provide unequal to the challenge. In particular the German media have been

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besieging the world governing body, FIFA, with questions to that effect, prompting the following response from its ubiquitous President, Sepp Blatter:

"In South Africa, there are problems. Will the stadiums be built? Will they be on time? We are perfectly aware of the great task that is required for staging the World Cup and South Africa needs help. We have established our own secretariat in Johannesburg and we shall take charge of ticketing. South Africa is a multicultural country where you have different tribes and you require a certain kind of intelligence to bring these forces together. Also the country's presidential elections will be held before the World Cup, but I am sure we will cope" (The Daily Telegraph of 6/7/2006, p.56).

The somewhat circuitous prose used by the FIFA president left some observers unsure whether it was meant to defend or lambast the future World Cup host (which cannot be greatly reassured either by FIFA's promise to take charge of ticketing arrangements, following this year's fiasco which has been well documented elsewhere in this Journal – see above, p.37). However, it must be conceded that it was in fact Mr. Blatter who was the main motivating force behind the allocation of the 2010 tournament to the African nation. He is, however, aware of some of the major difficulties involved. These do not relate exclusively to funding or organisational ability, but also concern some of the political machinations which have already beset the tournament organisation. Thus Mr. Blatter was compelled to intervene in order to prevent the South African organising committee from dismissing their Chief Executive, Danny Jordaan, who led both the 2006 bid (which very nearly had the better of Germany) and the successful 2010 application. Mr. Blatter is also aware of the strained relations between Mr. Jordaan and his Chairman, Irvin Khoza, which are reported to have caused a constant atmosphere of tension within the organising committee (*ibid*).

However, some of the media speculation surrounding the success or otherwise of the 2010 tournament became a little too uncomfortably close to home, when the Johannesburg-based Sunday newspaper Rapport claimed that the ruling body might take away the World Cup for 2010 and allocate it to Australia. This was followed by emphatic denials, with FIFA spokesman Andreas Herren dismissing the report as "one of those scare stories" which regularly appear prior to every major international sporting tournament – these had been groundless before and would be groundless in the case of South Africa. However, it appears that many prominent South Africans also entertain some dubiety as to their country's state of readiness. Thus Mninawa Ntloko, of the journal Business

Day, opines that many people were understandably anxious because "we all know the kinds of stadiums we've got in this country" – only a handful being of an acceptable standard. For his part, Tony Leon, the leader of the official opposition to the ANC government, vented the opinion that South Africa was "two years behind" in its preparations because of governmental sluggishness in processing all the necessary legislation (*The Observer of 9/7/2006, p.14*).

A further concern is the state of law and order in the country. According to most observers, violent crime remains rife in the major cities. In addition, public transport is extremely deficient, and it is thought that at least 600 hotels should be built over the next four years in order to cater for those expected to stream into the country for the tournament – estimates put these numbers at over 1 million (*ibid*).

Within days of having made the reassuring noises quoted above, however, FIFA executives were reported to have "serious doubts" about South Africa's ability to cope with the tournament, and were said to have discussed a radical contingency plan which would see the United States staging the World Cup instead. On the other hand, according to the German sports news agency SID, FIFA had once again turned its attention to the possibility of staging the event in Germany. However, the same sources suggested that no final decision would be taken until the middle of next year, after Sepp Blatter will have stood for re-election as the world governing body's president. It is widely believed that Mr. Blatter's chances of re-election would be considerably boosted by the votes cast by the African delegates (*The Guardian of 12/7/2006, p.56*).

Yet another concern about the 2010 tournament is that most matches could be played in half-empty stadiums, the main reason for this being the fact that tickets will be well beyond the means of a population whose average annual income (according to the World Bank) is £2,600. This would seriously damage the atmosphere and create a negative impression of the tournament among billions of television viewers. This is why FIFA have drawn up plans to make available tickets at very low prices, or even free of charge, for the benefit of the local population. FIFA also hopes that this initiative will help to dispel the gathering gloom surrounding the next World Cup (*The Observer of 6/8/2006, p.31*). However, there may be fears that this plan may backfire, since it is not unreasonable to suggest that at least some of these tickets may find themselves on the black market – giving rise to exactly the same kinds of problems that beset the ticketing for the previous tournament (see above, p.37).

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Beijing 2008 steams ahead – but at what price?

Few doubts of the kind that attach to the 2010 World Cup, adumbrated in the previous section, have been allowed to surround the organisation of the 2008 Olympic Games in Beijing. This is not to say, however, that all is sweetness and light as regards the outcome of the next Games – for reasons which have been stated in previous issues of this Journal (*see, for example, [2005] 3 Sport and the Law Journal p.59*) and which have continued to fester over the period under review.

Certainly the entire construction project seems to be going according to plan – as was witnessed by Lord Coe and Ken Livingstone, who will be closely involved in the London Olympics of 2012, on a visit which took place in mid-April 2006. There was naturally the odd concern – such as one report that steel shortages were becoming an impediment for the 17,000 workers on the Olympic site – but which have been airily dismissed by the construction authorities. The only problem to which they would admit was that the construction work involved the adoption of new technologies, unprecedented in the country, and their application – but this was not expected to cause any insuperable worries. However, there has been a price to pay for this unimpeded progress, in the shape of the many families whose homes have been razed to make way for the Olympic sites, and the many jobs lost because a number of factories have been moved away in order to try to ensure clean air over Beijing for the event (*The Times of 17/4/2006, p.24*).

There have also been concerns that the construction work is threatening what remains of the historic parts of the city. In spite of Government pledges to protect these areas, large parts of Qianmen, an area on the southern edge of Tiananmen Square which has, since the 17th century, been associated with shops, restaurants and various forms of entertainment, have been razed to the ground. The developers were able to act with impunity because they were linked with, or even owned by, local authorities, thus enabling them to flout central government pledges, and deny accusations of corruption which have engulfed senior party officials (*see above, p.63*). Many of the residents are, however, resisting pressure to leave. The district of Qianmen has a special place in Chinese hearts, because of the role it played when the Manchu invaders from the North established the Qing dynasty in the mid-17th century (*The Daily Telegraph of 19/6/2006, p.16*).

In spite of the Chinese authorities' apparent determination to ensure that Beijing is a clean city for the Games, there remain many obstacles to the

achievement of this lofty objective. One of these is the farming community of Hebei province, who in June every year start the process of straw burning, oblivious to the winds blowing North towards the Chinese capital. Since there are some 700 million tonnes of straw available in China in any given year, this represents a truly major problem, and within hours of the straw burning the residents of South Beijing are choking. This year, this pollution seems to have been worse than ever, with hundreds of people calling municipal hotlines to enquire what had gone wrong, and the elderly and small children being hastily instructed to remain indoors. The Beijing Daily described this as the worst day for pollution in six years (*The Sunday Times of 25/6/2006, p.12*).

This episode is, however, only one aspect of the difficulties facing the Olympic authorities to deliver on their clean air pledges. Experts are questioning whether, for example, the marathon runners will be able to compete in a city where levels of dangerous particles capable of being sucked into the lungs are three or four times higher than in those of a US city, according to Li Zijun, a researcher for the Worldwatch Institute. The city suffers in fact from four principal sources of polluted air. In the first instance, thanks to the rising prosperity in the country, thousands of new cars appear on the streets every year – and there may be as many as 3.5 million in Beijing by the time the Games are held. Secondly, a construction boom unleashed by the Olympics has caused a pall of dust from demolition and building sites. Thirdly, China has not succeeded in weaning itself off coal-burning plants and factories. These are all factors which could be controlled by government action.

However, the fourth pollutant is entirely immune to any action on the part of the authorities. Fierce dust storms blow in from the Gobi desert, often reducing the city to blinded confusion. Flights are delayed and the traffic ploughs through the darkness with headlights ablaze. In fact the darkness already sets in at noon. The prospects are not much better in Hong Kong, where riders will be competing in the equestrian events. Quite apart from being subjected to the stifling humidity and the threat of midsummer typhoons, the contestants will have to cope with some of the worst pollution to prevail in Asia. Hong Kong has experienced soaring smog levels which are so intense that, on some days, it is impossible to see from one side of the fabled "fragrant harbour" to another. This year, 22 contestants in the Standard Chartered marathon had to be taken to hospital after collapsing in the intense smog. However, the International Olympic Committee has admitted that,

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realistically, it is too late for the Games to be staged anywhere else (*ibid*).

The city's pollution levels are at their worst during the summer months – exactly at the time when the Olympics will be taking place. This raises major question marks over the competence of those who selected this particular month to stage the event. It has recently emerged that the Chinese would in fact have preferred to stage the Olympics in mid-September, when cooler, windy weather cleanses the air. The world governing body in athletics, the IAAF, was also in favour of this. However, it seems that the main culprit was the International Olympic Committee. The latter had concerns for the interests of its main bankers in the US, as well as European television, who insisted that the Olympics should steer clear of the start of the football season. In fact, the IOC even attempted to have the games staged in July. This was, however, bitterly opposed by the Chinese, so that ultimately everyone settled for August as a compromise. The IAAF for their part have insisted on heats starting at 9 am and the marathon starting at 8 am in order to avoid the worst heat of the day (*Daily Mail of 22/8/2006, p.67*).

Kung Fu made compulsory in Chinese schools

Many martial arts have their origins in the Far East, and the authorities in Central China seem intent on preserving this heritage for the future, since learning the art of Kung Fu has now become compulsory for all secondary school pupils in that area of the country. The first disciples of this martial art were the children of Henan province, home to the legendary and ancient Shaolin temple immortalised in the 1970s television series Kung Fu. Soon all the schoolchildren of China could be spending the physical education classes wielding knives, snake boxing and practising self-defence moves. If the pilot scheme works, it will be extended to primary schoolchildren (*The Guardian of 11/8/2006, p.34*).

Major tournament bids – latest developments

Football scandal hits Italy's bids for Olympics and Euro 2012

The Italian football corruption scandal, extensively reported elsewhere in this Journal (see above, p.32 et seq), seems to be leaving few areas of the nation's sporting life untouched. It seems that the entire sorry saga has cost the country the opportunity of hosting two of the world's major sporting events. The bid made by Rome for the 2016 Olympics is close to collapse,

and an offer to host the European football championship in 2012 is also in danger of being fatally undermined.

The link between the two is Franco Carraro who, as was reported earlier, was president of the Italian Football Federation (FIGC) until he resigned after being implicated in the scandal but remains a senior member of the International Olympic Committee (IOC). Italy were clear favourites to host the European championship in 2012, but such is the turmoil inside the Italian federation that they look unlikely to reorganise before the crucial vote is held in December later this year. That could be unwelcome news for European governing body UEFA, who would be left with two joint bids, one from Poland and the Ukraine, the other from Hungary and Croatia. Neither of these bid teams could offer the same facilities as Italy can (*The Guardian of 14/7/2006, p.S2*).

The bid made by Rome for the 2016 Olympics was also unlikely after the city's mayor, Walter Veltroni declared that the refusal issued by former Prime Minister Silvio Berlusconi's right-hand man, Gianni Letta, to be the head of the bid's organising committee showed that the then governing party was not behind the capital. It was widely felt that Franco Carraro would have been the ideal man to mediate in this dispute, but was unable to do so, mired as he was in his attempt to defend himself in the football corruption scandal (*Ibid.*)

Japan proposes Tokyo for 2016 Olympics

In late August 2006, the Japanese Olympic Committee (JOC) named Tokyo as their candidate to host the 2016 Olympics, in the hope of bringing the Games to their capital city. The International Olympic Committee will accept bids officially as from 2008. The final decision will be made in 2009.

Major sporting events cause havoc in Belgian politics

Belgium is a country whose relatively short history has constantly been marked by the rivalry – and sometimes open hostility – between its French-speaking (Wallonia) and Dutch-speaking (Flanders) parts. This profound division found its clearest political expression over 20 years ago, when Belgium transformed itself from a unitary nation into a federal state. This schism resulted in each of these regions acquiring its own parliament and government. It was the Walloon government which caused a political storm in early May 2006. Wallonia having been chosen as the site for the first four stages in the Tour of Italy, the regional government decided that the Walloon parliament should close so that MPs could watch the stage finish which took place in Namur,

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being the seat of the regional Parliament. This caused uproar amongst the opposition parties, with one federal government minister describing the decision as “grotesque”, whereas Green MP Bernard Wesphael asked what kind of image this kind of action projected, when politicians were asking workers for less and less (*The Guardian of 8/5/2006, p.S16*).

Sport also played a part in the furore which erupted when the leader of the other parliament, governing Flanders, described Belgium as an “accident of history” of no intrinsic value, and that years of devolution had eroded the kingdom to the point where it amounted to no more than “the King, the national football team and certain brands of beer”. The leader in question, Yves Leterme, went on to pour scorn on French speakers living in Flanders, who, in his words, “lacked the mental capacity to learn Dutch”. This naturally touched off a vivid reaction from the French-speaking Belgian press, who accused Mr. Leterme of insulting the country’s entire French-speaking community (*The Daily Telegraph of 19/8/2006, p.16*). However, it does seem that the Flemish leader touched a raw nerve, and has led to speculation that the failure of the nation’s football team to qualify for the World Cup finals may have constitutional implications...

Public health and safety issues

French skiing slopes take record toll of lives

The increasingly fraught health and safety issues besetting the skiing industry represent a key issue which has been highlighted before in these columns (*[2006] 1 Sport and the Law Journal p.67*). Recent developments in this area have given but scant cause for comfort, if the latest reports are anything to go by. Particularly in the course of this year, the old mountain saying “if it’s open enough to rise, it’s open enough to slide” appears to have applied all too faithfully, leaving the French skiing to reflect on the end of a season which has seen an unprecedented number of people killed in avalanches – a grim statistic which has already sparked a bitter “blame game” (*The Observer of 16/4/2006, p.28*).

The relevant statistics, issued by the Study of Snow and Avalanches (Anena) in Grenoble, paint a grim picture. During the past season, 52 people died on the slopes of the French Alps compared with 20 the previous year. There were also 102 avalanches in which people were killed, as compared with 62 in 2004. However, it is not only the French winter resorts which have incurred

such losses, since the death toll on other countries also gives cause for serious concern. Thus 50 people perished in the Austrian, Italian and Swiss mountains last season. According to Pistehors.com, a website for skiing enthusiasts, last year was one of the worst in living memory – even worse than 1970, when a single avalanche killed 39 people (*ibid*).

Maccabi Haifa Champions’ League ties switched following safety concerns

The conflict in the Middle East has caused ructions in the world of sport on a number of occasions, but has hitherto spared the European football competitions. However, even these tournaments were compelled to change their normal schedule of events as a result of the war between Israel and Lebanon during the summer of 2006. When Liverpool (England), NK Domzale (Slovenia) and Lokomotiv Sofia (Bulgaria) were informed that they were to play their European ties against Maccabi Haifa, Hapoel Tel-Aviv and Bnei Yehuda Tel Aviv respectively, their players managers and administrators were obviously concerned about the safety angle, with Liverpool making a specific protest about this matter to European governing body UEFA in early August 2006 (*The Daily Telegraph of 2/8/2006, p.S5*).

The following week, the latter did in fact confirm that none of the sides mentioned above would have to play their away matches for this tie in Israel – even after a plea from the Israeli FA that they should be allowed to stage matches in their capital, Tel Aviv. NK Domzale and Lokomotiv Sofia were to play their away fixtures in Tilburg (The Netherlands) and Senec (Slovakia) respectively (*The Daily Telegraph of 8/8/2006, p.S8*). Several days later, it was decided that Liverpool should play their away game in Kiev (Ukraine) (*The Guardian of 15/8/2006, p.S6*).

Latest Indonesian boxing death increases safety concerns

For some reason or other, the sport of boxing seems to have a particularly chequered history in Indonesia, since it is recorded that at least 19 of its exponents have died in the country’s history. Yet another sorry chapter was added to this morbid tally in mid-June 2006, when Fadly Kasim, who was performing in his first professional bout, died at a hospital in Manaso, the provincial capital of North Sulawesi, having collapsed just before the last of six rounds. He was rushed to hospital but died before any medical assistance could be provided. There were no indications that Mr. Kasim had sustained any potentially fatal injuries during the first five rounds. An investigation was immediately launched to establish whether organisers could be held liable for his death (*The Guardian of 20/6/2006, p.S16*).

5. Public Law

Nationality, visas, immigration and related issues

Angolan footballers fail in finals appeal

It has sometimes been said that, under the current nationality rules in international football, it is sufficient to receive a postcard from a country to qualify for representing it. However, in mid-May 2006 there occurred a reminder that, in spite of everything, certain rules remain and are applied seriously by the world governing body FIFA, when the latter confirmed that Angola, who qualified for the finals of the World Cup in 2006, would not be allowed to select two former Portugal youth internationals for the tournament. The Angolans had sought clarity on the international status of Chainho and Pedro Emanuel, both of whom were born in the Angolan capital Luanda, but had already appeared for Portugal's international youth team (*The Guardian of 12/5/2006, p.73*).

on iced-over rivers, and being mountain animals, yaks succeed in maintaining themselves upright (*The Daily Telegraph of 13/7/2006, p.18*).

In a way, this environmental endeavour is returning the sport to its very roots, since historians agree that the Mongol empire spread it across Asia. It was later discovered by the British in India. The big crowds for these fixtures come from tour companies (*ibid*).

Sporting figures in politics

[None]

Other issues

[None]

Environmental issues

Noise court order fails to halt Italian GP

Living in the neighbourhood of the Monza motor racing circuit definitely presents the disadvantage of being subjected to a good deal of noise pollution. It is for this reason that local residents obtained, in November 2005, a court order banning cars without silencers. This called into question the continued organisation of the Italian Formula One Grand Prix, which traditionally takes place on that particular track. However, in mid-April the following year the Regional Council for Lombardy, which has jurisdiction over the circuit, adopted legislation which granted a 30-day exemption from this rule, enabling the race to go ahead on 10 September as planned (*The Daily Telegraph of 13/4/2006, p.S17*).

Yak polo to rescue dying breed (Mongolia)

Mongolia is not a wealthy nation, even by Asian standards, and its economy has virtually collapsed since financial assistance from the old Soviet Union dried up 15 years ago. One of the ways in which its population – largely nomadic – attempts to survive is by venturing into the “ecotourist” market, which in turn has encouraged the development of a peculiar brand of polo played not on horseback, but using the yak, which is a breed of animal whose continued existence is said to be in serious danger. Although yaks have a reputation for being difficult, they can be trained to cope with a range of playing surfaces. Thus in December, when temperatures in the country can fall to -30°C, they play

6. Administrative Law

Planning law

Caracas mayor seeks compulsory purchase of golf courses (Venezuela)

The revolutionary figure Che Guevara may have been famously photographed showing Cuban leader Fidel Castro how to play golf at the Havana Country Club after the 1959 revolution, but the sport has never had any strong connection with revolutionary politics. However, this could change if the designs of the Left-wing municipal authorities of the Venezuelan capital, Caracas. Two of South America's most prestigious golf clubs are now facing the prospect of having their land expropriated to make homes for the less wealthy, in a move orchestrated by the radical Mayor of the Venezuelan capital Caracas.

It is a hard fact that there is a major housing shortage in the city, and its mayor, Juan Barreto, who is an ally of the nation's president, Hugo Chavez, has been seeking ways of resolving this growing crisis. Two areas of the city which have wide expanses of undeveloped land are the Caracas Country Club and the Valle Arriba golf club. The former, an elegantly landscaped site established in 1918, has since time immemorial been frequented by the Venezuelan upper classes, whereas the latter, established in 1942, has a customer base which includes foreign diplomats and businessmen (*The Guardian of 31/8.2006, p. 19*).

As a result, the two clubs were listed in the Official Gazette of Caracas as sites for "forced acquisition" – the eventual objective being to build low-cost housing for the city's homeless and shanty-town dwellers. The City Attorney has given an assurance that compensation will be paid, the amount to be decided by an assessment commission. The owners would have 30 days in which to apply at the Mayor's office; this will be followed by a process of negotiation for the eventual take-over of the properties. Estimates of the total number of homes which could be constructed if the acquisition procedure goes as planned have reached the figure of 50,000 (*ibid*).

Other issues

[None]

Judicial review (other than planning decisions)

[None]

7. Property Law

Land law

[None]

Intellectual property law

One of the remarkable phenomena in sports marketing is that, whereas the streets of the world abound in Michael Jordan trainers and David Beckham team shirts, one of the greatest icons in the world of boxing, Muhammad Ali, has enjoyed but scant success in terms of merchandising tie-ins and commercial spin-offs. However, all this may be about to change.

In mid-April 2006, the news broke that a media company called CKX, which already has ownership of the global Beckham commercial empire, had struck a deal to acquire 80 per cent of the rights to the Ali name and image, and may well possess them in their entirety in five years' time. The sum involved, £28 million, makes this deal something of a bargain. Exactly what practical forms this arrangement will take is as yet shrouded in mystery. The Chief Executive of CKX, Bob Sillerman, has been extremely reluctant to provide details of the marketing operation relating to the former boxing legend, who is currently crippled by Parkinson's disease and has in recent years been interested mainly in promoting his new Kentucky-based charity. He informed a prominent US newspaper that:

"people around the world will be talking about Muhammad Ali for the next hundred or two hundred years, so we're in no rush to put his face on a bag of potato chips" (The Independent of 13/4/2006, p.38).

Exactly what the reticent CEO means by being "in no rush" remains to be seen. The previous year, CKX acquired the rights to singer Elvis Presley, and immediately laid plans to construct restaurants, shops, convention space, an entertainment complex, an outdoor amphitheatre and a spa, as well as an Elvis museum and a theme show in Las Vegas. The company believes that the Ali legacy is an underexploited brand, given that it was generated a mere \$7 million in merchandising-related revenue over the past five years (*ibid*). However, out of respect for Mr. Ali's Muslim faith, his name will not be used to endorse alcohol or gambling (*The Guardian of 13/4/2006, p.19*).

Kanouté refuses to display sponsor's poker site logo (Spain)

Another sporting performer of the Muslim faith whose religious beliefs have clashed with his – or his team's – commercial interests is Fredi Kanouté, the prominent Seville footballer, who has refused to display the team sponsor's logo on his shirt. The leading Spanish side have recently struck a deal with online poker site 888.com. This season, Mr. Kanouté has been playing with the logo taped over (*Daily Mail of 6/9/2006, p.76*).

"Ambush marketing" news

One of the more intriguing phenomena in sports marketing has been that which is described as "ambush marketing", i.e. the process whereby brand names take advantage of sporting events to advertise themselves in defiance of already existing advertising and sponsorship deals covering the same events. Although many regard the danger of such "ambushing" tactics as vastly overrated, this phenomenon is treated seriously by the courts, and has therefore become a reality with which the organisers of major sporting events and tournaments have had to contend.

As expected, the recent football World Cup was not without its controversies in this field. Thus during the opening group stages, hundreds of Dutch fans were compelled to remove their trousers before being allowed to attend the Netherlands' defeat of the Ivory Coast. Orange dungarees bearing the logo of a Dutch beer company were banned in the efforts made by world governing body FIFA to clamp down on unauthorised marketing by companies which were not official sponsors (*The Sunday Telegraph of 18/6/2006, p.S4*).

This phenomenon has also caught the attention of the sports law commentariat. In an article which deals in the first place with the problem of ticket touting at the 2006 World Cup (see above), author Nikki Ferguson (*"FIFA tackles ticket touts" [2006] TW 186, 18-19*) discusses the manner in which world governing body FIFA intended to deal with problems of ambush marketing and the resale of tickets. She also considered the application of German trade mark law to various World Cup symbols and slogans (*European Current Law 6/2006, p.122*).

In an article entitled "Kick-off to ambush marketing at the World Cup" (*MIP 2006, 156, 91-92*), authors Boris Uphoff, Rohan Massey and Sarah Brown review the range of legal tools available to the organisers of major tournaments such as the 2006 World Cup, or the 2012 London Olympics, in order to tackle ambush marketing. These include the use of remedies for trade mark

7. Property Law

infringement and unfair competition. They also examine the question whether the most effective strategy could be to include clauses against ambush marketing in contracts with sporting clubs and stadium owners (European Current Law 5/2006, p.149).

Illegally stamped footballs confiscated in China

In mid-May 2005, it was learned that Chinese customs agents had confiscated 600 footballs which had been illegally stamped with the logo for the past summer's football World Cup in Germany. They were impounded in the eastern port of Ningbo (*The Daily Telegraph of 25/5/2006, p.S4*).

Other issues

[None]

8. Competition Law

National competition law

[None]

EU competition law

IOC doping control rules fall within scope of EU competition law, rules ECJ

In a recent landmark decision (Case C-519/04, *Meca-Medina and Majcen v. Commission of the European Communities*, as yet unpublished) the European Court of Justice (ECJ) held that the rules on doping control operated by the International Olympic Committee (IOC) fell within the scope of EU competition law. However, the Court also decided that these controls are consistent with these competition rules, since they do not go beyond that which is necessary in order to ensure the proper conduct of competitive sport (*ECJ Press Release No. 65/06*).

The applicants in this case, Mr. Meca-Medina and Mr. Majcen, are both professional athletes who compete in long-distance swimming events. During the World Cup for that discipline, they had tested positive for the anabolic steroid nandrolone. The International Swimming Federation (FINA), being the world governing body in the sport, suspended them under the Olympic Movement's Anti-Doping Code for a period of four years – a term which was subsequently reduced to two years by the Court of Arbitration for Sport (CAS). The two swimmers lodged a complaint with the European Commission, claiming that the IOC's rules on doping control were inconsistent with the EU's rules on competition and the freedom to provide services. The Commission dismissed this complaint by a decision dated 1/8/2002.

The two swimmers then brought an action before the ECJ Court of First Instance (CFI) in order to have the Commission's decision annulled. As was reported in an earlier issue of this Journal ([2005] 1 *Sport and the Law Journal* p.80-81), the CFI dismissed this action by judgment dated 30/9/2004, on the basis that the rules on doping control in question did not fall within the scope of the EU laws on competition and the freedom to provide services. Claiming that the CFI had committed an error of law in so ruling, Messrs. Meca-Medina and Majcen lodged an appeal against this decision before the Court of Justice.

The ECJ first examined whether the judgment of the Court of First Instance should be set aside. It recalled

that sport is subject to Community law in so far as it constitutes an economic activity. The Court has, however, held in its previous decisions that the provisions of the Treaty on freedom of movement for persons and freedom to provide services do not affect rules concerning questions which are of purely sporting interest and, as such, have no connection with economic activity.

However, even though those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity, this fact entails neither that the sporting activity in question necessarily falls outside the scope of the provisions of Community competition law nor that the rules do not satisfy the specific requirements of those provisions. By adopting the opposite approach, without first determining whether those rules fulfilled the specific requirements of Community competition law, the Court of First Instance erred in law. The Court of Justice therefore had to set aside the judgment of the Court of First Instance. Since the state of the proceedings so permits, the Court of Justice then ruled on the application for annulment of the Commission's decision.

The Court then turned to the Commission's original decision. As regards the compatibility of the rules at issue with the rules on competition, the ECJ held that the penal nature of the rules at issue and the magnitude of the penalties applicable if they are infringed were capable of producing adverse effects on competition. In order to escape the prohibition on distortion of competition laid down by the Treaty, the restrictions imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport. Rules of that kind could indeed prove excessive as a result of both the way in which the dividing line between circumstances which amount to doping in respect of which penalties may be imposed and those which do not is drawn and the severity of those penalties.

According to the ECJ, it did not appear that the restrictions inherent in the doping controls in question went beyond what is necessary in order to ensure that sporting events take place and function properly. Since Mr Meca-Medina and Mr Majcen had, moreover, not pleaded that the penalties which were applicable and were imposed in the present case were excessive, it had not been established that the anti-doping rules at issue are disproportionate. Consequently, the Court of Justice dismisses the action for annulment of the Commission's decision of 1 August 2002.

8. Competition Law

Irish horse-breeding tax exemption falls foul of EU law

Ireland is now one of the major breeding grounds for racehorses. One of the major reasons for this is the tax exemption on stud fees which the government introduced in 1969, and which has given rise to a flourishing industry, of which the best-known example is perhaps the Coolmore Farm operated by John Magnier. In fact, around 40 per cent of all European foals are born in Ireland. This has obviously worked to the detriment of other traditional horse-breeding countries such as France. In a country that stages nearly 7,000 horse races per year – including the world-renowned Prix de l'Arc de Triomphe – and where an estimated 6.5 million people are regular bettors, the decline of the horse breeding industry has been little short of catastrophic (*The Times of 26/8/2006, p.50*).

The French authorities have long been of the opinion that the Irish stallion exemption is a blatant example of a tax regime which distorts competition within the European single market, contrary to Article 88 of the EC Treaty. The European Commission agrees with this view, and has ruled that the exemption is unacceptable. It has accordingly compelled the Dublin authorities to announce that the exemption will be phased out by 2008. However, intense negotiations are being conducted over a new tax regime, with Irish breeders pressing for tax breaks which are "as close as possible to the current terms", according to Brian Kavanagh, Chief Executive of Horse Breeding Ireland. The stakes are extremely high, with the Irish thoroughbred breeding industry being worth €330 million per year, and the French horse racing community being desperate to win back a share of that revenue.

The Irish breeders, on the other hand, have urged their French colleagues to stop complaining about the Irish exemption and to turn their attention to their country's own fiscal rules. French breeders currently pay tax of around 27 per cent on the sale of a stallion, and a maximum of 48.9 per cent on stud fees (*ibid*).

9. EU Law

EU law (excluding competition law)

Important meeting of experts on free movement of amateur sporting performers

This meeting of experts, organised by the European Commission, brought together the representatives of 21 Member States as well as the relevant Commission departments. The morning session focused on a speech by an external legal expert, who outlined the way in which Community legislation and case law applies to professional sport. Then a representative from the Commission's Legal department spoke about the legal aspects of freedom of movement for amateur sporting performers, and a discussion with the Member States took place. The afternoon session was devoted to presentation of the results of the Commission's questionnaire and a dialogue with the Member States highlighting the problems faced in connection with freedom of movement and identifying examples of good practice in this area.

As regards the legal framework of this question, the Commission, as guardian of the Treaties, has had to draw the Member States' attention specifically to the existence of potential obstacles to the free movement of sportspersons in the amateur sphere.

The Commission believes that membership of sports teams and participation in competitions may be an important factor for integrating into the society of the host country, and that discrimination against EU nationals in this area should be avoided. Such an approach is also consistent with the case law of the Court of Justice, under which access to leisure activities, including sporting activities, constitutes a social advantage falling within the material scope of the EC Treaty. The Court of Justice's interpretation of the concept of citizenship, enshrined in Article 17 of the EC Treaty, has become increasingly broad as far as the principle of non-discrimination in providing access to social advantages is concerned.

The principle of equal treatment in respect of social advantages stems from Article 7(2) of Council Regulation No 1612/68 of 15 October 1968 on freedom of movement for workers and family members within the Community. The Court's case law has extended the right to equal treatment in the granting of social advantages to students and non-active persons who are lawfully resident in the host Member State. The Court has recognised the right of citizens of the Union who are lawfully resident in the territory of the host Member State to avail themselves of Article 123 of the EC Treaty

when they are in a situation which is identical to that of nationals and falls within the substantive scope of Community law.

Having regard to the principle of Union citizenship and the development of case law as regards access to certain social advantages, the Commission takes the view that rules laid down by a sports federation, whereby restrictions on participation in amateur sport are imposed on nationals of other Member States, would be contrary to Articles 12 and 17 of the EC Treaty where such restrictions are not imposed on the country's own nationals. Moreover, such rules would be contrary to Article 7(2) of Council Regulation No 1612/68, where they entail discrimination against workers and members of their family.

It is accordingly for the Commission to ensure that the Member States comply with the main legislative provisions concerning freedom of movement and the prohibition of discrimination, having due regard for the powers of the Member States and the autonomy of the sporting movement. The Commission's objective is to achieve a satisfactory balance between the economic freedoms championed by the Treaty, the specific characteristics of sport recognised by the Amsterdam and Nice declarations, and the legitimate rights and expectations of Europe's citizens, bearing in mind the following considerations:

- sport is not organised uniformly in the 25 Member States;
- there are differences in the organisation and statutes of different sports;
- there is a high number of sporting disciplines; and
- hidden forms of discrimination exist within certain sports regulations.

The meeting also featured a presentation of the case law relating to professional sport, provided by an expert in this area, Mr. Rizzo. The latter pointed out that the Court of Justice had clearly indicated, in the Walrave and Dona judgments, that rules restricting the movement of professional sportspersons, especially on grounds of nationality, were not in keeping with the principle of freedom of movement for workers within the European Union. A further point made by the Court is that sport falls within the scope of Community law, with particular reference to the principle of freedom of movement, if it constitutes an economic activity. In the Court's view, professional or semi-professional sporting performers carry out an economic activity when they

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exercise their sport as employed persons or as providers of remunerated services. The freedom of movement principle is a feature of the laws, regulations and administrative provisions adopted by the Member States (direct vertical effect) as well as of the rules laid down by private entities such as national or international sports federations and sports clubs formed as commercial companies or non-profit-making associations (direct horizontal effect).

The Bosman ruling confirmed that nationality clauses cannot be applied to EU or EEA nationals, while subsequent judgments (Kolpak and Simutenkov) have extended this prohibition to nationals of States linked to the European Union by agreements containing non-discrimination clauses applicable to persons working legally within the EU. The principle of non-discrimination does not, however, entitle a professional sporting performer from a country which has signed a cooperation or association agreement to claim a right of entry to EU territory, nor does it entitle him or her to reside or work in an EU Member State. As things stand, the EU States are responsible for setting the conditions required for entering their territory and for working there. On the other hand, in the Bosman decision, the Court rejected all the arguments put forward by the sports federations and the governments of Germany, France and Italy in support of nationality clauses, including the need to preserve the traditional link between club and country, to create a pool of national players and to maintain a competitive balance. Nevertheless, it accepted as legitimate the aim of maintaining a financial balance between clubs in order to preserve a degree of uncertainty and therefore interest in competitions. Furthermore, the Court has stated that an exception to the principle of freedom of movement for sporting performers is allowable for reasons which are not of an economic nature and are thus of sporting interest only. Such an exception applies particularly to the formation of national teams selected to represent their country.

Another point on which the Court has ruled is that the existence of selection rules governing participation in international sporting competitions does not constitute an obstacle to freedom to provide services in so far as a restriction on the number of participants in a competition is inherent in the conduct of that type of high-level international sporting event. It therefore takes the view that selection criteria of a purely sporting nature and devoid of any considerations relating to the nationality or the personal situation of athletes do not contravene the principle of freedom to provide services. The Court has also ruled that transfer deadlines are justified on non-economic grounds which are of

sporting interest, given that transfers of players outside the periods laid down by federations may affect the proper functioning of competitions. In accordance with the principle of proportionality, the Court therefore holds that a limitation on freedom of movement may be justified in the public interest if the objective is to ensure that sporting competitions are conducted fairly and are not distorted.

Mr Rizzo concluded by pointing out that, in order to take into account the specific characteristics of sport, it was not necessary to create rules derogating from the fundamental freedoms guaranteed by Community law; making use of all the possibilities for derogation and exemption under ordinary law as interpreted by the Court of Justice would suffice.

The representative of the Commission's Legal Service described the legal framework within which amateur sport takes place, pointing out that sport may be likened to a social advantage and that participation in amateur sport is also seen as a way of fostering integration in the host country. In this connection, a distinction had to be drawn between two situations :

- (1) Firstly, the case of a Member State national who works in another Member State and takes part in amateur sport. In this case, Regulation No 1612/68 applies, with particular reference to the first two paragraphs of Article 712. Additionally, the case law of the Court of Justice extends the concept of social advantage to all advantages (whether or not they are linked to a contract of employment) which are generally granted to national workers as a result of being employed or simply because they reside in the national territory; extending these advantages to workers from other Member States is a way of facilitating their mobility within the Community.
- (2) Secondly, the case of a citizen of a Member State (not necessarily a worker) who wishes to participate in an amateur sport in a Member State in which he or she has a right of residence. The Commission's analysis is that this situation is covered by various provisions of the Treaty establishing the European Community (ECT), with particular reference to the provisions prohibiting any discrimination on grounds of nationality (Article 12) and the provisions defining citizenship of the Union (Article 17, paragraph 1) as well as the application thereof (Article 18[1]).

In this context, the following measures may constitute obstacles to the free movement of amateur sporting performers;

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- citizenship clauses;
- quotas reserving places for a country's own nationals in clubs, or limiting the number of foreigners; and
- residence clauses (the Legal Service considers that access to a social advantage, linked to European citizenship, should not be subject to a residence criterion).

Furthermore, the Court of Justice has confirmed, in its *Walrave and Koch* decision, that prohibition of discrimination does not only apply to the action of public authorities but extends also to rules of any other nature aimed at collectively regulating gainful employment and the provision of services. The relevant case law and the Commission's analysis also limit to a considerable extent the restrictive measures that may be taken; in particular, they must be:

- non-discriminatory;
- geared to an objective of general interest ;
- proportionate to the attainment of that objective; and
- necessary for achieving it.

All in all, this was a crucial meeting from the point of view of defining the status of amateur sport at EU law, and may have important repercussions for the various national associations governing this aspect of sporting activity.

Meeting preparing for White Paper on Sport held

In the context of the consultations leading to a possible White Paper on Sport, the Member of the Commission responsible for sport, Mr Ján Figel', met European sport federations to discuss governance issues on 20/9/2006. A background paper had been sent out to federations the previous month (*"White Paper Consultation by Commissioner Jan Figel" Press Release of 20/9/2006*).

The Commissioner underlined the Commission's willingness to consult all stakeholders involved in European sport and stressed the societal and economic benefits of sport as well as the Commission's readiness to assist with the creation of the most favourable environment for the development and promotion of sport in the EU. Commissioner Figel' explained the need to launch a political initiative which could take the form of a White Paper and stressed the importance of governance issues in ensuring that interaction between the European Union and the sports movement brings positive results for European sport.

The Director General of DG EAC, Ms Odile Quintin, chaired the meeting. Together with the Director responsible for sport, Mr Pierre Mairesse, she presented the calendar of consultations both within the Commission (inter-service meetings, possible debate in the College of Commissioners before the end of the year) and externally (Sport Directors meeting in Naantali on 4-6/10/2006, Sport Ministers Conference in Brussels on 27-28/11/2006, on-line consultation directed at European citizens to be launched in October 2006). Reasons for the focus on governance were presented (legal challenges, presentation of the Independent European Sports Review) and the results of the 29-30 June 2006 Consultation Conference with the sport movement were commented upon by the Commission's representatives.

José Luis Arnaut, chairman of the Independent European Sport Review (IESR), made an opening presentation on elements of sport governance beyond football. Presentations were made by the following European sport federations: International Basketball Federation, European Squash Federation, International Ice Hockey Federation and European Athletics Association. Representatives of more than 30 European sport federations and organisations participated in the meeting and stated their views on governance in sport. The European Olympic Committee and the International Olympic Committee asserted that the IESR does not represent the Olympic movement's views and stressed that the issue of governance should be dealt with by sporting bodies themselves.

Most participants welcomed the possibility of a White Paper on Sport in Europe and outlined ways in which the EU could help in promoting good governance in sport, while insisting upon the need to respect the autonomy of sporting organisations and the specific characteristics of sport in Europe. While some federations, mainly for team sports, endorsed the IESR and its proposals as a concrete example of how to implement the Nice Declaration on the Specific Characteristics of Sport (2000), other federations insisted upon the specificities of football and its problems as compared to other sports in Europe. The Commission reaffirmed that the Review and its proposals were independent from the Commission, but that it was studying them with interest.

All participants agreed on the need to recognise the specificities of sport in Europe and to preserve its autonomy, but not everyone agreed on the existence of a unique European sports model. In particular, it was pointed out that large numbers of people engage in

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non-competitive sports, which do not match the concept of a European sports model. A need for clarification and for the definition of the term “sporting activities” was expressed.

All parties agreed that each sport had its specificities and deserved to be treated differently according to these. There was consensus, supported by the Commission, that governance was mainly the responsibility of federations themselves (and of Member States as legislators) and that the European Union should not impose general rules applicable to all European sports. However, most participants agreed that the EU could play a role in helping to develop a common set of principles for good governance in sport, drawing on previous work such as the “Rules of the Game” conference in 2001.

A number of participants pointed out that attention should be paid to the situation of federations with limited administrative capacity, and to the need to avoid imposing upon them heavy constraints in terms of overhead and other administrative costs. Some federations pleaded for the elaboration of guidelines, or a model, for statutes that would ensure good governance and compatibility with European law, as long as such guidelines, or model, would not be mandatory. All participants agreed on the need for greater legal stability and clarity in the field of European sport, in view of recent and forthcoming cases before the European Court of Justice.

The Commission was asked to provide guidelines on activities and practices which could be considered compatible with EU law. The need for a regular information and consultation process was expressed, as well as for the recognition of national and European governing sport bodies as counterparts in dialogue at EU level. The need for a structured forum for discussion and exchange of experience was also expressed.

Attention was drawn to a number of issues arising from the interaction between the EU and the rest of the world. The membership of most European sport federations is wider than that of the EU and European federations act within the framework provided for by international sporting federations. Specific issues needed to be considered, such as the interaction between national and EU rules and those of international federations, the participation of non-EU sportspeople in competitions held on EU territory, the composition of national teams (incl. the issue of home-grown players rules), and the fiscal and legal problems of federations having their seats in EU countries.

Other areas for possible EU action were identified by some federations, such as sports agents’ activities, the protection of minors in sport, betting in sport, doping (the Commission was called upon to appeal to Member States to sign the UNESCO anti-doping convention as soon as possible), preservation of the rights of sportspeople and of equal access to sport practice (leisure and competition), and the promotion of sport in schools and for young people.

“Don’t meddle in the beautiful game” MEPs tell Commission

The various meetings and documents reported above would seem to indicate a seriousness of intent by the European Union authorities at least to treat sporting activity seriously in the context of its legal system. However, these endeavours do not seem to be to the taste of everyone – including those democratically elected representatives of the citizens of this continent in the European Parliament. It will be clear from above that the EU authorities wish to regard sport as much as possible as an economic activity and made subject to the rules on free movement and fair competition. However, in early May 2006, MEPs informed a meeting in Brussels that sport, and in particular “the beautiful game” was not just a business – more a way of life (The Independent of 4/5/2006, p.25).

10. Company Law

Bankruptcy (actual or threatened) of sporting clubs & bodies

Italian Football association placed in administration

This issue has already been dealt with under an earlier heading (see above, p.32).

Other issues

Legal personality of sporting bodies in Romania – article in academic journal

In an article entitled “Lawful and determined purposes required for legal personality of sports structures in Romania” ([2006] *ISLJ* 1-2, p.124-5) the author, Alexandru Virgil Voicu, discusses the requirements for constituting a legal entity in Romania, including an independent structure, a distinct estate and a lawful distinct purpose. He also considers the effect of the Law on Physical Education and Sports that physical education and sporting activities must fall within the scope of the activities governed by sports structures. In addition, he comments on the negative consequences of business associations other than sports structures engaging in sporting activity (*European Current Law* 4/2006, p.221).

11. Procedural Law and Evidence

[None]

12. International Private Law

[None]

13. Fiscal Law

Maradona has watches seized (Italy)

In early June it was disclosed that Diego Maradona, the former Naples and Argentina football star, had two Rolex watches taken from him by Italian fiscal police near Naples as they attempted to recover at least a small part of an unpaid £21 million income tax bill. Geremia Guercia, a tax police spokesman, expressed his surprise that Mr. Maradona was wearing them because he is aware that whenever he visits Italy he “risks losing something” (*The Independent* of 8/6/2006, p.55). Officers claimed that the watches were worth £7,000, although they expect their connection to Mr. Maradona to boost the price when they are sold at auction. The Argentinian – who was in the city in order to take part in a charity match – has argued that the taxes in question should have been paid by the Naples club (*The Daily Telegraph* of 8/6/2006, p.9).

Russia football coach Hiddink accused of fiscal fraud (The Netherlands)

In late July 2006, it was learned that Guus Hiddink, who used to coach the Australian football team but now manages Russia, is facing charges of tax fraud in his native Netherlands. Reports allege that the case revolves around Mr. Hiddink claiming residence in Belgium in order to avoid paying Dutch taxes. Fiscal authorities raided the offices of Mr. Hiddink’s accountant in Eindhoven the previous year as part of a wider investigation. The accountant in question, Simon van den Boomen, who was briefly arrested as a result of these raids, will also face charges. The first hearing was scheduled for late September 2006. Mr. Hiddink denies any wrongdoing (*The Daily Telegraph* of 27/7/2006, p.S7).

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Racism in sport

New FIFA guidelines come into force – amid scepticism and reluctance

It will be recalled from the previous issue ([2006] 1 Sport and the Law Journal p.88) that the world governing body in football, FIFA, had taken a major new initiative for the purpose of excising the cancer of racialism from the sport. The punitive measures in question range from match suspensions and a deduction of points (three points for a first offence, six points for a second, and relegation in the event of further infringements) to disqualification of the team in question from a competition, depending on the seriousness of the case. Footballing confederations and member associations have been compelled to incorporate these provisions into their national regulations. Any national association which infringes these measures could be excluded from international football for a period of two years.

In addition, it was made clear that players and officials would also be made subject to these rules, which would be applicable at all levels, including the World Cup. In theory, any three transgressions – for example, three separate incidents of “contemptuous” behaviour such as Nazi salutes – could cause a participating country to be dismissed from the tournament. The new rules were agreed in principle under changes made to Article 55 of the FIFA disciplinary code, and Urs Linsi, the General Secretary of the world governing body, has written to every football association in the world instructing them to enforce these new rules (*The Independent of 31/3/2006, p.70*).

However, many football officials have expressed concerns that these new rules are unworkable in practice. Thus an English newspaper reported on one of the first racially aggravated incidents to occur after the new rules had entered into force – at Chesterfield, where Gillingham goalkeeper had suffered racial abuse. If the letter of the law had been applied, Chesterfield should, if found guilty, have been compelled to play one game behind closed doors and have three points deducted. However, no process is in place to pursue such action, let alone administer punishment. FIFA has provided no practical guidance to this effect. In fact some authorities, such as the “Kick It Out” anti-racism pressure group, have alleged that unrealistic penalties which are never actually used could make the problem worse, particularly in countries such as Italy, where education rather than repression is what is required, and where the FIFA measures could exacerbate hostility (*ibid*).

In Spain, where the problem of racist spectators has been adequately documented in this Journal and elsewhere, the FIFA instructions have been ratified by the domestic Upper Council of Sports (CSD), which is effectively the nation’s Sports Ministry. The CSD was always unlikely to withhold ratification since it had itself been preparing a tough Government Bill dealing with the problem. Referring to a recent incident whereby Barcelona striker Samuel Eto’o had threatened to leave the pitch following abuse directed towards him at Zaragoza, CSD Secretary Jaime Lissavetsky commented: **“What happened to Eto’o cannot be permitted to happen again. The Government is sick of football telling us that we are only talking about a “sick few” or that this is something that also happens in other countries. It will not be permitted in Spain”** (*ibid*).

As the World Cup approached, the minds of the football authorities naturally turned to the possibility that the tournament could be marred by incidents of racism. As the tournament kicked off, FIFA president Sepp Blatter reminded everyone concerned that racist behaviour by fans, players or management could result in expulsion from the Cup’s final rounds, which were played in Germany. He went considerably further in his threats than on previous occasions, stating that not only the chanting of racist slogans, but also the waving of fascist or anti-semitic flags and banners could see their country losing points or be expelled. Anxiety about such incidents had increased since an investigation by a leading British newspaper throughout Eastern Europe had uncovered a network of hooligans who claimed that they would use the tournament to proclaim extreme racist views (*The Sunday Telegraph of 14/6/2006, p.22*).

Ultimately, the tournament proceeded with a minimum of racist aggravation. However, as has been intimated above, this was probably due more to the German authorities’ uncompromising intention to enforce domestic anti-fascist legislation than to the new FIFA code. It has also been suggested that Mr. Blatter might have scored more credits for the seriousness of his intent had he been a little more supportive of anti-racist campaigners such as French international striker Thierry Henry. It will be recalled from a previous issue ([2005] 1 Sport and the Law Journal p.88 et seq) that, as part of the racism that affects Spanish football even at the managerial level, the Spanish coach Luis Aragones had called the Arsenal striker a “black sh*t”. On the eve of the France v. Spain World Cup quarter final match, the Spanish manager pointedly refused to apologise for his remarks, and, following France’s victory, Mr. Henry described this as a victory for anti-racism. However. Mr. Blatter stopped well short of endorsing this view when

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he commented:

“Thierry Henry is one of Fifa’s anti-racism ambassadors so I am not going to contradict what he said, but I am not saying exactly the same thing either” (The Guardian of 29/6/2006, p.S8).

Once the tournament had finished, other difficulties loomed on the horizon – on this occasion at the European level. Initially, governing body UEFA seemed to embrace the new FIFA code enthusiastically, and at the end of July announced a series of tough measures, with players engaging in racist behaviour facing five-match bans and clubs whose fans offended in this manner being threatened with ground closures, having matches awarded against them by default, and point deductions (*The Guardian of 1/8/2006, p.S6*). However, shortly after this announcement it emerged that, somewhat belatedly, legal officials from both FIFA and the European governing body had discovered that the new anti-racism rules would be open to a challenge in court. This was reflected in the new UEFA regulations for the Euro 2008 tournament qualifiers. Although these allowed for points deductions and exclusions, the only stipulated penalty is a £14,000 fine. That is only £3,000 more than the fine imposed on the Macedonian Football Association in 2003 following the racist abuse levelled at members of the England team. UEFA communications director William Gaillard insisted that racial abuse during these matches would not be tolerated but that an automatic points deduction could not be applied because the rule in question had to be “watered down” on legal grounds (*The Daily Telegraph of 6/9/2006, p.S7*).

Clearly, these problems will remain, and the governing bodies may be faced with an invidious choice between expressly watering down the rules and retaining them without applying them. Certainly UEFA may need to display greater resolution in tackling the problem of racism and discriminatory behaviour than it did over the Glasgow Rangers affair, documented in the next section.

Rangers escape censure over sectarian behaviour by fans in Spain

Glasgow Rangers are a football team known for their sectarian leanings, which sometimes spills over into hooliganism and behaviour which could be described as downright racist. This appeared to have been the case during a recent European Champions League fixture against Spanish side Villareal. The Scottish club was reported to UEFA after a window was broken on Villareal’s team bus in Spain as it made its way to the second-leg match, and the fans were accused of sectarian chanting during both legs of the fixture. Rangers in reply submitted to UEFA a dossier which

included evidence of their anti-sectarian initiatives (*The Guardian of 12/4/2006, p.S4*).

Many observers at the scene had been particularly disturbed by some of the more uncivilized chants on offer from the Glaswegians, its most contentious anthem, Billy Boys, which contains a line exulting at being “up to your knees in Fenian blood”. It was therefore expected that UEFA would regard this kind of discriminatory behaviour as falling entirely within the definition of racism (*The Times of 14/4/2006, p.66*). However, the resulting hearing allowed Rangers to emerge almost unscathed from the investigation by the European governing body. In a decision that surprised many – including those present on the occasion of both ties – the Glaswegians were cleared. They were merely fined just under £9,000 for the damage caused to the said team bus, but suffered no penalty for the sectarian chanting William Gaillard, the UEFA Head of Communications, stated:

“We had individual reports of such chanting but, having (sic) looked at the evidence, Rangers fans were found not guilty of racist or discriminatory chanting. UEFA might have a more elaborate explanation when they reveal explanations on both counts on Thursday” (The Daily Telegraph of 13/4/2006, p.S6)

It is thought that UEFA’s control and disciplinary body took into account the fact that large numbers of spectators, who had not made the journey with Rangers’ official travel agencies, gained entry to Villareal’s El Madrigal ground because of significant shortcomings in ticket distribution and segregation. More controversially, UEFA subsequently defended its position as regards the chanting by stating that it could not demand an end “to behaviour which had been tolerated for years” by Scotland’s footballing authorities and government (*The Independent of 15/4/2006, p.70*). This caused Nil by Mouth, a Scottish anti-sectarian group, to describe the UEFA decision as a “shaming judgment for Scotland”. Rangers Chairman David Murray welcomed the decision, but conceded that sectarianism remained a problem at Ibrox, and urged the club’s supporters, and particularly what he described as the “90-minute bigots”, to heed the probability that the football authorities would impose heavy penalties if such behaviour did not cease – which could mean matches being played behind closed doors, stands being closed down, percentage reductions in authorized capacities, points deducted, or even suspension from entire competitions (*ibid*).

The Rangers episode may not yet be entirely over, since, as expected, UEFA disciplinary inspector Dr Gerhard

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Kapl subsequently lodged an appeal against this decision (*The Scotsman of 19/4/2006, p.34*). The outcome of this appeal was not known at the time of writing.

Racial issues continue to rumble in South African sport – but one major breakthrough is reached

Although the internationally-condemned system of apartheid which prevailed in South Africa for a long period officially came to an end fifteen years ago, its legacy has continued to leave its mark on many aspects of life in that country, and none more so than its sporting dimension – as has been reported in many a Journal issue past. In some cases this seems to have deprived South Africa of some potentially world class performers – as the case of England batsman Kevin Pietersen exemplifies. Serialising his life's story in a British newspaper, he drew attention to the kind of pressures that ultimately led him to abandon the country of his birth (*Daily Mail of 30/8/2006, p.64*). Thus he relates how, following his rise through the South African schools system to the provincial side of Natal, he was dropped from the latter team because of the quota system introduced into domestic cricket in order to discriminate positively in favour of "players of colour" and to fast-track the racial integration of the sport.

More particularly, it had been decreed that the team had to contain three non-white players, and for that reason Mr. Pietersen was replaced by another batsman with spin-bowling abilities, Ghulam Bodi. Both he and his father sought a meeting with former South African batsman Ali Bacher, who was a key figure in getting his country's cricketers back into the international fold. Because the latter could not give any guarantees that the quota system would cease, Mr. Pietersen made the fateful decision to transfer his international career prospects to England – where he finished up as one of the members of the victorious Ashes-winning team in 2005 (*ibid*).

However, a truly uplifting note in the country's cricketing annals of the was sounded in mid-July 2006, when it was announced that, for the first time ever, the national side was to be captained by a non-white player – in the shape of Ashwell Prince. The left-handed batsman from Port Elizabeth was elevated to this status because the first-choice captain, Graeme Smith, tore ligaments in his right ankle just before the two-Test series against Sri Lanka was due to commence. National selection convener Haroon Lorgat lauded this decision in the following terms:

"The enormity and significance of his appointment, albeit through forced circumstances, will not be missed and should be celebrated by South Africa and the rest of the

world. As the first black man to captain South Africa he will command an important place in history, but with that comes extra responsibility. For the team, however, it will be an on-event. From personal conversations I know how much respect the players have for Ashwell and they are all very comfortable with him leading. His ability to assess match situations and remain calm and level-headed is not questioned" (*The Guardian of 12/7/2006, p.S8*).

Mr. Prince was recruited by the Western Province side as a 19-year-old when South African sport was beginning to redress the injustices of the apartheid era. Initially he was, unjustly, regarded by some white cricketers as a token appointment (*ibid*).

Ban on Iranian president for anti-Israeli remarks demanded – but ultimately unnecessary

Mention has already been made of the controversy surrounding the possible appearance of Iranian president Mahmoud Ahmedinejad at the 2006 World Cup finals in Germany earlier this year, following the anti-Israeli remarks he had made in previous months (see above, p.51). In fact the calls for a ban on the Iranian head of state had come from some eminent quarters, such as the Simon Wiesenthal centre, which described the possibility of his presence at the World Cup as "mind-boggling". The Jewish human rights organisation had written to Sepp Blatter, the president of world governing body FIFA, urging the latter to ban Mr. Ahmedinejad from the tournament. The centre went even so far as to suggest that allowing the latter to attend the World Cup would be tantamount to endorsing the 1936 Olympic games hosted by Hitler (*The Guardian of 28/4/2006, p.S7*).

At first it was uncertain whether the Iranian president would actually seek to visit Germany in order to cheer on his national team, who had made it for the final stages of the tournament. However, in mid-May he appeared to have changed his mind, and announced his intention of going. Because Mr. Ahmedinejad's denial of the Holocaust and his reported desire to see "Israel wiped off the map" had made him something of a cult figure amongst neo-Nazi groups, this led to intensified calls for his banishment from the tournament. Claude Moraes MEP, a prominent campaigner against racism in sport, commented:

"It's an appalling prospect. Neo-Nazi groups are issuing leaflets saying Ahmedinejad is a hero. All the intelligence is that neo-Nazi groups, not only from Germany but from eastern Europe, Italy and Spain, will be coming to Germany and targeting the World Cup. We could see Hitler salutes and anti-semitic chanting at matches. The Ghanaian team,

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as an African one, are also being targeted and will be subjected to "monkey" chanting. I'm sure the German authorities will deal with hooliganism, but racism in the stadium requires a partnership between FIFA and the German authorities and we don't have that" (The Daily Telegraph of 11/5/2006, p.58).

The FIFA president, for his part, when asked about the problem, replied that the visit of the Iranian president, as was the case with all visiting dignitaries, was the responsibility of the German government, and that he was confident the German authorities would handle any neo-Nazi problems. Mr. Moraes described this reaction as "complacent and one-dimensional" (*ibid*). Mr. Ahmedinejad then appeared to be playing a teasing waiting game, since for the next few weeks he expressed uncertainty as to whether he would in fact be travelling to Germany. He pronounced himself "unsurprised" by the political debate which had come to surround the possibility of his attendance – even after the German interior minister Wolfgang Schäuble had announced that he would be welcome. He blamed the controversy on the "network of Zionists" in Europe and elsewhere (*The Guardian of 298/5/2006, p.57*).

In the event, the Iranian president did not travel to Germany for the tournament. Instead, the German Foreign Ministry issued a visa for the country's Vice-President, Mohammed Aliabadi, in order that he may attend the event. It was made clear that Mr. Aliabadi, who is also the head of the state physical education body, would be travelling to Germany as "a sports official" (*The Daily Telegraph of 8/6/2006, p.57*).

Dean Jones resumes commentating after "terrorist" slur (Australia)

The former Australian test batsman, Dean Jones, landed himself in trouble in August 2006 when, commentating on the Test series between his country and South Africa, he observed that "the terrorist's got another catch", referring to the South African Hashim Amla. This promptly led to his dismissal from the South Asian network Ten Sports. Mr Jones subsequently apologised for the remark, and has recently announced that he would be providing the commentary for the 2007 cricket World Cup in the West Indies for two Indian networks (*The Daily Telegraph of 27/9/2006, p.517*).

Adidas trainer advertising gives rise to protests (US)

In mid-April 2006, Chinese-American groups voiced complaints about the marketing, by German sportswear manufacturer Adidas, of a trainer bearing an image which they claim perpetuates a negative stereotype.

The shoe in question, which costs \$250, features an image of a Chinese man with bowl-cut hair, slanted eyes, porcine nose and buck teeth. The image used on the Fing trainer's tongue resembles those used in past anti-Chinese political cartoons, according to those groups (*The Guardian of 10/4/2006, p.18*).

Human rights issues

Exploitation claims surround four-year-old marathon prodigy

In recent months, the progress made by a small marathon runner has captured the imagination of millions in the Indian sub-continent. Budhia Singh has, at the tender age of four, completed the 26-mile marathon faster than many runners who are twice his height and many times his age. However, just as fame and fortune seem to beckon, doctors who have examined the boy phenomenon seem to have called a premature halt to his career. Concerned at television coverage of him collapsing in the final stages of a record-breaking 43-mile run, in mid-May 2006, Indian health officials ordered police to take him to hospital for tests in order to check whether this intense exercise was damaging his youthful body. The subsequent results seemed to confirm these fears, and doctors have warned that he will soon degenerate into a physical wreck.

Budhia has accordingly become the subject-matter of a legal tussle between the state authorities and his coach, who has been accused of exploiting and mistreating the boy wonder. This controversy is being played out amid considerable media interest in the boy's story, a "rags-to-riches" tale which has fascinated the Indian public. The son of an illiterate dishwasher and alcoholic beggar, Budhia was sold for 800 rupees to a street hawkker after his father died three years ago. His physical stamina was noticed by a judo coach, Biranchi Das, who caught him bullying another child close to his club one day and ordered him to run round an athletics track by way of punishment. When he returned five hours later, expecting the boy to have departed a long time since, he found him still running laps (*The Sunday Telegraph of 7/5/2006, p.15*).

The main problem as identified by the doctors is that Budhia is just too young to be able to run these distances safely. His bones have not yet finished growing, and he risks permanent skeletal damage. He also risks damaging the cartilage of his joints. This could cause early arthritis, which could ultimately cripple him.

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There is also a danger that he may suffer enlargement of his heart, which could also cause him health problems at some stage in the future. Doctors have claimed that the blood tests which have been taken indicate that his heart is being overstrained. They found that he has a very high level of urea in his blood, which could cause kidney failure. In addition, Budhia's blood pressure and pulse rate are too high for a child of his age (*The Independent of 9/5/2006, p.26*).

The outcome of the legal action described above is not yet known.

Oxfam criticise sportswear firm over dismissed workers (Indonesia)

In early July 2006, the international charity Oxfam alleged that sportswear corporation Adidas had reneged on a pledge to demand the reinstatement of 33 workers dismissed from a large Indonesian supplier in a manner which that country's Human Rights Commission had found to be illegal. More particularly it claims that Adidas pledged to put formal pressure on Panarub, the Indonesian plant where Adidas's produce is made, after the human rights commission referred to ruled, in a non-binding decision, that there were insufficient grounds to dismiss 33 workers following a one-day strike. Nevertheless, William Anderson, the company's regional head of social and environmental affairs, insisted that Adidas had not changed its position, claiming that they continued to support the dismissed workers and asked the Indonesian firm to reinstate them. However, he added that Adidas were not willing to issue Panarub with a formal warning (*The Guardian of 7/7/2006, p.24*).

Gender issues

Iranian ban on women in football grounds lifted, then reinstated

The hard-line fundamentalist regime which currently holds power in Iran has been particularly severe on the position of women in society. However, the harshness of this system seemed to have been relaxed somewhat when the Iranian president, Mahmoud Ahmedinejad, announced that women would be allowed to attend football matches in big grounds for the first time since the 1979 Islamic revolution. Under the decree, which was reported on state television, the president ordered the head of the nation's sports organisation to provide separate areas for women – in fact, he specified that the best stands in the stadiums should be reserved for this purpose. It had been reported already that women

had from time to time scuffled with police when barred from entering grounds, although they had occasionally been allowed to attend basketball or volleyball fixtures at smaller grounds (*The Guardian of 25/4/2006, p.27*).

However, a few days later a major qualification was added, when a sports official specified that this removal of the ban on women did not apply to unmarried females, stating that the plan to allow women was "merely for families" (*The Daily Telegraph of 27/4/2006, p.20*). Worse was to follow two weeks later, when it was learned that the country's "supreme leader, Ayatollah Ali Khomeini, had vetoed the lifting of the ban. This was the first occasion on which the religious leader had openly challenged government policy since the new President's inauguration in August 2005 (*The Guardian of 9/5/2006, p.13*).

Other issues

Calls for the "Palio" to be banned (Italy)

This column has already had occasion to report on the concern to which the annual Palio horse race, held in Siena, Italy, has given rise, because of the inhumane treatment which is sometimes administered to the horses in question. Now this concern has spread to similar events in other Italian towns and cities. Thus the Palio which is held every year in the medieval city of Ferrara also came under scrutiny when three horses were lamed and had to be destroyed. Another mount and two jockeys sustained severe injuries, whilst a number of spectators were treated by the Red Cross after police fired tear gas in order to control rioting. As a result, the race was annulled and no prizes awarded. The local public prosecutor opened an investigation (*The Independent of 2/6/2006, p.19*).

Even though the president of the race claimed that it was "the first serious incident" ever experienced by the event, the nation's animal lovers have proved to be in no mood for reflection. As news of what had happened spread across the country, along with shocking pictures of injured horses lying on their backs on stony tracks, legs thrashing in the air, the Anti-Vivisection League (LAV) and Animalisti Italiani led the call for the Ferrara Palio to be banned, describing it as an "anachronistic event". This will certainly run into a great deal of opposition, in view of the special place which these races hold in Italian hearts (*ibid*).

15. Drugs legislation & related issues

General, scientific and technological developments

[None]

Doping issues and measures – international bodies

[None]

Doping issues and measures – individual countries

Reverberations from BALCO scandal continue (US)

Journalists could face jail sentences for failing to divulge sources

The scandal surrounding the Bay Area Laboratory Co-operative (BALCO), which proved to be one of the biggest doping scandals of all times in sport, has been extensively reported in previous issues of this Journal. Now it appears that the heavy hand of repression could fall not only on the athletes and coaches involved, but also on some of the journalists who assisted in exposing the scandal – to the extent that two of these may suffer longer prison sentences than the men at the centre of the scandal. In late May 2006, Lance Williams and Mark Fainaru-Wada (sic), who are employed by the San Francisco Chronicle, were summoned to appear before the relevant Federal Grand Jury in order to explain how they obtained confidential Grand Jury testimonies from the top athletes questioned over the affair.

The two journalists used these testimonies as the basis for several articles which exposed the use of anabolic steroids by prominent athletes. However, the US Attorney-General now wants the journalists to name the source of the leaked transcripts and return the material. Should they fail to comply with this instruction, they will be held in contempt of court and incur a jail sentence. However, Mr. Fainaru-Wada has already indicated his intention to stand by his sources and not betray them. The contempt charge carries a maximum jail sentence of two years (*The Guardian of 1/6/2006, p.S2*). The federal prosecutors contended that California's shield law protecting lawyers from divulging their sources does not apply to federal investigations of those who have infringed a court order and leaked the documents (*The Guardian of 23/6/2006, p.S16*).

Just before going to press, we learned that the two journalists were about to appear before a hearing in San Francisco, which would provide them with one final opportunity to reveal the names of their sources. Since in the meantime the reporters in question had not moved from their firm stance referred to above, it looked as though a term of imprisonment for the two was inevitable, since federal prosecutors have maintained their demand for the maximum 18-month sentence to be applied (*The Guardian of 21/9/2006, p.S2*). No further details are available at the time of writing.

BALCO investigation turns on whistleblower

One of the turning points in the entire affair occurred when one of the suspected athletes' coaches, Trevor Graham, sent a syringe contained the designer steroid THG to the United States Anti-Doping Agency (USADA) in June 2003. However, it now appears that the BALCO whistleblower is himself being investigated by the Grand Jury which was called upon to lead the inquiry into this affair. This followed a claim made by a man who worked with him, who informed federal investigators that he was the main supplier of drugs – including steroids, human growth hormone and EPO – to Mr. Graham and many of his athletes (*The Times of 22/7/2006, p.80*).

Mr. Graham was also implicated in the Justin Gatlin affair, which is reported in the section featured below.

Baseball investigation commenced

It may be recalled from the previous issue (*[2006] 1 Sport and the Law Journal p.99*) that athletics is not the only sport to have been implicated in the BALCO affair, particularly following the publication of a book entitled *Game of Shadows* by the two journalists attached to the San Francisco Chronicle, whose efforts contributed considerably to exposing this affair to the public gaze (and who, as was revealed earlier, are currently facing the prospect of imprisonment for their pains – see above p.50). So extensive and compelling is the information contained in this work, that Bud Selig, the sport's Commissioner, had no alternative but to act. In late March 2006, it was announced that major League Baseball was launching an official investigation into the alleged use of steroids by Barry Bonds, of the San Francisco Giants, and several other leading players. This inquiry was to be led by George Mitchell, the former Democrat majority leader in the Senate, who is a passionate aficionado of the sport (*The Independent of 31/3/2006, p.28*). It must also be recalled that Mr. Bonds's trainer, Greg Anderson, pleaded guilty to distributing steroids during the BALCO investigation (*[2006] 1 Sport and the Law Journal p.128*).

15. Drugs legislation & related issues

No sport in the US is more encrusted in tradition and concerned with its history, and this affair is potentially the greatest scandal to envelop the game since the Chicago White Sox deliberately lost the World Series in 1919. Mr. Bonds has always denied the use of steroids, and some of his supporters are claiming that he is being singled out because of the colour of his skin. They also point out that he had not failed a drugs test since these were introduced by the MLB in 2003. If the allegations made by the journalists are true, this would mean that every statistic of the so-called "steroid era" in question – i.e. the 1995-2002 period – would be virtually worthless (*The Independent of 31/3/2006, loc. cit.*)

It would appear that the backlash against Mr. Bonds has already started, given the hostile reception to which he was subjected on the opening day of the 2006 season – in the course of which a syringe was hurled onto the field of play (*The Guardian of 5/4/2006, p.S2*). There was also a banner proclaiming the message "Cheaters never prosper" (*The Independent of 5/4/2006, p.66*). Baseball fans are currently awaiting the outcome of the investigation with bated breath.

Last of BALCO defendants sentenced

In early August 2006, Patrick Arnold, the chemist who created a previously undetectable steroid called "the clear", was sentenced to a three-month term of imprisonment and three months' home confinement in San Francisco, for his role in the scandal. Mr. Arnold was the last of the original five defendants connected with BALCO (*The Daily Telegraph of 5/8/2006, p.S22*).

Positive, then negative – the Marion Jones enigma continues

It is an unfortunate fact that drugs have assumed a major dimension in the athletics career of triple Olympic winner Marion Jones, as many past issues of this Journal can attest. As far back as 1992, when she was a 16-year-old sprinter, she came into contact with the track-and-field drug-probing system when she missed a test. It took the intervention of Johnnie Cochran, the future courtroom saviour of ex- American footballer C. J. Simpson, to save her from disciplinary sanctions.

When the infamous BALCO affair emerged, it was accompanied by a drip-feed of reports and testimony linking her to the murky depths of performance-enhancing drugs in track and field. Her former husband, shot putter C.J. Hunter, was reported to have informed investigators from the US Internal Revenue Service that he had injected her in the midriff with the steroid THG when they were in Sydney, Australia, for the 2000 Olympic Games, where she carried off three gold and two bronze medals.

Mr. Hunter also mentioned a telephone conversation in which Victor Conte, the now disgraced owner of BALCO, warned him that his then wife could die of excessive insulin consumption, allegedly wondering whether she "realised she could have a stroke" if the drug was not taken in the proper manner.

In Sydney, Ms. Jones interrupted her Olympic medal campaign in order to offer her support, together with that of Messrs. Cochran and Conte, when it was revealed that Mr. Hunter had tested positive for the anabolic steroid nandrolone, registering 1,000 above the permitted limit. They claimed contaminated food supplements were to blame. The couple divorced in 2002. In September 2000, Ms. Jones's new partner, Tim Montgomery, emerged from the shadows to shatter the 100 metres world record. When news of the BALCO affair broke, the pair left their former coach, Trevor Graham (currently under investigation for doping by his national authorities – see above) to become associated briefly with Charlie Francis, coach to Ben Johnson. Mr. Montgomery never actually failed a doping test, but was banned in December 2005 because of the weight of evidence against him arising from the BALCO investigation.

All this while, Ms. Jones had vociferously protested her innocence, telling her accusers to look at her record and point to any failed test (*The Independent on Sunday of 20/8/2006, p.S9*). She has even initiated court action against Mr. Conte over allegations he made against her during the inquiry. However, the net seemed to have closed on Ms. Jones in late August 2006, when it was announced that traces of EPO, the illegal red blood cell-booster, has been found in a sample which she had given during the US Championships the previous June (*The Independent of 21/8/2006, p.39*). The world of athletics now had to wait on the results of the B sample analysis. However – contrary to the normal pattern – the B-sample proved negative, and Mr. Jones was cleared to continue her athletics career (*Daily Mail of 8/9/2006, p.89*). Her lawyers claimed immediately that this cast major doubts on the entire internationally-accepted dope-testing system. One of the troubling aspects of the entire episode was that some liberties had been taken with normal procedures. If protocol had been followed, Ms. Jones's A-sample would never have been leaked as it was the previous month – to the British newspaper *The Guardian*. Under USADA rules, positive tests may only be released after the second test has been checked and confirms the original positive result (*The Guardian of 8/9/2006, p.S10*).

The World Anti-Doping Agency (WADA), under whose

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direction the entire dope control system is operated, played down the significance of this episode, with its Chairman, Dick Pound, commenting:

“EPO is open to interpretation. Maybe the first (test) was made too hastily. You wouldn’t think there would be variations between the amounts in Sample A and Sample B. I’m sure there will be some explanation forthcoming from the lab or from USADA. I think the test is good, you just have to know how to read it” (ibid).

There were others who emerged from the entire affair in a somewhat chastened mode – including the many commentators who had, a little too eagerly and prematurely, started to pontificate about Ms. Jones and to claim that this was only the top part of the proverbial iceberg. Thus Duncan Mackay of the British newspaper *The Observer*, who, under an article entitled “Only surprise about Jones drugs bust was that she got caught”, subjected the Olympic medallist to a variety of accusations based exclusively on her association with the leading personalities in other drugs scandals (as detailed above) (*The Observer of 20/8/2006, p.S24*). Apart from the regrettable nature of these pronouncements – which in the present writer’s opinion came dangerously close to libel – they highlighted the potential damage inherent in the manner in which, as can be seen below, the world of athletics seems to handle these matters.

Procedural hitches indeed continued to accompany this entire affair – on this occasion to the detriment of Ms. Jones’s career. There was an unaccountably long delay before the result of the B-test was communicated to the IAAF. This meant that the US athlete could not compete in the World Athletics Final in Stuttgart in early September 2006. This was an important development, since Ms. Jones, who in spite of the interruption caused by the A-test continued to lie second in IAAF world rankings, was deprived of an opportunity of chasing the top place – and its £16,000 prize (*The Independent of 8/9/2006, p.61*). In the event, she also pulled out of the World Cup in Athens latter that month, stating that she was not ready to race after the dope test imbroglio (*The Daily Telegraph of 15/9/2006, p.S17*).

This certainly provided some ammunition for the allegations – whether justified or not – made by the athlete’s coach, Steve Riddick, that his protégée had been the subject of a conspiracy. He claimed that for the latter to walk into an event such as US national championships with EPO in her system would be to “commit public suicide”. The timing of these comments was quite significant, because Mr. Riddick’s observations carried echoes of the claims made by

Trevor Graham, Justin Gatlin’s coach, that the latter had been sabotaged by his masseur when he had been tested positive for testosterone (see above, p.60). (*The Guardian of 21/8/2006, p.S15*).

Chinese anti-doping raid uncovers drug-taking at sports school

Preparations for hosting the Olympics are seldom short of controversies, which can become public knowledge even in such authoritarian societies as China. The latest scandal to affect the run-up to the 2008 Beijing Olympics erupted in late August 2005, and consisted in astonishing discoveries which have led to renewed fears of mass drug-taking in Chinese sport. During a surprise visit to the Liaoning Anshan track and field school in the north-east of the country in early August 2006, officials from the national Anti-Doping Commission caught a number of students consuming performance-enhancing drugs. Xinhua, the official Chinese news agency, said:

“They found appalling evidence of collective doping. Officials caught school staff injecting teenage students with banned substances and confiscated illegal drugs, including EPO and testosterone” (The Daily Telegraph of 24/8/2006, p.S14).

At the time of writing, the school staff were to face criminal charges under the Chinese anti-doping code, which entered into effect in February 2004. China had previously vowed to penalise doping after a succession of scandals during the 1990s, which featured swimmers, athletes and weightlifters. It would appear that the problem persists (*ibid*).

French anti-doping law adopted

In early April 2006, the Law on Anti-Doping was adopted by the French Parliament (Law 2006-405 of 5/4/2006 [2006] JORF 5193). Its aim is to modernise the previous Law (99-223) on this subject, taking into account various developments which have occurred at the international level in this field. More particularly, the Law clarified the area of jurisdiction incumbent on the French Anti-Doping Agency in relation to the World Anti-Doping Agency (WADA). The new legislation also refers to the 1989 Anti-Doping Convention and the Copenhagen Declaration on Anti-Doping in Sport 2003. In addition, the Law seeks to improve authorisation procedures in cases where sporting performers require medicine from the “blacklist” for health purposes. It should also be pointed out that the Law deals not only with doping of humans but also with that of animals which take part in competitions (*European Current Law 6/2006, 281*).

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Doping issues and measures – Athletics

Justin Gatlin banned for eight years after positive test – pending arbitration appeal (US)

Just as the world US athletics had started to recover from the infamous BALCO affair, related above, there erupted a new doping scandal involving one of the most prominent figures in the country's sporting firmament, i.e. Justin Gatlin. In late July 2006, the news broke that the world and Olympic 100-metres champion had failed a doping test following a relay race in Kansas City three months earlier. Coming as it did within days of the positive test attributed to US Tour de France winner Floyd Landis – of which more later in this Journal (below, p.99) – this news therefore constituted yet another major blow to the nation's sporting image (*The Independent on Sunday of 30/7/2006, p.46*). Mr. Gatlin commented:

"I can't account for these results. I have never knowingly used any banned substance or authorised anyone else to administer such a substance to me. I have been tested more than 100 times. All of the tests this season, including tests conducted just before and after the race in Kansas, were negative" (The Daily Telegraph of 31/7/2006, p.S1).

The stakes involved were very high for Mr. Gatlin, since this was the second doping offence of his career, which in principle carries an automatic life ban. In 2001, he tested positive for amphetamines but had his two-year ban halved when the world governing body, the IAAF, accepted that the drug had been contained in medication which he took in order to remedy attention deficit disorder (*ibid*). One option was open to him in order to escape this life ban – which was to turn "supergrass" against his coach, Trevor Graham, whom the athletes claimed to be responsible for the positive test. This came hard on the heels of an announcement by the IAAF that, as was mentioned earlier, it was investigating Mr. Graham, the Jamaican-born coach of at least ten athletes who had tested positive for banned performance-enhancing drugs during the previous eight years (*The Guardian of 11/8/2006, p.S6*).

In the event, Mr. Gatlin agreed to an eight-year ban from his sport, avoiding a lifetime ban in exchange for his co-operation with the doping authorities and because of the exceptional circumstances which surrounded his first positive test (see above). However, he was to be stripped of the world record which he equalled when he ran 100 metres in 9.77 seconds (*The Independent of 23/8/2006, p.47*). More particularly, Gatlin accepted the carbon isotope method of testing

which identified synthetic testosterone, or its precursors, as well as agreeing not to raise "technical arguments or frivolous defences", and to co-operate with USADA "to eradicate drugs from sport" (*The Daily Telegraph of 24/8/2006, p.S14*). His coach, Trevor Graham, had alleged that Mr. Gatlin had tested positive after a massage therapist had used testosterone cream on the runner without his knowledge. Gatlin's attorney, however, did not use this claim in his defence (*The Independent of 23/8/2006, p.47*).

However, in making this accommodation with the US Anti-Doping Agency (USADA), Mr. Gatlin was still able to appeal to an arbitration panel within the following six months in order to have the ban reduced. Moreover, it also emerged that the athlete could see this suspension halved if he was willing to give information about others who might have facilitated the doping for which he was penalised. These options were confirmed by Nick Davies, an IAAF spokesman, where he states that:

"we want to know how the doping got there and see if it leads to other people and other convictions. For us, this is the key issue. We would accept eight years or even less – but four years would be the minimum" (The Independent of 24/8/2006, p.47).

This insistence that the "bottom line" should be a punishment of four years seemed to put paid to the claims made by Gatlin's lawyers that the object was to have the athlete "back on the track as soon as possible". At the time of writing, the outcome of Mr. Gatlin's appeal was as yet unknown. The IAAF announced that he would be able to keep his share of the 100 metre world record until this appeal process had been completed (*The Daily Telegraph of 25/8/2006, p.S18*). However, the very next day sportswear corporation Nike suspended their contract with Gatlin until further notice, and terminated its deal with coach Graham (*Daily Mail of 26/8/2006, p.105*).

Procedurally, however, the Gatlin case produced a few hitches, as was evident from the communication problems which appeared between the IAAF and US Track and Field (USATF), the US governing body in the sport. It emerged that USATF had known of Mr. Gatlin's predicament since 14/6/2006 but had failed to inform the IAAF, contrary to the latter's rules. The first the latter knew about the affair was 29 July. The IAAF General Secretary, Pierre Weiss, attempted to gloss over this discrepancy. According to a statement which he made at a meeting in Beijing, USATF were under the impression that the US Anti-Doping Agency (USADA) had informed the world governing body because of their "good relationship" with the latter (*The Daily Telegraph*

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of 22/8/2006, p.S20). However, this could give rise to suspicions that the US athletics authorities are sometimes not 100 per cent behind the fight against doping in their sport...

One of the main elements of the "co-operation with the authorities" which Mr. Gatlin had pledged in return for a reduction in the duration of the ban was that he should turn "supergrass" against his coach Trevor Graham, claiming that it was the latter who administered the drug to him. Mr. Graham has already been referred to earlier in connection with the BALCO scandal, in that he was the main instigator of the investigation into the scandal, only to become the subject of inquiry himself (see above, p.91). In fact, in the midst of the Gatlin scandal, the IAAF announced that it was opening an investigation against the Jamaican-born Graham, who had coached at least 10 athletes who had all tested positive for banned performance-enhancing drugs during the previous eight years. It added that it was conducting the investigation in conjunction with USADA. The US Olympic Committee had already banned Graham from the use of its facilities because of the unusual number of athletes whom he had coached and who had been convicted of doping offences. One of these was C.J. Hunter, the 1999 shut putt champion who had record unprecedented levels of anabolic steroids, and Tim Montgomery, who had been deprived of his world record over 100 metres following the BALCO investigation. A recent survey had indicated that Graham had coached 30 per cent of athletes banned for two years or longer (*The Guardian of 11/8/2006, p.S6*).

The pressure was thus mounting on Mr. Graham, whose name had reportedly appeared extensively in documents discovered by the US FBI relating to the BALCO case, which made it increasingly likely that he would make his own deal with the authorities. He had earlier denied to the Grand Jury in the BALCO case that he had been involved in supplying drugs to the athletes coached by him. He also provided an interesting link to Marion Jones, whose case is dealt with below in this section (*The Guardian of 24/8/2006, p.S6*). In addition, shortly after news broke of the investigation into Graham's dealings, another US athlete coached by him, LaTasha Jenkins, tested positive for nandrolone (see below, p.96).

This column will naturally follow the outcome of this case with the keenest of interest.

"Doping stash" found at European championships proves innocuous – but Swedish athlete admits cocaine use

Before this year's European athletics championship, held in Gothenburg, Sweden, commenced, there were many dire predictions that, once again, the sport would be dragged through the proverbial mire by further doping scandals. These foreboding seemed to have been vindicated when, on the day after the Championships ended, various bags of syringes, bottles, phials and tubes had been discovered in and around two Gothenburg hotels and impounded by the local police. The Swedish anti-doping authorities attempted to downplay this event, with spokesman Jan Engström commenting:

"It looks like it is rather innocent – it's only vitamins. When the head of our Stockholm laboratory, Mats Garle, was shown pictures of the cartons, his spontaneous reaction was that this is innocent material" (The Independent of 16/8/2006, p.50).

Mr. Engström reported that two or three "cartons" had been found in public bins close to two of the hotels which hosted teams at the Championships. The first was the German team hotel, whereas the second housed competitors from Bosnia, Malta, Gibraltar, Montenegro, Poland and Russia (*ibid*).

In the event, however, the stash provided to be innocuous – at least in the eyes of the law. Swedish police closed the case two weeks later, stating that, although one of the substances found was banned for sporting purposes, none of them was illegal (www.sweden.se of 28/8/2006). The banned drug in question was actovegin, which has been on the list of banned substances drawn up by the World Anti-Doping Agency (WADA) since 2000, after an investigation at the Tour de France (cycling) found that competitors had used it to enhance their stamina (*The Guardian of 23/8/2006, p.S2*).

However, the Championships were not entirely free from drug-related controversy. During the first week of the tournament, five people were arrested in a drugs raid. The next day, Sven Nylander, a Swedish 400 metres hurdling champion, admitted to having used cocaine at a party. After having initially denied any wrongdoing, he changed his story, informing Swedish television that he had taken the drug. This followed hard on the heels of the admission by his fellow-countryman, Patrik Sjöberg – a former world record holder for the high jump event, that he had used cocaine at a party (*The Daily Telegraph of 16/8/2006, p.S17*).

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East German records allowed to stand in spite of doping claims....

It is no longer disputed that the phenomenal success enjoyed by athletes from the former German Democratic Republic (GDR) was due in no small measure to a comprehensive State-sponsored doping programme. Since the fall of the Berlin Wall, there had almost inevitably been calls for any records produced with the aid of such underhand methods to be erased from the record books. Accordingly, in October 2005, the German Athletics Federation (Deutscher Leichtathletikverband – LVB) agreed to examine the validity of all national records after Ines Geipel, a sprinter from the former East Germany, requested the removal of her name from the record books. Ms. Geipel, a victim of the GDR state-run drugs programme, was one of four athletes to set the German women's 4x100 metres relay record in 1984 (*The Daily Telegraph of 2/5/2006, p.S7*).

However, several months after its investigation commenced, the DLV concluded that it was impossible to rewrite history, and that therefore the records set during the "golden years" of GDR athletics, however controversial, should be allowed to stand (*ibid*).

.... but others are ruled out for want of EPO tests

In late August 2006, the International Association of Athletics Federations (IAAF) announced that three world records had been erased because no tests were conducted for the anabolic steroid EPO. More particularly this deficiency deprived the US 4x400 metre relay team of an indoor world record set in February 2006 and cancelled out Haile Gebrselassie's 25 km world mark of 1h 11.37min. set in the Netherlands the previous March. A junior men's 10 km race walking record set by Russian Sergey Morozov in February was also withdrawn (*The Daily Telegraph of 23/8/2006, p.S18*).

Thanou/Kenteris affair ends with two-year ban (Greece)

The case of the two Greek athletes who failed to attend a dope test on the eve of the 2004 Athens Olympics has been well documented in this Journal. This affair erupted when they missed three doping tests before the start of the Games. Having been initially cleared by their national federation, they were suspended in December 2004 pending the outcome of an appeal by the world governing body IAAF before the Court of Arbitration for Sport (CAS).

However, just as the CAS, which sits in Lausanne, Switzerland, was preparing to re-open the hearing into the sprinter's case, it was learned that they admitted breaching doping regulations by missing these tests. Matthieu Reeb, the General Secretary of the CAS, announced that the appeal had been withdrawn and that the athletes had accepted their two-year ban. They will be eligible to compete again from 22/12/2006 (*The Daily Telegraph of 27/6/2006, p.S15*).

South African Olympic silver medallist suspended for nandrolone consumption

In late May 2006, it was learned that Hezekiel Spring, South Africa's Olympic silver medallist, had been suspended for two years after testing positive for the banned anabolic steroid nandrolone. Mr. Spring, who finished second at the 800-metres event at the 1996 Atlanta Olympics, had been tested out of season by the world governing body of his sport, the IAAF, in February 2005. When the findings were announced the following May, he had denied any wrongdoing and pleaded "exceptional circumstances". His case was referred to the Doping Review Board of world governing body IAAF by Athletics South Africa for consideration of these alleged special circumstances. However, the Board found that no such circumstances applied (*The Guardian of 23/5/2006, p.S2*).

Other cases (all months quoted refer to 2006 unless stated otherwise)

Ville Tiisanoja. In late August, the Finnish shot putter tested positive for testosterone on three occasions during the summer of 2006, according to the Finnish athletics federation. Mr. Tiisanoja was issued with a two-year ban and a £34,000 fine for infringing the federation's anti-doping rules (*The Daily Telegraph of 31/8/2006, p.S13*).

Nordine Gezzar. In late July 2006, it emerged that the French middle distance runner denied the use of banned drugs after having tested positive for nandrolone as well as a masking agent following a tournament at Strasbourg, France. His performances had improved considerably in recent times, but Mr. Gezzar had attributed this to a new training programme, and claimed that hair-loss treatment could have affected the tests (*The Daily Telegraph of 31/7/2006, p.S27*). No further details are available at the time of writing.

LaTasha Jenkins. As was reported earlier (p.95) the US sprinter reportedly tested positive for nandrolone in late August (*Daily Mail of 25/8/2006, p.92*). No further details were available at the time of writing.

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Doping issues and measures – Cycling

French court sentences 23 for involvement in drugs ring

In early July 2006, a criminal court in Bordeaux (France) sentenced 23 people to jail terms for a maximum of four years for their part in a drugs ring supplying a cocktail of amphetamines known as “Belgian pot” to various cyclists (*The Daily Telegraph of 4/7/2006, p.S16*). The Belgian physiotherapist Freddy Sergant, who supplied the drug, was sentenced to four years, whilst the former French professional rider, Laurent Roux, who during the trial admitted to taking banned substances throughout his career, received a 30-month sentence (*The Independent of 4/7/2006, p.46*).

This case will be returned to in the section dealing with the Spanish drugs ring detailed below (p.97).

Top riders implicated in massive Spanish doping operation – the story so far

It is a sad fact that, as well as athletics, cycling is a sport which frequently finds itself caught up in drug-related dishonour – the Tour de France and Giro d’Italia scandals of 1998 and 2000 respectively being merely the worst examples. It now looks as if another doping scandal will give rise to widespread ructions in the sport, the action on this occasion being centred on Spain.

Then entire affair has its origins in a series of allegations, reported in a previous issue of this column (*[2004] 1 Sport and the Law Journal p.92*) when Jesus Manzano, a Spanish cyclist who used to ride for the Kelme team, chose to reveal a number of alleged illegal medical practices within his team on television. More particularly he claimed to have had personal experience of such practices during the Tour of Portugal and the Tour de France, and that he had been kicked off a train in Valencia because he was “half dead” (presumably from drug use). In a further interview, he listed a large number of banned substances complete with prices and methods used in their application, all of which he claimed had been used at some point during his career.

These allegations gave rise to “Operation Puerto”, which consisted in close surveillance by the police of a Madrid flat which, according to Mr. Manzano, was visited by many sporting figures and apparently used for blood-doping purposes (*The Guardian of 28/6/2006, p.S14*). This resulted in a raid in the course of which, according to the police, bags of frozen blood, steroids and hormones, including EPO, were found – as well as various lists naming over 100 top-level athletes. Many

of these had been filmed entering and leaving the clinic. The police seized 100 bags of frozen blood and equipment for treating blood, as well as documents on doping procedures (*The Guardian of 26/5/2006, p.S8*). Another result of this operation was the arrest, in late May 2006, of Manolo Saiz, the sporting director of the Spanish team Liberty, and the team doctor, Eufemiano Fuentes on doping charges (*The Daily Telegraph of 24/5/2006, p.S17*). He was released the next day, but informed that he had to make himself available for further appearances before the examining judge (*The Daily Telegraph of 25/5/2006, p.S6*). It then emerged that three more people were to be questioned by the judge, namely Jose Merino Batres, another team doctor, Jose Ignacio Labarta, deputy director of the Comunidad Valenciana team, and Alberto Leon Herranz, a former mountain biker (*The Independent of 27/5/2006, p.62*). Later, Dr. Fuentes was placed under formal investigation for offences against public health (*The Guardian of 31/5/2006, p.S10*).

Inevitably, speculation started as to the identities of the 100 cyclists in question – particularly when police spokesman José-Manuel Gallego refused to comment when asked whether non-Spanish athletes were on the list. One of the names being persistently mentioned in this connection was the 1997 Tour de France winner, Jan Ullrich, particularly after a Spanish radio station linked the German cyclist to Dr. Fuentes. Mr. Ullrich vehemently denied these allegations (*The Guardian of 26/5/2006, p.S8*). Not only prominent cyclists, but also world-class Olympic athletes, footballers and boxers had been named as possible owners of the bags of blood (*The Observer of 28/5/2006, p.29*).

As more details of the operation started to emerge – including the code names, numbers and dated featured on the sachets of blood – the world governing body for the sport, the UCI, announced that it would follow through the relevant anti-doping procedures even if, as reports were beginning to suggest, up to 150 cyclists could be involved. Its Chairman, Pat McQuaid, commented:

“If we get the evidence we will move on it and complete the process no matter how painful. It has to be done for the integrity of the sport. The message has to get out to anyone who thinks they can get away with [doping] that there are other means to catch people and [a police investigation] is one of them” (*The Guardian of 31/5/2006, p.S10*).

Mr. McQuaid conformed that he has been in touch with the Spanish Ministry of Sports in order to try to expedite the release of evidence accumulated by the Guardia Civil (Spanish police) during the three-month

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“Operation Puerto” investigation. It appeared that, for some time, the UCI were regularly recording anomalies in the blood of Spanish cyclists, leading the governing body to alert the Spanish authorities (*ibid*).

The scandal took on a further twist several days later, when two riders who had been named in press leaks were withdrawn from competition. Jose Enrique Gutierrez, and former Tour de France “King of the Mountains” Santiago Botero, would not perform in any races for their team, which was the Swiss squad Phonak, until their innocence was established. Both were alleged to have featured on the police videos of riders entering and leaving the flat at the centre of the investigation, referred to above. However, the team manager went to great pains to stress that they had been “neither suspended nor dismissed” (*The Guardian of 5/6/2006, p.S15*).

The following week, it was announced that the Spanish team Comunidad Valenciana had been excluded from this year’s Tour de France for their involvement in the scandal. This followed the arrest, referred to above, of their sporting director Jose Ignacio Labarta. Although the latter protested that he had resigned his position “to protect the team”, the Tour organisers stated that the implication was sufficient for them to withdraw their invitation (*The Daily Telegraph of 14/6/2006, p.S19*).

In the meantime, the Spanish media were not unexpectedly giving maximum coverage to this whole affair, sometimes in an extremely intrusive manner. Matters reached a climax when the leading daily newspaper El Pais published extracts from the relevant judicial inquiry. This caused the Spanish riders competing in their national championship to boycott the race in retaliation, protesting that the press coverage of the scandal had tarnished the image of the sport in the country. The riders stopped pedalling some three kilometres into the race, and returned to their hotels (*The Daily Telegraph of 26/6/2006, p.S8*).

As the scandal unfolded, the starting date of the Tour de France was approaching inexorably. Fears that the inquiry would affect the build-up to this annual major event were confirmed when a Spanish newspaper once again linked the Tour favourite, Jan Ullrich, to the investigation. This was once again firmly denied by the German rider. This speculation had followed another report from the El Pais newspaper in which it published documents – purportedly leaked from the investigation – claiming that a business card belonging to Lose-Luis Merino, one of the men arrested with Dr. Fuentes, had 17 coded names written on it. One of these was alleged to be Mr. Ullrich’s (*The Guardian of 27/6/2006, p.S17*).

The very next day, the Astana team, which featured the Kazakh star Alexandr Vinokourov, were denied a place in the Tour because of their involvement in the affair, on the basis that their presence would be damaging to the image of the event. The team’s management company, Active Bay, immediately applied to the Court of Arbitration for Sport (CAS) for a ruling aimed at lifting this ban (*The Guardian of 28/6/2006, p.S14*). Two days later, the CAS ruled that the Tour organisers were not entitled to ban a team on the basis of press reports, and therefore Mr. Vinokourov’s side were reinstated (*The Guardian of 30/6/2006, p.S16*). However, this turned out to be a hollow victory for the team, since on that very day, the names of the 56 riders officially under investigation were released. These included five members of the Astana team. Since, under professional cycling rules, any rider officially connected with anti-doping investigations must be suspended, the team in question – including Mr. Vinokourov, who was not thus implicated – withdrew en masse since it would have been unsustainable without the five riders in question (*The Independent of 1/7/2006, p.55*).

Also included among the 56 names released were its three favourites, the aforementioned Jan Ullrich, Italian rider Ivan Basso and Francesco Mancebo, from Spain, who were therefore unceremoniously expelled from the race. The scale of these withdrawals and exclusions was unprecedented in the 103-year-old history of the tour, and naturally sent shockwaves across the Rhine, where Mr. Ullrich is one of the country’s greatest sporting figures. The tour organisers were also presented with a 50-page summary of the main findings produced by the investigation. These were sufficient for Tour organiser-in-chief Jean-Marie Leblanc to declare:

“This is organised trafficking. We are no longer in the domain of cheating, we are in the domain of criminal organisation (...) a mafia to make money, to threaten the health of young athletes and completely falsify the balance of sporting competitions. It is scandalous, at the limit of criminality. As organisers this news (sic) fills us with infinite sadness. Our big hope is that the great clear-out will enable us to have a Tour de France without tension, a Tour that can breathe easily, and most of all that this affair will be the last serious, collective [one] in cycling history”
(*The Guardian of 1/7/2006, p.18*).

For Mr. Ullrich, this only provide to be the beginning of his travails. After the Tour had ended, he found himself under attack from several sides. First of all, he was dismissed by his team, T-Mobile, despite his continued denials. Then the Swiss cycling federation started to consult documents resulting from the investigation in order to determine whether the rider had a case to

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answer. Ullrich is a resident of Switzerland and rides under a licence issued by that federation (*The Guardian of 17/8/2006, p.S9*). Then, inevitably, the German prosecuting authorities also developed an interest in the matter. This development was not exclusively related to the rider's nationality, since it had been revealed that the blood doping ring which was at the centre of Operation Puerto apparently had a centre in Hamburg, where blood transfusions had been carried out in May and June 2006. This led to an investigation being opened against a German doctor (*The Guardian of 9/9/2006, p.S15*). As for Mr. Ullrich himself, the German police raided his Swiss home as they intensified their inquiries – officially as a result of a “complaint made in Bonn for fraud”. Wolfgang Strohband, Mr. Ullrich's manager, announced that his home and office in Hamburg had also been searched, and that he was considering legal action (*The Daily Telegraph of 14/9/2006, p.S18*). The Spanish judge investigating the case also stated that he was prepared to send samples of frozen blood seized during the Operation Puerto raids to the German authorities in order that the latter may check whether they belonged to Mr. Ullrich (*The Independent of 16/9/2006, p.61*). The final outcome of these investigations was not yet known at the time of writing.

The fall-out from this affair also had career-threatening implications for Ivan Basso. This was certainly the view expressly communicated by the manager of his team, Bjarne Riis, who said that he did not believe that Mr. Basso would race again unless he was cleared of these doping allegations (*The Guardian of 23/8/2006, p.S2*). Naturally, the anti-doping authorities of his country also began their own investigation, and at the time of writing the matter was being referred to a special disciplinary committee (*The Guardian of 30/8/2006, p.S2*). Here too, it was not known at the time of writing what further developments occurred in Mr. Basso's case.

As the inquiry deepened, other names began to emerge as being implicated in the scandal. Thus it appeared that the Olympic medallist Tyler Hamilton, who was suspended for two years for blood doping (*[2005] 1 Sport and the Law Journal p.101*) was also to be investigated for his alleged link to the Spanish drugs scandal (*The Independent of 16/9/2006, p.61*). Here again, no further details were available at the time of writing. The investigation also revealed that the clients of the doping ring included Marco Pantani, who died from an overdose of cocaine in 2004 (*[2005] 1 Sport and the Law Journal p.78*). According to documents leaked to the press, he was supplied during the season preceding his death with EPO, growth hormone and steroids (*The Guardian of 4/7/2006, p.S12*). Yet another

cyclist implicated in the investigation was Joseba Beloki, who finished second in the 2002 Tour (*The Guardian 1/7/2006, p.S11*).

The investigation also revealed the sheer scale of the clandestine businesses which supply drugs to cyclists – as well various links to other doping operations. The turnover of the blood-boosting network was revealed to have topped ?8 million during the last four years, whilst a ring in France known as Belgian Mix netted the dealers more than £10,000 in two years (*The Guardian of 4/7/2006, p.S12*).

These two operations worked at opposite ends of the cycling spectrum. The Spanish network centred around Dr. Fuentes, who dealt with elite cyclists. The Belgian Mix, being a cocktail based on amphetamines, was sold to amateurs by Belgian Freddy Sergeant, a masseur having 21 years' experience in the professional sport, and who recently received a four-year sentence in Bordeaux (France). Along with Mr. Sergeant, 20 other were penalised, including three former professional cyclists and the former assistant manager of the Ag2R team, who received suspended sentences and fines. Between them they sold 2,000 flasks of the drug in two years

Clearly, this entire sordid affair has yet more troubling details to reveal. This column will, as ever, follow further developments in this saga with the keenest of interest.

The Floyd Landis affair (US/France)

The events described in the previous section could not have done more damage to an already tainted sport if their script had been written by its bitterest enemy – particularly as, coincidentally, or not, they unfolded in such a way as to coincide and interfere with the greatest showpiece event which the sport can claim, namely the Tour de France. Unfortunately, worse was to come even after the sport considered that it had rehabilitated itself by one of the most thrilling finishes of all time.

Initially, it seemed that the 21-day race had been won fairly and squarely by US rider Floyd Landis, following one of the most spectacular last-day comebacks the event had ever witnessed. When, three days after the dust had settled on the finishing line at the Champs Elysees, the race organisers announced that a rider in the Tour had failed a drugs test, the reluctance of the organisers initially to reveal the name started the alarm bells ringing (*The Guardian of 27/7/2006, p.5*). The next day, the worst fears entertained by cycling fans were realised when it was announced that the culprit was

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none other than the US winner himself, and that the substance for which he tested positive was testosterone. Mr. Landis, as well as the world of cycling, waited with bated breath for the outcome of the tests on the B sample. This process was accelerated by the world governing body in the sport, the UCI, and the B test confirmed the original diagnosis the following weekend (*The Observer of 6/8/2006, p.S15*).

The US rider accordingly became the first Tour winner to have his title removed over a doping scandal. His team, Phonak, immediately proceeded to dismiss the cyclist “without notice” for infringing the team’s internal code of ethics. Mr. Landis followed this by issuing a statement protesting his innocence, and announced his intention to appeal and take legal action aimed at clearing his name. Philippe Verbist, a lawyer representing the world governing body UCI, announced that Landis would continue to be classed as the champion until disciplinary proceedings had run their course (*The Observer of 6/8/2006, p.S15*). This set in motion a process which was widely predicted to take at least eight months. The stakes were very high, since Mr. Landis not only faced the loss of his title, but was also staring a two-year suspension in the face – followed by a two-year prohibition from racing on the elite ProTour circuit, which includes major events such as the Tour de France (*The Mail on Sunday of 6/8/2006, p.97*).

The dire predictions about the possible duration of the case were not unwarranted. Although the unsuccessful appeal waged by Tour of Spain winner Roberto Heras against his positive test for EPO was completed in six months’ time, the other major cycling drugs-related case, that of Tyler Hamilton (fully documented in Journals past!) lasted a full 15 months because of the complexity of the scientific evidence produced by the US rider and his lawyers. It became clear that, in addition to attacking the UCI over what they claimed to be breaches of procedure, Mr. Landis and his legal team would focus on two areas: (a) that other circumstances had created an increase in the testosterone level, or (b) a finding that the testosterone was exogenous (*The Guardian of 7/8/2006, p.S13*). The rider lost no time in expanding on these themes, particularly the alleged procedural defects, stating:

“There are extraneous circumstances that indicate there’s (sic) some strange goings-on with this test. You will see that they (the testers) clearly broke the rules. The only explanation I can come up with is that there is some agenda here” (*The Guardian of 9/8/2006, p.S2*).

The main butt of Landis’s criticism was the accusation that both the UCI and the World Anti-Doping Agency (WADA) had released details of his failed A-test before

the B-sample had been analysed (*ibid*). There are clear and uncanny echoes here of the procedural hitches which marred the Justin Gatlin and Marion Jones cases detailed in previous sections under this heading. Yet it was possible to read into Mr. Landis’s protestations something more than accusations of mere incompetence – and even hints at a conspiracy inspired by the proverbial rancid grapes at the fact that yet another US rider had succeeded in trumping the best which the “old Europe” had on offer. The UCI, however, vigorously rejected the claims of procedural impropriety made by the Landis team, its President, Pat McQuaid, claiming that they acted entirely correctly, and that the UCI had informed not only the team and the rider, but also the federation, that an irregularity had occurred – followed by a press release to the effect that an unnamed rider had been found positive in the course of the Tour. His team then published his name two days later (*The Guardian of 10/8/2006, p.S2*).

The entire Landis affair was already taking its toll – and not only of the principal actors involved. Within a few weeks of Mr. Landis’s positive test being confirmed, the latter’s team, Phonak, announced that it was disbanding in the wake of the scandal (*The Daily Telegraph of 16/8/2006, p.S17*). Team owner Andy Rihs explained that the scandal surrounding Mr. Landis had been the deciding factor, following several other doping scandals which had involved other Phonak riders in previous years (*The Daily Telegraph of 16/8/2006, p.S17*). Infinitely more seriously, it was learned a few days later that Mr. Landis’s father-in-law had taken his own life. San Diego police announced that Mr. David Witt, the stepfather of Landis’s wife Amber, died of a self-inflicted gunshot wound to the head (*The Daily Telegraph of 18/8/2006*). Mr. Witt was himself a keen amateur cyclist who met Landis through a mutual coach in 1998. He was credited with introducing Mr. Landis to road racing. It was thought that the doping affair had contributed to this tragic turn of events.

The legal battle waged by Mr. Landis began in earnest when, in mid-September 2006, he presented evidence to the United States Anti-Doping Agency (USADA) which he claimed would lead the latter to reject the allegations of testosterone use. This he did by reiterating and expanding the procedural and substantive arguments referred to above, namely:

- that three of the four testosterone tests in his sample were “negative” within the margin of error normally applied by WADA protocol;
- that the one test (out of four) which was undoubtedly positive, even accounting for margins of errors, could still have resulted from a laboratory

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error and was not necessarily the result of testosterone use;

- that the test which WADA considered to be the most reliable indicator of long-term usage proved negative in the urine sample provided by the US rider;
- that the B test was invalid because the sample number assigned to the Landis specimen did not match the results which were recorded.

Particularly the last point was important because, if it could be proven, the testing procedure would be legally invalidated and USADA would have no alternative to exonerating Mr. Landis (The Daily Telegraph of 13/9/2006, p.S24). The rider also pointed out that the reliability of the laboratory which performed the test, situated in the Paris district of Chatenay-Malabry, had already been challenged in a report into the alleged discovery of EPO in urine samples provided by fellow-US Tour winner Lance Armstrong on the occasion of the latter's first success in 1999. That report had concluded that there were no grounds for any further action against Mr. Armstrong (*The Guardian of 13/9/2006, p.S9* – see also the next section below).

As was mentioned earlier, the legal battle waged by Mr. Landis was expected to take almost a year to complete. Naturally this column will monitor future developments in this case for the benefit of its readership.

Armstrong cleared following drugs inquiry

The remarkable career of Texan cyclist Lance Armstrong took yet another strange twist in late May 2006, when an independent investigator cleared him of doping during the 1999 Tour de France, which was the first of his successive seven victories in the world's showpiece event in the sport. It will be recalled from a previous issue ([2006] 1 Sport and the Law Journal p.84) that the world governing body in cycling, the UCI, had appointed a Netherlands lawyer, Emile Vrijman, to investigate allegations that Mr. Armstrong had taken the stamina-enhancing drug EPO during the 1999 Tour – a charge which the US cyclist has invariably denied. In an interview with the Dutch newspaper De Volkskrant, Mr. Vrijman announced that his report completely exonerated Armstrong of these drug-taking accusations.

The allegations against the Tour winner were made on the basis of urine samples from the 1999 event which had been frozen for possible later analysis. This was the year before a test for EPO became accepted internationally. Mr. Vrijman stated that the laboratory in question, located near Paris, had analysed the samples

only as part of a research programme for the detection of EPO, and that there were no confirmatory, or "B", tests. He added that samples may be used in research programmes only on condition that all information tracing them to a particular person is removed. This had not been done. Mr. Vrijman also presented a list of errors in the way in which the sample was handled, saying:

"Sometimes with doping cases you can say it was a technicality. These are not technicalities. These are fundamental issues which should have been done differently (The Times of 1/6/2006, p.76).

He also alleged that the World Anti-Doping Agency (WADA), the Parisian laboratory and the French Government had failed to provide documents and cooperate fully in his investigation. The Vrijman report, which ran to 12 pages, recommended the convening of a tribunal in order to discuss possible legal and ethical violations by WADA in this case, and to consider appropriate penalties to remedy these infringements. However, both the UCI and WADA vehemently criticised Mr. Vrijman for having given a media interview before sending the reports to them (*ibid*).

There the matter might have rested were it not – once again – for the intervention of WADA Chairman Dick Pound. Displaying once again all the symptoms of his traditional "foot-in-mouth disease", Mr. Pound made the following statement:

"It's clearly everything that we feared. There was no interest in determining whether the samples Armstrong provided were positive or not. I don't know how a Dutch lawyer with no expertise came to a conclusion that one of the leading laboratories messed up (sic) on the analysis. To say Armstrong is totally exonerated seems strange" (ibid)

As a result of this intervention Mr. Armstrong requested the International Olympic Committee to compel Mr. Pound's resignation, describing the Canadian QC's criticisms of the case as "reprehensible and indefensible" (*Daily Mail of 20/6/2006, p.77*). Thus far, the IOC does not seem to have made any such move.

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Doping issues and measures – Tennis

Argentinian tennis players' doping bans reduced

The strange trend in recent years for the world of tennis to become increasingly embroiled in doping scandals, and more particularly the prominent Argentinian exponents of the game, has caused a good deal of surprise among fans and sporting authorities alike. Thus it will be recalled from the previous issue ([2006] 1 *Sport and the Law Journal* p.89) that Mariano Puerta had been sentenced to a suspension of eight years on the basis of a positive test for the banned substance etilefrine, and Guillermo Canas was banned for two years for HCT, a diuretic. Both players appealed against these bans before the Court of Arbitration for Sport.

In Mr. Puerta's case, the ban was reduced from eight to two years. The CAS ruled that the consumption of the drug by Mr. Puerta had been inadvertent and that it was linked to his wife's use of medication during the French Open of 2005. The quantity taken was negligible and there had been no performance-enhancing effect. Therefore, a finding of "no significant fault or negligence" was both inevitable and necessary. However, it also ruled that the Argentinian would forfeit all his results and prize money gained at the said French Open, as well as those of the tournaments in which he took part afterwards, plus all the ranking points he had gained since (*The Guardian of 13/7/2006, p.S2*).

As regards Guillermo Canas, the two-year ban was mitigated to 15 months by the CAS, which partially upheld his appeal. It ruled that the player was not entirely at fault for the doping infringement after testing positive in February 2005 at a tournament in Acapulco, Mexico. The Court held that a mistake in the delivery of the medication was made not by the player, but by the tournament staff (*The Daily Telegraph of 24/5/2006, p.S17*).

Nadal claims drug-taking allegations are "nonsense" (Spain)

This year's French open champion, Rafael Nadal from Spain, entered the Wimbledon tournament concerned mainly about the problem of adjusting his all-conquering clay court game to grass surfaces. However, it soon appeared that he may have other worries to contend with when, on the eve of qualifying for the quarter-finals of the London-based tournament, he was accused by a leading French newspaper of having taken drugs. Mr. Nadal firmly rejected any such accusations (*The Daily Telegraph of 4/7/2006, p.S4*). No further details are available at the time of writing.

Doping issues and measures – Football

FIFA falls into line with WADA rules following CAS ruling (in time for World Cup)

It will be recalled from a previous issue of this Journal ([2006] 1 *Sport and the Law Journal* p.90) that "the beautiful game" appears to have been remarkably reluctant to adopt the current rules on doping, which other sports have experienced little difficulty in accommodating. The shortcomings in the procedures operated in the world of football in this respect have recently been officially confirmed by the Court of Arbitration for Sport (CAS), which in late April 2005 ruled that the six-month ban for a first-time offender, which is laid down by rules enacted by world governing body FIFA, falls short of the legislation adopted on this subject by the World Anti-Doping Agency (WADA), the latter recommending a two-year suspension. The CAS decision, reached in late April 2006, described the six-month ban as "definitely not a deterrent". However, FIFA is not compelled to amend its rules, since the Court also found that, under the Swiss law which governs its constitution, the world governing body is entitled to lay down its own policy (*The Independent of 25/4/2006, p.68*).

However, the CAS ruling still means that football faces banishment from the Olympic Games, since the WADA rules should apply across all 35 sports represented at the Games (*The Guardian of 25/4/2006, p.S5*). This fate was avoided several weeks later, when the FIFA Congress, meeting in Munich, agreed to fall in line with the said WADA rules. There will, however, be a provision for individual case management (*The Daily Telegraph of 9/6/2006, p.S8*). This change came just in time for the commencement of the World Cup in Germany which started the following week (*The Times of 6/6/2006, p.85*). In fact, even before this change in FIFA's rules had been formally agreed, the world governing body had announced that it would carry out a record number of doping probes after matches, with 256 post-match tests and 132 random spot checks. Some had even wanted to go further, but Professor Jiri Dvorak, FIFA's Chief Medical officer, stated that it was neither feasible nor necessary to test every player after every game (*The Independent of 27/5/2006, p.77*).

15. Drugs legislation & related issues

Doping issues and measures – Golf

Drug testing makes its debut – amidst mixed reactions

The sport of golf is not one which comes immediately to mind as prime territory for the use of performance-enhancing drugs. Yet increasingly, voices have been raised in favour of subjecting the top practitioners of this sport to dope tests, and in July 2006, it was announced that organisers of the Open Championships were to introduce such tests at the World Amateur Team championships in South Africa, to be held in the autumn of 2006 (*The Times of 20/7/2006, p.84*). However, there continued a great deal of scepticism as to whether the truly top events in the sport should also be subjected to such probes.

Such opposition will become increasingly difficult to maintain given the calibre of those who are increasingly advocating drug-testing. In late August 2006, no lesser personality than Tiger Woods, the world's No. 1, suggested that golf should be no different from any other sport and should therefore implement such a programme as soon as possible. This announcement came the day after Tim Finchem, the commissioner in charge of the Professional Golfers Association (PGA) tour, had dismissed this idea, claiming that there was no evidence of players using steroids or any other performance-enhancing drugs (*The Times of 26/8/2006, p.88*). It may well be that this intervention by one of the sport's greatest exponents is the ultimate catalyst for change, since Mr. Woods is normally listened to when he makes his views known – as was the case in 2003 when he inveighed against players who were using illegal clubs which had faces so thin that the trampoline effect added several yards to their drives. This led to various procedures being put into place to check clubs at tournaments (*ibid*).

Doping issues and measures – Weightlifting

Iranian team barred from World Championships

In late September 2006, it was learned that the Iranian team were being banned from competing in the World Championships after nine out of 11 members had tested positive for illegal substances. The ban also covers the World and Olympic champion Hossein Reza zadeh, who is the most renowned sporting figure in his native land – even though he was one of the two athletes who tested negative (*The Daily Telegraph of 26/9/2006, p.S14*).

Olympic champion faces ban (Russia)

In early July 2006 it was learned that Olympic weightlifting champion Dmitry Berestov was facing a two-year ban from the sport after failing a test for the steroid prostanazol – being one of the new generation of “designer drugs”. Mr. Berestov had provided a sample to the World Anti-Dumping Agency (WADA) at a training camp two months earlier, and thus became the first athlete in Russia to fail a test for one of these new agents (*The Guardian of 5/7/2006, p.S14*).

Doping issues and measures – Other sports

Former skiing coach cleared by Austrian federation (Winter Olympics)

The bizarre case of the doping raids conducted during the 2006 Winter Olympics in Turin has been extensively covered in the previous issue (*[2006] 1 Sport and the Law Journal p.93*). It will be recalled that WADA (World Anti-Doping Agency) agents found blood-doping equipment in Austria which was linked to Walter Mayer, former coach to the Austrian team, who had been banned from the Turin and Vancouver (2010) Winter Games because of his involvement with in blood manipulation offences in the course of the Salt Lake City games of 2002. The former coach was placed under official investigation by Italian magistrates on suspicion of having committed a crime. Mr. Mayer later fled Turin and drove 250 miles back to Austria, where he was arrested after crashing into a police roadblock 15 miles over the border. He was then charged with civil disorder, damage to property and assault. It was also learned that the Italian police had conducted a raid on the house where Walter Mayer had allegedly stayed. The police later confirmed that “medical equipment” found at the house was being held for investigation purposes.

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Naturally, this affair also attracted the attention of the Austrian national skiing federation – more particularly its disciplinary committee. Following the appropriate internal investigation, the latter found no evidence that Mr. Mayer had been involved in “organised doping”, and therefore cleared the former coach of any wrongdoing (*The Daily Telegraph of 20/4/2006, p.S18*). However, Giselle Davies, a spokeswoman for the IOC, stated that the Olympic organisation was carrying out its own, “totally independent”, investigation into the affair (*The Independent of 3/6/2006, p.65*).

In the meantime, Mr. Mayer has initiated defamation proceedings against the heads of both the IOC and WADA for comments made in relation to this affair (*see above, under the heading “Torts”, p.67*).

Australian rugby winger banned for two years after failing test

Wendell Sailor is an Australian rugby back who has contributed a great deal towards the national team’s success over the years, but has from time to time found himself at odds with the game’s administrators (*see [2005] 3 Sport and the Law Journal p.94*). However, he recently found himself in more serious trouble when he failed a doping test after a clash between the Waratahs and the ACT Brumbies (*The Daily Telegraph of 15/5/2006, p.S27*). He was promptly banned for two years, and had his career virtually ended when the Australian Rugby Union (ARU) announced that it was terminating its £200,000-per-year contract with the player (*The Guardian of 22/7/2007, p.S8*). Mr. Sailor described his suspension as “grossly unfair” and vowed to make a comeback after serving his ban (*The Daily Telegraph of 24/7/2006, p.S16*). More particularly he hinted at a possible return to his first club – Rugby league side Brisbane Broncos (*ibid*).

Dutch Squash international banned

In mid-June 2006, it was learned that Dutch international Karen Kronenmeyer had been banned for two years after failing a drugs test. Traces of benzylpiperazine were found in her urine sample during the Dutch Championships the previous February (*The Daily Telegraph of 9/6/2006, p.S7*).

16. Family Law

Top German footballer unmasked as bigamist

German football has had its problems recently, what with match-fixing scandals and allegations of irregularities in connection with World Cup tickets. However, a controversy of a totally different kind arose in mid-April 2006, when one of its leading exponents was revealed as a bigamist. According to a leading German tabloid Mehdi Mahdavia, a defender who plays for Hamburg SV, a leading side in the German Bundesliga, has two wives. He married the first, Sepideh, eight years ago, and the second, Samira, in December 2005. The deception emerged as late as February 2006 when Samira arrived at Hamburg's stadium and introduced herself as Mrs. Mahdavia and was contradicted. Three weeks later, the star defender, who also plays for Iran's national side and was part of the country's World Cup squad, disowned Samira, refusing to pay the rent on her flat. However, although bigamy is an offence in Germany, officials said that the player could not be prosecuted because both marriages took place in Iran (*The Guardian of 13/4/2006, p.22*).

17. Issues specific to individual sports

Issues specific to individual sports (including disciplinary proceedings)

Football

World Cup issues

Authorities take preventative action

The World Cup is an event which almost inevitably brings a host of disciplinary problems in its wake, and it would appear that the game's authorities did their best to forestall any difficulties in this regard. One of the major problems facing the modern game has been the regrettable tendency, even among some of the leading players, to cheat by feigning infringements committed by the other side. This has taken the particular form of "diving" as a result of tackles. So serious has the problem become that, with days to go before the tournament kicked off, FIFA warned players that those found guilty of this kind of subterfuge would face instant fines of £2,205, following a ruling of the world governing body's disciplinary committee. Although this

relatively modest sum would hardly dent the bank balances of the leading players, FIFA were hoping that this move would help to discourage cheating and simulation during the tournament (*The Daily Telegraph of 8/6/2006, p.S10*).

In addition, it was announced that players who are booked for pulling an opponent's shirt would be fined by the same amount, whilst those receiving the dreaded red card would face a fine of at least this amount. However, it was the fine for diving which attracted the most attention, given the furore caused by certain players who openly admitted using this tactic deliberately (*ibid*).

Another recent headache besetting the game has been the habit on the part of certain players to engage in betting – sometimes on the result of games in which they were directly or indirectly involved. This explains the announcement made by the world governing body, well before the tournament commenced, that every player, official and referee at the World Cup would be required to sign a statement that they – and their

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families – would refrain from betting on the outcome of tournament games. In addition, an “early warning system” would have FIFA officials working with legitimate bookmakers in order to discern any unusual betting patterns (*The Daily Telegraph of 26/4/2006, p.56*). FIFA’s edict came at a time when it was revealed that top England player Wayne Rooney had settled the dispute over his £700,000 gambling debt owed to a business partner of England colleague Michael Owen. Bookmakers Goldchip, operated by Stephen Smith, issued a statement to the effect that Mr. Rooney had resolved “outstanding issues” with the company (*Daily Mail of 16/4/2006, p.112*).

Refereeing errors cause embarrassment

The world governing body was naturally anxious to ensure that the guardians of the game on the pitch, i.e. the referees, maintained respect for the game’s laws by officiating effectively and correctly in the course of the tournament. However, one of the officials who definitely let the side down in this respect was English referee Graham Poll, who, during the game between Croatia and Australia, showed the former team’s Josip Simunic three yellow cards before finally dismissing the player. Given that the three other match officials should also have been aware of the error, this extraordinary turn of events seemed as unforgivable as it was inexplicable. FIFA President Sepp Blatter attempted to explain away this incident as follows:

“The four officials were all wired up and this may have been a blackout. If the referee is making an evident error, one of them should go on the field and say ‘Stop, stop, something is wrong’. It shouldn’t have happened. We can’t excuse it, we can’t even understand it. I’m sure there will be a very interesting discussion in the referees’ committee about this” (*The Daily Telegraph of 24/6/2006, p.57*).

FIFA were secretly relieved that Croatia did not make an immediate protest on the field of play. Had they done so, given that the mistake was a technical error, the match would have had to be replayed – as indeed was the case in the final game for the Asian qualifying group, between Uzbekistan and Bahrain, because of another technical error on the part of the referee (*ibid*).

The Harry Kewell affair

Harry Kewell is an Antipodean player sometimes euphemistically described as a typical “Australian with attitude”, which has on occasion led him into conflict with match officials. It seemed that his volubility had once again landed him in trouble during the Australia v. Brazil fixture, which the latter won 2-0. Mr. Kewell was reported for swearing at German referee Markus Merk several times after the final whistle had blown (*The Independent of 20/6/2006, p.51*).

This at first seemed quite a straightforward disciplinary matter to deal with. However, the relevant FIFA disciplinary committee announced that it cleared Mr. Kewell of any wrongdoing as it had received “contradictory versions of the incident” from match officials. In fact, FIFA officials seemed to be dismayed with Mr. Merk’s performance during the match in general. He had been overheard telling the Australian that his World Cup was over as he and the match officials left the pitch. This had left the referee open to accusations of premeditation where he mentioned Kewell in his post-match report. There was also criticism of Mr. Merk over his refusal to explain to “Socceroo” captain Mark Viduka during the game why he was consistently penalising Australia. He had failed to caution Brazilian goalscorer Fred after he had removed his shirt in celebration. However, he had also omitted to issue Mr. Kewell with a yellow – or even red – card after his confrontation with the player. Mr. Merk had initially taken a hard line with Kewell but later softened his stance, leading FIFA to describe his report as “inconsistent” (*The Guardian of 21/6/2006, p.59*).

The Australian assistant coach, Graham Arnold, afterwards expressed his belief that referees were unfairly persecuting his country’s squad, adding that Brazil would “be the first to admit” that Australia were not a dirty team (*ibid*).

Frings suspended after post-match brawl

The quarter-final match between Germany and Argentina in Berlin produced some fine football and a thrilling finish, but was marred by a full-blown on-pitch brawl involving players and team officials after the final whistle had sounded, which saw several kicks and punches being dispensed.

Naturally this affair was always going to produce disciplinary consequences, and detailed scrutiny of the relevant television footage followed (*The Daily Telegraph of 1/7/2006, p.55*). Initially, it appeared that only Argentinian players such as Leandro Cufre would be penalised, but then attention became focused on pictures of the melee which were taken by Italy’s Sky Sport television network, and which showed Germany’s Torsten Frings throwing a punch at opponent Julio Ricardo Cruz, thus causing the case to be reopened (*The Independent of 3/7/2006, p.56*). The German Football Association immediately employed the services of a sports lawyer in order to assist with its defence of Mr. Frings. However, this failed to sway the relevant disciplinary committee, which suspended Frings for the semi-final against Italy, and issued him with a suspended ban from the next fixture (which would have

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been the final had Germany progressed that far). He was also fined £2,200. The fact that Germany did not appeal seemed to suggest the footage in question was convincing (*The Guardian of 4/7/2006, p.S4*).

The fact that the incriminating footage originated in Italy caused some of the wilder sections of the German press to cry foul, alleging that the footage was part of a plot to have the highly influential Frings banned from the semi-final, in which Germany faced Italy. However reluctant this column is to give credence to shrill conspiracy theories, it does appear somewhat strange that pictures derived from the footage referred to above appeared in a leading Italian newspaper after FIFA had initially cleared the Germans of any blame. Equally intriguing was the fact that Mr. Cruz, the alleged victim, informed the leading Italian sporting newspaper Gazzetta dello Sport that if he had been struck, he had not been aware of it (*The Daily Telegraph of 4/7/2006, p.S12*).

L'affaire Zidane provokes dismay and disbelief

However, the most controversial of all disciplinary incidents of the tournament was saved until the very last – i.e. the final between France and Italy. The match had stretched into extra time, and in the 20th minute French captain Zidane, the scorer of his country's own goal, was shown a red card for headbutting opponent Marco Materazzi. For one of the world's most respected players, who was making his last international appearance, to act in this way caused massive disbelief amongst the watching millions. It soon appeared that Mr. Zidane might have been provoked by comments made by the Italian moments before the incident, and there was some suspicion that the remarks could have been of a racist nature (*Daily Mail of 12/7/2006, p.76*). Italian manager Marcello Lippi immediately leapt to his player's defence, stating:

"You will realise it was not Materazzi who got the attention of the referee. It was the fourth and fifth officials looking at the video at the edge of the pitch. We did not do anything. They saw it and called the attention of the referee" (The Guardian of 10/7/2006, p.S3).

Mr. Materazzi, although he cultivates a the image of a hard man, was widely regarded as tolerant and easy-going off the pitch, and his best friend within the team for whom he plays, Internazionale, is Nigerian international Obafemi Martins, which made the accusation of racism even more baffling. However, there was also a widespread feeling that the Italian had collapsed rather too easily and heavily in response to the attack (*ibid*). In the meantime, the accusations against him had become more specific, and contended that he had called Zidane a terrorist (in fact, lip-readers

claimed that he had called the Frenchman "the son of a terrorist whore"). This was vehemently denied by Materazzi in the following terms:

"I did insult him, it's true, but I categorically did not call him a terrorist. I'm not cultured and I don't even know what an Islamic terrorist is. I held his shirt for a few seconds only, then he turned round and spoke to me, sneering. He looked me up and down arrogantly, and said 'If you really want my shirt, I'll give it to you afterwards. I replied with an insult, that's true. It's one of these insults you're told dozens of times and that you often let fall on a pitch" (The Times of 12/7/2006, p.76)

Following these allegations world governing body FIFA, having initially focused its attention exclusively on the French captain, also involved Mr. Materazzi in its disciplinary investigations. In the meantime, Mr. Zidane appeared on French television to give his version of events. He claimed that he had been "very seriously provoked" because the Italian player had "said very hard words" about his mother and sister. He also claimed that he had tried to ignore these comments but that Mr. Materazzi kept repeating them. However, Mr. Zidane failed to specify what the insults had consisted in. he conceded that his headbutt was an "unforgivable gesture" and apologised to all children and educators who were watching the game. Materazzi responded by denying that he had mentioned anything about "religion, politics or racism" (*The Guardian of 13/7/2006, p.19*).

The next day, FIFA announced that it would interview both players as part of its investigation into the affair. Although Mr. Zidane had retired from football immediately after the final, he could still be subjected to penalties capable of affecting any future role he plays in football (*The Guardian of 14/7/2006, p.S7*). In the event, Mr. Zidane was banned for three matches and fined £3,000 – which was commuted to community service in view of his retirement. Mr. Materazzi was banned for two matches (*The Independent of 6/9/2006, p.46*). The Italian made a further statement on what had been said during the altercation, claiming that, after Zidane had informed him that he would give his opponent his shirt afterwards, the latter had replied that he would "rather have his sister". He admitted that it was not a particularly charming thing to say, but claimed that "much worse things are said" on the field of play (*The Daily Telegraph of 6/9/2006, p.S5*).

17. Issues specific to individual sports

Other cases

Daniele De Rossi. The Italian midfielder was suspended for four World Cup matches following his red card which he had earned for elbowing US striker Brian McBride. Initially, the penalty was to have been a ban lasting five matches, but a letter from De Rossi apologising for the incident produced the lesser punishment (*The Mail on Sunday of 24/6/2006, p.103*).

Ivan Kaviedes. Fastidious goal-scoring celebrations have increasingly become circumscribed by rules heavy with disciplinary consequences, and when the Ecuador striker donned a Spider Man mask after scoring against Costa Rica during a group match, it looked as though the governing authorities' wrath might descend upon him. However, FIFA declined to take any action over this incident, saying that to act otherwise would be "petty". Nevertheless, Markus Siegler, the world governing body's Director of Communications, did warn that action may be taken if this kind of celebration were to catch on (*The Independent of 17/6/2006, p.74*).

G14 clubs warned against breakaway move – but find support in European Parliament

The threat – or promise, depending on one's point of view – of Europe's leading clubs forming a breakaway superleague has surfaced in this column with almost monotonous regularity. Whilst the group itself, and its member clubs, have officially denied any such impending move, some of their actions – such as changing their constitutions to accommodate just such a move – are not entirely consistent with such protestations. This has led the European governing body UEFA to issue an indirect warning to these clubs that they could be expelled from their domestic leagues should they ever choose to implement such plans. This warning came in the context of a wider attack made by UEFA Chief Executive Lars-Christer Olsson on the Group, in which he criticised it for having a negative impact on the game:

"We don't have to talk to the G14 – but we will talk to the clubs. There's no room for accommodation – we are throwing lots of olive branches to the clubs. When we talk to the individual clubs their views are not as militant as when they are coming from the G14 office in Brussels. It's creating the conditions for a war rather than trying to find agreements. Most of the clubs are saying 'we don't want to break away' but then they change their statutes to say that now we should be able to organise a competition. Now they have to show their real cards" (*The Independent of 1/4/2006, p.73*)

As if to give another twist to the proverbial jungle animal's appendage, Mr. Olsson suggested that the income from the European Champions' league, which is the most

lucrative tournament in European football, should be more evenly distributed in favour of "those who are actually doing the grass-roots work", rather than pandering to the top sides who want "the entire pie" (*ibid*).

However, in its endeavours to prevent the top 14 clubs lifting themselves into a league of their own, UEFA may have a more powerful opponent in a member of the European Parliament, Toine Manders (Netherlands). In his document "On the economics and consumer aspects of professional sport and the internal market" – which appeared a few days after Mr. Olsson's statement – Mr. Manders inter alia stated his belief that:

"the existing pyramid structure of professional football in Europe is contrary to the principles of the internal market as it is based on the principle of territorial nationality" (attention should be drawn to) "the fact that breakaway leagues are forbidden by UEFA and FIFA and players in such leagues would not be allowed to play for their national team any more (.....) under EU competition and internal market law clubs have the freedom to form cross-boundary leagues themselves if they think this is appropriate" (*The Guardian of 4/4/2006, p.57*).

However, a spokesman for the G14 group, which reported that it had read an "executive summary" of the document, commented that it would be "ludicrous" to present this as evidence of a desire amongst its members to form a secessionist league. Instead, he maintained that G14 supported many of the other aspects of the document, such as its demand for reform of the game's governing bodies (*ibid*).

FIFA rules out retrospective video evidence for "divers"

In the section devoted to the World Cup disciplinary issues (above, p.32), it was reported that the game's world governing body FIFA was intent on coming down hard on those who "dive" in order to secure penalties. Some national authorities have urged FIFA to give chapter and verse, and to allow video evidence in order to trap retrospectively those who have engaged in this kind of cheating. However, the governing body declined to comply with this, stating that it:

"strongly opposes any kind of cheating action, including diving, which goes against the spirit of fair play (....) although a disciplinary committee may rectify serious and obviously incorrect decisions taken by a referee, particularly regarding disciplinary sanctions, a referee's discretionary decision cannot be classed as such" (*The Independent of 5/4/2006, p.69*)

FIFA also pointed out that rules aimed at penalising diving already existed, and that referees should caution any players they believed to have dived (*ibid*).

17. Issues specific to individual sports

Cricket

New technology aimed at refining umpires' decisions to have trial at Champions' Trophy

Cricket has in recent years done a great deal in order to accommodate advances made in modern technology which are capable of assisting match officials in making difficult decisions. However, one sacred principle has hitherto remained unquestioned – that of the unchallengeable nature of the umpire's decision. All this is set to change, following a decision by the International Cricket Council (ICC) to conduct a trial at the international Champions' Trophy in October 2006, whereby both teams are to be given a small number of appeals to the third umpire to be used during a day's play. The query needs to be lodged immediately, before television replays have been consulted, and will have to emanate either from the batsman (in the case of an "out" decision) or the fielding captain the third umpire will then review the incident, although the use of gimmicks such as "Hawkeye" or the "Snickometer" will not be allowed (*The Daily Telegraph of 8/5/2006, p.S19*).

Misgivings have been expressed by leading commentators that this will adversely affect the "spirit of the game" and the role and authority of the on-field umpires (*The Independent of 8/5/2006, p.54*).

The ICC also ruled that test matches where no result is possible may be ended after 75 overs of the final day or at the beginning of the final hour. Previously this could only take place after 30 minutes of the final hour (*ibid*).

Woolmer reported to ICC by Sri Lanka for pict tampering

In early April 2006, Sri Lanka lodged a complaint with the International Cricket Council (ICC) against the Pakistan coach, Bob Woolmer, for interference with the preparation of the pitch prior to the Second test between the two countries. It appears that Mr. Woolmer inserted a thin metal spike into the edge of the pitch at team practice, and was confronted by the ground authorities. Later, following a heated exchange with Sri Lankan groundsman Anuruddha Polonowita, Woolmer returned to bounce a cricket ball between the popping crease and the stumps. Polonowita reported the incident to the ICC match referee, former Australian bowler Alan Hurst, claiming that Mr. Woolmer's actions had violated ICC regulations (*The Guardian of 3/4/2006, p.S17*).

Rugby Union

Tuqiri banned for dangerous tackling (Australia/New Zealand)

In mid-August 2006, it was reported that Australian international wing Lote Tuqiri had been suspended from the game for three months after having been found guilty of a dangerous tackle on New Zealand captain Rickie McCaw during the Tri-Nations tournament. He appeared before a three-man judicial committee in Auckland for the 44th-minute incident in the game, which was won by New Zealand (*The Guardian of 21/8/2006, p.S14*). The player commented that he considered the penalty to have been "harsh", since there had been no malice in the tackle (*The Daily Telegraph of 21/8/2006, p.S24*).

Van Rooyen banned from holding office (South Africa)

In mid-June 2006, it was learned that Brian van Rooyen had been banned from holding any office in the South African Rugby Union, of which he was the President until February this year. Chief Justice Joos Hefer chaired a two-day disciplinary enquiry the previous month and had found Mr. Van Rooyen guilty on six charges of having breached the Union's code of conduct. He was also barred from returning to the Board of Directors of South African rugby, the commercial arm of SARU. Mr. Van Rooyen was found guilty of having lied to the South African coach Jake White. He had informed Mr. White that management committee member Dolf van Huyssteen, as well as the former deputy president Andre Markgraaff, were dissatisfied with the team for the second Test against France the previous year, when in fact it was van Rooyen who was unhappy. He was also found guilty of establishing a president's office at his place of work, attempting to get a sponsored car for his personal use in breach of SARU's sponsorship agreement with a different car firm, of illegally signing agreements with third parties relating to proposed new international competitions, and of giving unlawful instructions to the Chief Executive officer of the union to sign some agreements with third parties over a proposed tournament between English clubs and South African provinces (*The Guardian of 17/6/2006, p.S19*).

17. Issues specific to individual sports

Tennis

Instant replay technology to be used

In early June 2006, it was decided that instant replay video technology would be used, in order to rule on disputed line calls, at the US Open and 10 other men's and women's tournaments. Players will be allowed to challenge two line calls per set – as they were when the system was first used in Miami earlier this year (*The Independent of 9/6/2006, p.53*).

Basketball

O'Neal and Miami heat fined (US)

In mid-June 2006, the National Basketball Association (NBA) announced that top player Shaquille O'Neal had been fined \$10,000 for failing to make himself available to the media after his team, the Miami Heat, lost 99-85 to the Dallas Mavericks. The Miami Heat organisation was also fined \$25,000 for failing to ensure that its players comply with the rules concerning media interviews (*The Guardian of 13/6/2006, p.S17*).

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The law reports in the Sport and the Law Journal are compiled by Barristers at Blackstone Chambers, Middle Temple, under the editorship of Nick De Marco. The individual reporters (indicated by their initials after the date of the judgment) are Mark Vinall, James Segan and Nick De Marco. The Reports should be cited by their “SLJR” number

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Clinical negligence – negligent advice to player causing economic loss to football club – whether doctor owed duty to club in contract or tort

WEST BROMWICH ALBION FOOTBALL CLUB LTD V EL-SAFY

Court of Appeal (Civil Division) (Mummery and Rix LJJ, Peter Smith J), [2006] EWCA Civ 1299, 11 October 2006 (Reporter: MV)

Facts

Michael Appleton, professional footballer signed to West Bromwich Albion FC, suffered a knee injury in training which was treated by a consultant orthopaedic surgeon. The surgeon's advice was negligent, the player never played professional football again and the club suffered financial loss, which it sought to recover from the surgeon.

The player was contractually obliged to undergo such treatment as the club's advisers prescribed. The player's appointment with the surgeon had been arranged by the club's physiotherapist, who attended the appointment with the player and considered the surgeon's advice with the player. The surgeon's fees were paid by the club's medical insurers, and the surgeon rendered an invoice addressed to the club, as he had done in respect of other players in the past.

On the trial of a preliminary issue, Royce J held that the surgeon owed the club no duty in contract or tort. The club appealed.

Held (dismissing the appeal)

It was common ground that the surgeon was party to a contract. The question was the identity of the other party: was it the player or the club? The natural objective interpretation of the booking of the consultation was the making of a contract on behalf of the player, and it was not necessary for a contract with the club to be implied. The danger of a conflict of interest between a sports employer and a sportsman, all the more important where the sportsman may think that his principal interest is tied up in his soonest possible availability to his employer, militated against implying a contract with the employer rather than, or as well as, the patient. Despite the unusual and strong terms of the player's contract with the club, the club recognised that treatment depended on his consent. His agreement was necessary, and the situation could not therefore be presented as simply one where the

club was buying in medical services for him, as though he were a racehorse.

As for the claim in tort, even assuming foreseeability and reliance, there was no assumption of responsibility to advise the club or sufficient proximity to give rise to a duty of care to the club, and it was not fair, just or reasonable to impose one. The surgeon's concern is or ought to be not only primarily, but exclusively, with his patient's well-being, not with the club's financial circumstances. The dominant relationship was that of doctor and patient, and the dominant context was that of the player's health, not his employer's financial security. If the club had wanted the surgeon's advice for the purposes of its own interests, it could have made that plain to him. He would then have been put in a position where he could choose to charge for that advice and the risks involved in giving it, and/or of disclaiming liability.

Commentary

On any view of the facts, there was a fairly close relationship between the club and the surgeon, and the Court of Appeal's rejection of any duty in contract or tort appears to owe a great deal to concerns about potential conflicts between the financial interests of the club and the long-term health of the player. Rix LJ emphasised that although players appeared as assets on the club's balance sheet, unlike racehorses they have their own rights and obligations.

It is not clear from the judgment whether the club was actually bearing the claimed losses, or whether it had recovered under a first-party insurance policy and its insurer was seeking to shift the loss. Either way, clubs should consider what arrangements they have in place, and whether it is necessary to make express provision for third-party advisers to owe duties to the club as well as the player, on the basis that no such duty is likely to arise otherwise. Players and their advisers may wish to take note of the Court's finding that, as between the surgeon and the player, the player would have been liable to pay the surgeon's fees if the club and its insurer had not done so.

(2006) SLJR 9**Horse racing – Broadcasting rights – Bookmakers – EC Competition law****ATHERACES LIMITED v THE BRITISH HORSE RACING BOARD***High Court, Chancery Division (Mr Justice Etherton), [2005] EWHC 3015 (Ch), 21 December 2005 (Reporter: JS)***Facts**

The Claimant (“Attheraces”) was a provider of websites, television channels and other audio-visual media relating to British horse racing. The Defendant (“BHB”) played a central policy, promotional and administrative role in British racing. BHB maintained and operated a large database of race meetings, runners, times and similar information. As part of its commercial operations, BHB supplied information from that database for payment to interested parties, including Attheraces.

Attheraces brought proceedings for an injunction, declaration and other relief to restrain BHB’s alleged abuse of a dominant position under Article 82 of the Treaty of Rome and section 18 of the Competition Act 1998. The abuses alleged by Attheraces were: (i) “excessive, unfair and discriminatory pricing” by BHB in the supply of pre-race data; and (ii) unreasonable refusal by BHB to supply such data to Attheraces. BHB argued that it was not dominant, and in any event had not abused its position.

Held (upholding the claim)

The product supplied by BHB was pre-race data. It was not “the ability to create value from the whole show of British racing”, as BHB contended. The relevant product market was the market for the supply of UK pre-race data to those in the horse racing industry that required such information for the services they provide their customers. The geographical extent of that product market was all countries outside the UK and Ireland. BHB was dominant in that market.

BHB had abused its dominant position by:

- (i) threatening without justification to discontinue the supply of pre-race data to Attheraces, even though Attheraces was an existing customer of BHB and pre-race data was an essential facility controlled by BHB;
- (ii) charging prices which were substantially in excess of BHB’s normal charges for comparable customers without objective justification; and

- (iii) charging prices which were significantly in excess of the economic value of BHB’s pre-race data and not otherwise justified.

Commentary

This is a significant judgment for all those connected with British horse racing. Unless and until the Court of Appeal overturns Mr Justice Etherton, it has been held that BHB’s data licensing operation (as constituted at the relevant time) essentially leveraged a monopoly over the gathering and processing of pre-race data in order to charge an unfair surplus to key market participants such as broadcasters and bookmakers. In conjunction with the decision of the Court of Appeal in the William Hill case, this is likely to put a considerable brake on the commercial ambitions of BHB, and to give a corresponding fillip to participants in downstream markets such as bookmakers.

It is also a significant judgment for competition lawyers. The lawyers for Attheraces noted after the judgment that it had resulted in a number of legal firsts, namely that it was:

- (i) the first time a court in the United Kingdom had ever found that a business practice is an abuse of a dominant market position;
- (ii) the first time a court in the United Kingdom had definitively ruled that a proposed price or licence fee was illegal because it was “excessive”; and
- (iii) the first time a national court anywhere in the EU had applied the controversial “essential facilities” doctrine, which requires owners of key assets or intellectual property to make these available in order to avoid distorting competition.

(2006) SLJR 10**Horse racing – Jockey Club – Courts’ supervisory jurisdiction over sporting disciplinary bodies – deference to sporting bodies’ disciplinary processes – criminal charges****KIERON FALLON v HORSERACING REGULATORY AUTHORITY***High Court, Queen’s Bench Division (Mr Justice Davis), [2006] EWHC 2030 (QB)
28th July 2006, (Reporter: JS)***Facts**

The Claimant, Mr Fallon, was one of the best jockeys in the world of racing. The Defendant was a division of the

Jockey Club, whose functions, amongst other things, included the licensing of jockeys. On 3rd July 2006, after a lengthy investigation, Mr Fallon was charged by the Crown Prosecution Service with common law conspiracy to defraud, by reason of his allegedly having been involved in race-fixing. On the same day, the disciplinary Panel of the Defendant decided to prohibit Mr Fallon from riding in races in Great Britain until the conclusion of the proceedings or further order.

Mr Fallon appealed, as was his right, to the Appeal Board. Mr Fallon argued that the criminal charges against him were “weak”, and therefore did not justify his prohibition. Mr Fallon argued that, in order to determine the correctness of this submission, the Appeal Board was obliged to review the parts of the evidence which had been disclosed by the Crown Prosecution Service, and come to its own conclusion as to the strength of the criminal charges. The Appeal Board rejected this argument on the basis that it would pre-empt the Crown Prosecution Service, and would risk concentrating unduly on specific aspects of the prosecution evidence without allowing the consideration of the full range of such evidence which would take place at a criminal trial.

Mr Fallon brought proceedings in the High Court for the quashing of the Appeal Board’s decision on the grounds that it had erred in law by:

- (i) failing to consider the Crown Prosecution Service evidence against Mr Fallon; and/or
- (ii) coming to a decision which was unjustified and disproportionate.

Held (dismissing the proceedings)

The High Court had a well-established supervisory jurisdiction over decisions of bodies such as the Appeal Board. The approach to be adopted was essentially that which the Administrative Court would adopt in a public law case. A significant degree of deference should be shown to sporting bodies’ disciplinary processes.

Mr Fallon’s first argument, that the Appeal Board had erred by failing to consider the Crown Prosecution Service evidence, was incorrect. It would be “relatively rare” that a body such as the Appeal Board could justifiably examine the weakness of a Crown charge. That decision would have to be taken according to the circumstances of each case. However, there was no obligation to make such an examination. In the present case, the approach urged by Mr Fallon risked:

- (i) second-guessing the CPS;
- (ii) enabling him to “cherry-pick” parts of the prosecution case; and possibly
- (iii) necessitating a “collateral mini-trial in front of a body

which is not a Crown court or having criminal law functions”.

Mr Fallon’s second argument, that the penalty was unjustified and disproportionate, was also incorrect. Although prohibition from racing would cause a very significant and irremediable detriment to Mr Fallon, the Appeal Board had borne this fully in mind when coming to its decision. Furthermore, the Appeal Board was entitled to take into account the effect which its decision would have on the integrity and public standing of horseracing. There was nothing in the Appeal Board’s decision which was capricious or obviously wrong.

Commentary

There are three especially notable points which can be extracted from this judgment.

First, the High Court’s supervisory jurisdiction over the decisions of sports disciplinary bodies, and the wide margin of discretion to be afforded to such decisions, are now well-established. There does not appear to have been any serious argument about the relevant principles in this case.

Secondly, it will be rare indeed in the light of this case that a sports disciplinary body will be prepared to countenance second-guessing the outcome of criminal charges against a sportsperson. This does not of course mean that a criminal charge will lead to automatic prohibition; the penalty is still in the hands of the decision maker. However, there will be little or no scope for “mini-trials” of the sort criticised by Mr Justice Davies.

Thirdly, and most interestingly, Mr Justice Davis strongly endorsed the Appeal Board’s entitlement to have regard to the need to maintain public perceptions of integrity in horse racing, given that the charges “were so close to the very heart of the sport”. This passage of his judgment will be of great assistance to those prosecuting cases before disciplinary bodies wherever charges or allegations of dishonesty or corruption are levelled.

(2006) SLJR 11 (previously reported (2004) SLJR 14)**EC Competition law – whether rules relating to questions of purely sporting interest fell outside the scope of Arts. 81 and 82 EC – IOC doping control rules****MECA-MEDINA AND MAJCEN V COMMISSION OF THE EUROPEAN COMMUNITIES*****European Court of Justice, Case C-519/04P, 18 July 2006 (Reporter; MV)*****Facts**

Two long-distance swimmers, David Meca-Medina and Igor Majcen, tested positive for Nandrolone in 1999 and were suspended from competition for 4 years by FINA, the swimming governing body, applying the IOC doping control rules. On appeal to the CAS, the suspension was reduced to 2 years. The swimmers made a complaint to the European Commission that the doping control rules (in particular the fixing of the limit for Nandrolone at 2 nanograms per millilitre of urine) were incompatible with EU rules on competition (Art. 81 and 82 EC) and freedom to provide services (Art. 49 EC).

The Commission rejected their complaint and they brought an action for annulment before the Court of First Instance (CFI). The CFI dismissed the claim, holding that the doping control rules were rules relating to questions of “purely sporting interest”, which fell outside the scope of the relevant provisions of EU law because they were not connected to “economic activity”. The swimmers appealed to the Court of Justice.

Held (dismissing the appeal)

The mere fact that a rule is purely sporting in nature does not have the effect of removing it from the scope of the EC Treaty. If the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the Treaty including those relating to free movement and competition. Even if a rule does not constitute a restriction on freedom of movement because it has nothing to do with economic activity, that does not mean that EC competition law does not apply. In holding that Arts. 81 and 82 did not apply simply because the rule was regarded as purely sporting, the CFI made an error of law.

To apply Art. 81 it is necessary to take account of the overall context and the objectives of the disputed rule,

and to consider whether the anticompetitive effects of the rule are inherent in the pursuit of those objectives and proportionate to them. The anti-doping rules had the legitimate aim of safeguarding fairness, equal chances for athletes, athletes’ health, the integrity and objectivity of competitive sport and ethical values in sport. The imposition of penalties was necessary to ensure enforcement of the doping ban. However, the penalties were capable of producing adverse effects on competition because, if unjustified, they could result in an athlete’s unwarranted exclusion from sporting events. The restrictions must therefore be limited to what is necessary to ensure the proper conduct of competitive sport, both in respect of the definition of a doping offence and the severity of the penalties for it. The swimmers had failed to establish that the threshold levels of Nandrolone had been set so low that they should be regarded as not taking sufficient account of the state of scientific knowledge at the time the rules were made, or at the time they were applied in this case. More recent developments in scientific knowledge were not relevant. The swimmers had not challenged the proportionality of the penalties imposed. An action for annulment of a Commission decision on a competition law complaint was not the appropriate route for a challenge on grounds other than competition law and the Court therefore refused to consider the Art. 49 EC challenge. Accordingly no breach of EC law had been established.

Comment

Most sports lawyers will by now be familiar with this important decision of the ECJ. The earlier decisions of the Commission and the CFI, endorsed by the Opinion of Advocate General Léger, had given comfort to sports governing bodies that there was a category of “purely sporting” rules which were not subject to EC law challenge. The decision in Meca-Medina that EC competition law does apply to (at least some) purely sporting rules thus represents a significant change to the legal landscape of sports regulation. Since it will frequently be possible to characterise a regulatory body as an “undertaking” or “association of undertakings” for the purposes of Art. 81, courts will be required to engage with detailed questions of proportionality, in relation to both the substance of the sporting rules, and the penalties for those found to be in breach of them. In Meca-Medina itself, the ECJ made its own assessment of whether the permitted level of Nandrolone in urine took proper account of what was known at the relevant time about the potential for Nandrolone to be produced endogenously, and would have examined whether the penalty was excessive but for the fact that this had not been pleaded.

Whether this will represent as significant a change in practice as it does in theory depends on the degree of deference which national competition authorities and courts are willing to accord to sports regulatory bodies in conducting the proportionality assessment. This may depend on the nature of the particular decision being challenged and questions of relative expertise. All other things being equal, a court is likely to be more willing to question the proportionality of a penalty than to become involved in subjects of scientific controversy (although it is true that the ECJ in *Meca-Medina* made no reference to the expertise of sporting bodies, even though the case had been considered by CAS on two occasions).

In procedural terms, those seeking to challenge sporting decisions may well find the option of a complaint to the competition authorities attractive (perhaps alongside other avenues), since it is cheap and carries no adverse costs risk.

(2006) SLJR 12

Doping – WADA code – No Significant Fault or Negligence – “Spiking” of drinks – requirement of athlete to prove how substance entered his body

INTERNATIONAL RUGBY BOARD v KEYTER

Court of Arbitration for Sport (President Massimo Coccia) CAS 2006/A.1067, 13 October 2006 (Reporter: NDM)

Facts

The case concerned an appeal by the International Rugby Board (“IRB”) against the decision of the Rugby Football Union (“RFU”) Review Panel to uphold the decision of the RFU Disciplinary Panel to ban Jason Keyter from all participation in RFU competitions for 12 months following a positive doping test.

Jason Keyter is a US citizen and a professional rugby player with Esher RFC – an affiliate of the RFU. On 22 October 2005, Mr Keyter was selected for an in-competition doping test and tested positive for Benzoyllecgonine – a prohibited substance, classified as a stimulant under the WADA Prohibited List.

Mr Keyter appeared before an RFU Disciplinary Panel hearing on 12 January 2006 where he pleaded guilty to a doping offence but claimed the prohibited substance had entered his body as a result of a “spiked” drink. He said that he was in a nightclub on 19 October 2005 and accepted some drinks from strangers sitting at the next table in the club. He claimed the strangers must have

put cocaine into one of the drinks (Benzoyllecgonine is a cocaine metabolite).

The Disciplinary Panel found that Mr Keyter was guilty of a doping offence but that, given his good character evidence submitted, on the balance of probabilities the prohibited substance entered into his body through a “spiked” drink. Therefore, although he bore some responsibility for his behaviour, he bore “No Significant Fault or Negligence”. In the circumstances, the Disciplinary panel decided to suspend Mr Keyter from participation in competitions for 12 months. The RFU Review Panel upheld the decision.

The IRB appealed the decision as too lenient. In particular, the IRB claimed that as Mr Keyter had failed to prove how the prohibited substance had entered his body he was not able to argue that he bore No Significant Fault or Negligence and he should have been banned for the mandatory period of two years in the absence of such a defence.

Held (allowing the appeal)

The CAS found that the RFU had applied the wrong test. The mandatory sanction for a first doping offence is two years. For the athlete to eliminate (by a finding of No Fault or Negligence) or reduce (by a finding of No Significant Fault or Negligence) that ban a finding of exceptional circumstances must be made.

To establish exceptional circumstances, the athlete must prove (a) how the prohibited substances came to be present in his body, and (b) that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had been administered the prohibited substances. This would establish No Fault or Negligence. To make a finding of No Significant Fault or Negligence the Panel would have to, in addition to considering these matters, decide that, given the totality of the circumstances, the athlete’s fault or negligence was not significant – the athlete would have to prove that it was not significant on the balance of probability.

The RFU was not entitled to find that the prohibited substance had entered Mr Keyter’s body as a result of a spiked drink. There was no medical evidence, or other direct evidence of the night in question, to support Mr Keyter’s claim that it must have done so. The claim that the prohibited substance entered Mr Keyter’s body as a result of a spiked drink was only a speculative guess and not proof of what actually occurred. The failure to establish how the prohibited substance entered his body meant that Mr Keyter was not able to rely on

exceptional circumstances to reduce the mandatory ban.

In any event, even if Mr Keyter had been able to establish how the prohibited substance entered his body it would appear he had been significantly negligent. He claimed he consumed nearly half a bottle of vodka and at least one glass of a cocktail containing champagne, vodka and Red Bull. He had not exercised any caution, let alone the utmost caution).

The CAS ordered that the ban must be varied and Mr Keyter suspended for the full mandatory two year period.

Commentary

This case demonstrates how difficult it is for an athlete to be able to rely on the “spiking defence” in WADA doping cases.

First, it will usually be very difficult to prove spiking. Where a person has deliberately concealed the administration of a prohibited substance from another, such that the person doped is not aware that he has been doped, it will always be difficult for that person, after the event, to prove (rather than speculate) that his drink was spiked. Character evidence that the athlete would never do such a thing etc. will clearly not be enough to establish such proof according to Keyter. So long as it is impossible to prove how the prohibited substance entered the athlete’s body, he will be unable to secure any reduction in the mandatory two year ban for a first offence.

Secondly, most circumstances where an athlete claims his drink was spiked are likely to involve a significant amount of negligence. Accepting a drink from a stranger in itself, for a professional athlete, is likely to be negligent. To do so having already consumed such quantities of alcohol such that his faculties are impaired will almost always amount to significant negligence.

Professional athletes will continue to have to exercise the utmost caution in accepting drinks, medicines or other substances from third parties. It is increasingly difficult to rely on the such circumstances as exceptional circumstances for the purposes of WADA doping jurisprudence. The rationale for such a strict approach is obvious: if athletes were able to get away with reductions in bans by claiming they were not guilty and somebody else must have spiked their drink, without evidence of that fact or the care they took to prevent it occurring, then this would create a large loophole in the anti-doping regime and every athlete accused of a doping offence would simply point the finger at an unnamed stranger.

On the other hand, it is easy to sympathise with the RFU’s decision in circumstances where they were persuaded that Mr Keyter was honest and was unlikely to have deliberately taken the substance, and in circumstances where the substance taken (cocaine) is not a performance enhancing drug – although this latter point may be more relevant to the debates around the reclassification of recreational drugs in sport.

(2006) SLJR 13

Doping – WADA Code – FIFA Anti-doping Code – Compatibility of Codes with each other and with Swiss law – Proportionality – Minimum period of mandatory sanctions

FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION & WORLD ANTI-DOPING AGENCY (ADVISORY OPINION)

Court of Arbitration for Sport (President: Mr Nater), CAS 2005/C/976 & 986, FIFA & WADA, 21 April 2006 (Reporter: NDM)

Facts

Both the Fédération Internationale de Football Association (“FIFA”), the international governing body for football, and the World Anti-Doping Agency (“WADA”) independently requested the CAS provide an Advisory Opinion on a number of matters. FIFA and WADA were in dispute as to whether certain rules of the World Anti-Doping Code (“WADC”) concerning the imposition of sanctions for doping offences were admissible under Swiss law. FIFA were concerned that the standard sanction of a two year ban for a doping offence, with limited possibilities of eliminating or reducing the sanction in exceptional circumstances, was unlawful under Swiss law (the national law governing FIFA), since Swiss law required an individual assessment of the sanction, based on the objective and subjective circumstances of the individual case.

The Advisory Opinion is a unique process and procedure. It is non-binding, in an arbitration format, and answers specific questions. The answers may set out certain general principles and act as guidelines as to possible ways of viewing and characterizing particular situations.

Opinion

The CAS first proceeded with a detailed analysis of the differences between the FIFA Anti-Doping Rules (“FIFA DC”) and the WADC. It concluded (para 88) that the two sets of rules are not substantially different with

regard to the method to determine the individual sanction for a specific anti-doping rule violation in that both measure the conduct of the athlete against a duty of the utmost caution. However the CAS highlighted the following (amongst others) as material differences in the two sets of rules (para 121):

- (1) The minimum duration of the ineligibility period for a first offence: 6 months under art. 62.2 of the FIFA DC; 1 year according to Art. 10.5.2 of the WADC.
- (2) The degree of fault which is relevant for the determination of the individual sanction: WADC Art. 10.5.2 provides for a reduction of the standard two years' ineligibility only if "no significant fault" demonstrated; FIFA DC Art 62.1 provided for a consideration of all degrees of guilt or fault to determine the sanction.
- (3) The FIFA DC did not have an analogous provision to the WADC provision providing for no sanction where the athlete proves no fault or negligence.
- (4) The WADC did not have any time limit during which an offence could be regarded as a "second offence" and thus attract a more severe sanction.

On the central issue between the parties the CAS held that whilst Swiss law granted an association a wide discretion to determine the obligations of its members, this was limited by a mandatory prohibition on excessive penalties. To find out whether a sanction is excessive, a judge must review the type and scope of the proved rule-violation, the individual circumstances of the case, and the overall effect of the sanction on the offender. However, only if the sanction is evidently and grossly disproportionate in comparison with the rule violation and if it is considered as a violation of fundamental justice and fairness, would the Panel regard such a sanction as abusive and contrary to Swiss law.

Whilst a mandatory two-year ban could constitute a very harsh punishment for an athlete it constituted a credible deterrent against doping. The fact that this could be reduced where an athlete could demonstrate no significant fault or negligence was in full compliance with the principle of proportionality (a principle of Swiss law).

The principle of proportionality required a consideration not only of the circumstances of the offence and the effect of a ban on the athlete, but also on the need to have a uniform and harmonised concept in the fight against doping. Swiss law did not require the reduction of the minimum sanction from 1 year to 6 months in

cases of no significant fault, nor did it require an imposition of a less severe sanction than a 2 year ban if the athlete could not demonstrate that he bore no significant fault.

However, an unlimited period in which a finding could be made that an offence is a "second offence" is most likely a violation of Swiss law. The CAS would consider a period of 8 years to be a reasonable one in which an offence could be regarded as a second offence. FIFA was not obliged to limit the time period to 2 years to be in accordance with Swiss law.

Both the WADC and the FIFA DC are in compliance with Swiss law. There are no mandatory provisions of Swiss law that require FIFA to deviate from the WADC with the only exception of the unlimited period to determine a second offence.

Commentary

This Opinion is of interest to those involved in doping cases for a number of reasons. It discusses in depth the principles of both the WADC and the FIFA DC and comprehensively sets out the differences between the two codes.

In determining that the WADC (save for one point) was not in breach of Swiss law and not in breach of the principle of proportionality in particular, the Opinion will be a disappointment to some who argue that the WADC is far too strict and can often lead to disproportionate results. However, the mere fact that the CAS came to the conclusion that the WADC is in general compliant with the principles of proportionality does not mean that every result reached under the WADC will be proportionate. If the principle of proportionality applies then an individual assessment is necessary. Considered alongside the developments in *Meca-Medina* ((2006) SLJR 11) and *Puerta*, the Opinion could give further weight to those who argue that the WADC must be applied proportionately, although it is likely to also be relied on by those who say that proportionality does not come into it since the structure of the WADC is compliant with the general principle of proportionality in any event. It continues to be the case that it will only be in exceptional circumstances that CAS (or other sports tribunals) will consider a sanction under the WADC to be disproportionate, and given that exceptional circumstances can provide for the elimination or reduction of the mandatory sanction, such cases are likely to be few and far between.

In other respects, the Opinion draws out the stalemate between FIFA and WADA. FIFA continue to refuse to

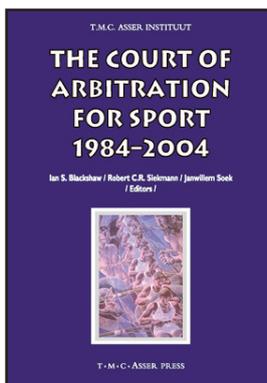
sign up to the WADC because they argue the code does not properly recognise the principle of proportionality. FIFA represent one of the most important pressures on WADA to relax some of its rules. Had FIFA been successful in securing an Opinion that the WADC is in fundamental breach of the principle of proportionality and unlawful under Swiss law it would not only have justified FIFA's refusal to sign up to the WADC, it would have seriously undermined the WADC. However, although the Opinion more or less gave the WADC a clean bill of health, it also made clear that FIFA's own code was not in breach of Swiss law and thus can be seen as simply concluding that there is nothing wrong in the status quo continuing.

Football is likely to come under increased pressure to sign up to WADC, however, and this Opinion will overall support that trend. The Opinion should be of particular interest to British sports lawyers since the recent announcement that English FA is signing up to WADC, and that the new anti-doping rules come into force from 1 January 2007. The Opinion provides some indication of how CAS may consider appeals (it is assumed doping appeals from the FA will go to CAS) and in particular the arguments about proportionality those who represent football players may make. 

Reviews



Reviews



Ian Blackshaw, Robert Siekmann & Janwillem Soek (eds.), *The Court of Arbitration for Sport 1984-2004* (2006) TMC Asser Press (577 pp) £85.00 (hardback).

CAS has just celebrated its 20th anniversary, and this book is published to mark that anniversary. During

those 20 years CAS has progressed rapidly from the first of Shakespeare's "seven ages of man", infancy, to the fourth, justice. And it has done so with remarkable efficiency under the watchful and wise eyes of Judge Kéba Mbaye and the Secretary-General for the last few years, Matthieu Reeb.

CAS is now recognised as the Supreme Court of Sport, a position that a few years ago might have been unthinkable. What has been the reason for its success? The editors of this useful book do not attempt to answer that question. What they do is to divide the book into five sections, and provide, through the pens of the contributors, a bird's eye view of the way in which the Court has developed.

The five sections into which the book is divided are: first, general aspects, including the mission of the CAS and its organisation; secondly, a review of the organs and instruments of the CAS; thirdly, particular aspects of CAS proceedings, such as, arbitrability, the examination of witnesses and experts, provisional measures; and, fifthly, some general articles, including a discussion on the existence of a *lex sportiva* or a *lex ludica*.

Thus, it can be readily seen that the book is wide-ranging, and comprehensive in its scope. The editors have chosen their contributors with care and skill from amongst the most thoughtful and experienced of CAS arbitrators, so that the reader will be provided with an holistic view of the CAS.

This is not a book to read from cover to cover, but it provides a useful starting point for those interested in the history of the CAS or who want to be pointed in the right direction in their researches. But such is the pace of the development of the CAS that the book must inevitably become out-of-date within a short time. That is not a criticism of the editors, for they cannot have intended the book to provide more than a "bird's eye" view of the CAS.

What the book illustrates clearly is the manner in which the CAS has married the experience and expertise of civil lawyers and common lawyers to produce tribunals in which the approach of those different, but complementary, disciplines are melded together in a coherent whole. The CAS has been the beneficiary of the outcome of the clash between civil law and common law procedures that once disfigured international commercial arbitration. Today in international commercial arbitration the production of witness statements and documents is the norm, and, increasingly, the CAS is adopting those procedures.

In some ways the most interesting section of the book is that in which the decisions of the Swiss Federal Tribunal are recorded. Although the CAS is the Supreme Court of Sport, it has its seat in Lausanne, Switzerland and its decisions can be reviewed by the Swiss Federal Tribunal. The presence of that Tribunal in the background is one of which every CAS arbitrator is, or should be, aware, and it is a salutary presence. Thus, the important decision of the CAS Tribunal in the case of *Lazutina and Danilova v IOC* not only cemented the status of the CAS as an independent arbitral tribunal, but also, in the light of some criticism of the CAS panel of arbitrators, has led to a review of the panel by the ICAS, and to the publication of new guidelines about who may appear as advocates at CAS hearings. The latter issue had become acute because a number of arbitrators on the CAS panel also acted as legal advisers to international federations, and, if necessary, as advocates, for parties who were appearing before the CAS. Whilst there clearly cannot be a rule precluding the giving of advice, it has been felt increasingly that the appearance of such persons as advocates does not present the correct public face of the CAS. After all, the need for justice not only to be done, but to be seen to

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be done, is just as acute at the CAS as in any other judicial tribunal. Thus, the CAS adapts its practices and procedures to the developing world in which it operates.

There will be more challenges for the CAS in the future. More and more sports will submit their disputes to the jurisdiction of the CAS, and an increasing

Reviews

number of those disputes will be commercial disputes. With considerable foresight, the ICAS has added well-known international commercial arbitrators to the CAS Panel. Indeed, such has been the success of the CAS in resolving well-publicised sports disputes that commercial arbitrators have been pushing their credentials to be added to the panel of CAS arbitrators. Sports arbitration has become “sexy”, and, increasingly recognised as an one of the three important pillars of international arbitration, taking its place alongside international commercial arbitration and investment dispute arbitration.

The CAS has now lived through its infancy and childhood. Its teething problems are behind it, but the future will hold yet more challenges. As the editors of this valuable book have demonstrated, the CAS is sufficiently robust to deal with those challenges, and to continue to provide a service as the Supreme Court of Sport. 

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Member of CAS.