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Editorial

By Simon Gardiner, Editor

This issue of the Sport and the Law Journal concerns a number of on-going and current issues. The Opinion and Practice section provides a ‘highlights’ extract from the most recent Deloitte’s ‘Annual Review of Football Finance’ for 2008 that provides the annual ‘snap shot’ of the state of the national game. The journal has a long standing agreement to publish material from the Review – the full document can be purchased with full details on page 7.

The Analysis section features two articles focusing on issues connected to the Olympic Games. Firstly, Abraham Mouritz’s ‘Challenging the legal enforceability of the Vancouver 2010 Olympic Games’ anti-ambush marketing provisions’ reviews the provisions put into pace to regulate ambush marketing for this event. Secondly, Laura Donnellan’s ‘Gender Testing at the Beijing Olympics’ charts the sometimes dishonourable history of the IOC’s efforts to manage this issue and the new procedures that have been put into place.

Additionally the regular Sports Law Foreign Update by Walter Cairns, the Sport and the Law Journal Reports and the Review Section can be found.

Finally, I would like to say a few words about Edward Grayson. Edward died on September 23, 2008, aged 83. He has been hugely influential in the development of Sports Law in Britain both as an area of legal practice and as an area of academic inquiry. He was also the first President of BASL and was very influential in its creation. The title of the Founding Father of British Sports Law is fitting. A subsequent issue of the Journal will focus on his legacy.

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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Annual Review of Football Finance 2008 Highlights

By Sports Business Group at Deloitte.

Europe’s premier leagues

- The total European market grew to €13.6 billion in 2006/07, a €1 billion increase in revenue on the previous year.

- Revenue for the ‘big five’ European leagues exceeded €7 billion for the first time in 2006/07, up €402m (6%) to €1 billion. The increase in revenue was achieved despite a €236m reduction in Italian Serie A revenues in 2006/07, which was primarily due to the relegation of Juventus into Serie B. Total revenue for the other four ‘big five’ European leagues increased by €638m (12%) in 2006/07.

- The English Premier League clubs’ revenue totalled €2.3 billion in 2006/07 (up 11%). Premier League total revenue was €0.9 billion (65%) higher than that reported by its nearest challenger, the German Bundesliga (€1.4 billion). For the first time since 2001/02, the Premier League has reported the highest revenue from each of the three main sources – matchday, broadcast and commercial – amongst the ‘big five’ European leagues.

- Germany’s Bundesliga and Spain’s La Liga achieved the highest percentage increases in revenue – both up 15% – which helped these two leagues overtake Italy’s Serie A in 2006/07. Juventus’s return to Serie A in 2007/08 should result in a close race for second place in next year’s edition, behind England’s Premier League.

- In four of the ‘big five’ European leagues, the wages/turnover ratio was in the relatively narrow range 62%-64% in 2006/07, with the German Bundesliga proving to be the exception with a much lower ratio of 45%. Despite a €184m increase in revenue in 2006/07, Bundesliga wage costs only increased by €12m, which bucks a trend seen elsewhere in the ‘big five’ leagues where increases in revenues have historically largely flowed through to increased wage costs.

- Total wage costs for the ‘big five’ leagues increased by €260m (7%) in 2006/07, primarily driven by a €171m (13%) increase in English Premier League clubs’ wages to over €1.4 billion. Premier League clubs’ wages were more than €0.6 billion (75%) higher than in Spain’s La Liga (€0.8 billion) and double the total wage costs paid by any of the other ‘big five’ leagues.

- For the first time since our analysis began, the English Premier League has been knocked off the top spot in terms of operating profits amongst the ‘big five’ European leagues. With an impressive €168m (206%) increase in operating profits to €250m in 2006/07, the German Bundesliga generated €109m more in operating profits than England’s Premier League (€141m), its closest rival. Bundesliga clubs’ operating margin was 18%, three times as high as the 6% for Premier League clubs.

- The improvement in Bundesliga clubs’ profitability has not been matched by recent on-pitch success. During the five seasons from 2003/04 to 2007/08, no Bundesliga clubs have reached the semi-finals of the UEFA Champions League. In contrast, the English Premier League has provided three semi-finalists in both 2006/07 and 2007/08 and at least one finalist every season since Liverpool’s success in 2004/05.

Revenue and profitability

- The overall revenues of the top 92 professional clubs exceeded £2 billion for the first time in 2006/07.

- Premier League clubs’ revenues increased by 11% (£151m) to £1,530m in 2006/07. Average Premier League club revenues exceeded £75m for the first time.

- Championship club revenues increased by 3% (£11m) to £329m in 2006/07. League 1 revenues were unchanged at £102m whilst League 2 revenues increased by 3% (£2m) to £63m.
Annual Review of Football Finance 2008 Highlights

- The key components in Premier League clubs’ revenue growth in 2006/07 were matchday revenues, which increased 19% (£87m) and commercial revenues which increased by 15% (£52m). Broadcasting revenues were relatively flat in the year, increasing by 2% to £592m. We estimate that broadcasting revenues increased by just under 50% in 2007/08.

- The £87m increase in 2006/07 was a record for matchday revenue growth in a single year. Arsenal was the main contributor, reporting a 105% matchday revenue increase from £44m to £91m for their first season in the Emirates Stadium. Other key contributors were Manchester United, Chelsea and Tottenham Hotspur with increases of £21m, £17m and £15m respectively.

- The £52m rise in commercial revenues in 2006/07 was also the biggest increase in that revenue stream ever recorded. Again, some of the largest clubs had significant growth in commercial revenues, with Chelsea recording the biggest increase (£14m).

- Revenue growth was focussed amongst the ‘big four’ clubs. On average, ‘big four’ club revenues increased by 24% (£34m) to £178m, while the rest of the Premier League clubs had average revenues of £50m in 2006/07.

- We estimate that total Premier League clubs’ revenues were £1.9 billion in 2007/08 based on the new broadcasting deals. If Premier League clubs maintain growth from both matchday and commercial revenues then an annual total in excess of £2 billion should be reached before the end of the decade.

- Increases in both wages and other operating costs have led to a fall in operating profits for the Premier League clubs for the second consecutive year after five years of growth. Operating losses amongst Championship clubs increased for the third successive year, but the gap in operating performance between the average Premier League and Championship club decreased from £9.1m to £7.9m.

- In 2005/06, 16 Premier League clubs recorded operating profits. In 2006/07 half that number – eight clubs – recorded an operating profit. These were five long standing, well supported, Premier League clubs; Manchester United, Arsenal, Tottenham Hotspur, Liverpool and Newcastle United and the three promoted clubs; Reading, Sheffield United and Watford.

- Manchester United shattered their own record for operating profits set in 2003/04 (£52m), with operating profits of £66m in 2006/07.

- We expect that operating profits will have been boosted in 2007/08 by increased broadcasting revenue. The question is how much of the increased revenues have already been spent and will continue to be spent on wages and transfers. We expect that 2007/08 operating profits for the Premier League clubs will have exceeded the 2004/05 record of £162m, and could have doubled from 2006/07 levels of £95m to exceed £200m for the first time.

- Aggregate operating losses for Championship clubs increased from £53m to £75m; in excess of £3m per club in 2006/07. Increased parachute payments and solidarity payments from the Premier League in 2007/08 should help arrest this decline.

- Total taxes contributed by the top 92 professional clubs were at a record high of £710m in 2006/07, up 11% on 2005/06. As a result, total taxes paid to the Exchequer by the clubs from the top four divisions over the years since 1992/93 are in excess of £5.5 billion.

Wages and transfers

- After the unprecedented fall in wage costs in 2004/05, Premier League clubs’ wage costs increased by 13% to £969m in 2006/07, a second consecutive year of growth. Premier League clubs’ total wages will have exceeded £1 billion for the first time in 2007/08, an average of more than £50m per club.

- The key performance indicator – wages/turnover ratio – has increased to 63% in 2006/07, which in general remains a reasonably comfortable level for the finances of clubs in England’s top division.

- All 20 Premier League clubs have reported an increase in wages in 2006/07, the first time this has happened since 1999/2000, whereas only 12 clubs reported an increase in revenue.

- The largest increases in wages in 2006/07 were reported by Chelsea (£19m), West Ham United (£13m), Portsmouth (£12m), Newcastle United (£10m) and Liverpool (£9m), with West Ham United and Portsmouth investing significantly in their playing squads following the arrival of new owners.
Annual Review of Football Finance 2008 Highlights

• Excluding the revenue and wages increases of the top five finishers and the three newly promoted clubs, the remaining Premier League clubs, who were competing to qualify for Europe or avoid relegation, reported an aggregate increase in wages of £61m, despite an £18m reduction in their revenue in 2006/07. This will have made significant inroads into spending the c.£300m of incremental annual revenue from 2007/08 from the new broadcasting agreements.

• Despite the increase in wage costs, the surplus of revenue over wages for the Premier League clubs has increased again from £525m to £561m (7%) in 2006/07.

• The significantly enhanced broadcast rights revenue in 2007/08 will provide Premier League clubs with the opportunity to address the League’s record high wages/turnover ratio of 63%.

• An increase of £31m (14%) in 2006/07 means that Championship clubs’ wages growth has exceeded revenue growth (£11m) resulting in an increase in the wages/turnover ratio to 79%, breaking the recent trend shown in the previous three years of around 72%.

• Premier League clubs invested a record £492m on total gross transfer spending in 2006/07. This record was then beaten in 2007/08 with Premier League clubs spending in excess of £600m in reported gross transfer fees in the summer 2007 and January 2008 transfer windows.

• The majority of Premier League clubs’ transfer spending continues to be with overseas clubs with £275m spent in 2006/07 (up from £256m in 2005/06). Once Football League clubs are considered, the net transfer spending leaving English football (to non English clubs and agents) has increased by 15% to a record £277m.

• No Premier League clubs reported a cash inflow on player transfers in 2006/07, which compares with two clubs with net transfer receipts in 2005/06 (Charlton Athletic and Manchester City). Transfer activity now almost always represents a net cash outflow for Premier League clubs which will therefore need to be funded by operating profits or borrowings.

• Total player costs for the top four divisions – being the aggregate of wage costs and net transfers spending – increased to a record high of £1.2 billion in 2006/07, a 12% increase on 2005/06.

• Football League clubs’ total transfer expenditure has increased by 79% from £48m to a record £86m with spending on buying players from the Premier League clubs doubling from £11m to £22m. The most significant net spenders in 2006/07 were the three clubs who subsequently managed to secure promotion to the Premier League: Sunderland, Birmingham City and Derby County – money ultimately well spent.

Stadia development and operations

• Total attendances across the four divisions of English football of 29.9m for 2007/08 are the highest since the 1967/68 season.

• Average attendance at 36,144 and total attendances of 13.7m for 2007/08 represent records for the Premier League.

• 2007/08 was the tenth consecutive season of average attendances over 30,000 and the eleventh consecutive season of utilisation over 90% in the Premier League.

• In terms of total attendances in 2007/08, the Championship is now the fourth biggest football league in the world eclipsing Serie A in Italy and Ligue 1 in France and pushing La Liga in Spain very close for third place.

• Revenue per attendee in the Premier League has more than doubled in a decade and sustains the dominance of the Premier League in matchday revenue generation in European football.

• Despite the predicted slowdown in development spending, stadia investment levels across the top 92 clubs were over £100m for the eleventh consecutive season with £161m invested in total in 2006/07. Almost £2.4 billion has now been invested by clubs since the Premier League began.

• Football League clubs invested £34m in 2006/07 – their highest amount since 2002/03.
Club financing

• Capital employed by Premier League clubs – being the aggregate of debt financing and shareholders funds – continued the rise of recent years to reach over £2.2 billion at the end of the 2006/07 season.

• The Premier League clubs’ net debt figure at summer 2007 increased by 19% to £2,469m. It is sometimes commented that “football is not like a normal business”; the net debt figure includes around £900m which is of a non-interest bearing ‘soft loan’ nature from club owners.

• The net debt figure includes £605m in relation to Red Football Shareholder Limited (the UK parent company of Manchester United) and £620m in respect of Chelsea Limited (the parent company of Chelsea).

• By the end of the 2006/07 season, Roman Abramovich had injected around £575m of new money into Chelsea, through a combination of debt and equity. This represents by far the largest contribution to a football club from any single funder.

• Around £1.4 billion has changed hands in respect of almost 20 changes of ownership of English clubs in the top two divisions since the start of 2005. For the majority of these transactions it is too early to assess the overall financial impact on the clubs themselves.

• Premier League clubs incurred aggregate net interest charges from finance providers of £144m in 2006/07. The non-interest bearing nature of other loans at a number of clubs help to keep the Premier League clubs’ aggregate net debt service charge at under 6% of the overall debt balance.

• Based on the available information, the Championship clubs had aggregate net debt at the end of the 2006/07 season of £289m. Ten Championship clubs had filed accounts showing net debt at the end of the 2006/07 season in excess of £10m. In general, a Championship club can only hope to significantly reduce its net debt in the short/medium term via either promotion to the Premier League or an injection of equity funding from its owner.

• Below the top two divisions, managing the club’s financial position remains a challenge from one season to the next. Legacy debt issues and the risks taken by some boards of directors will, without correction, inevitably lead to a continuing flow of insolvency cases in the seasons to come.

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Analysis
Challenging the legal enforceability of the Vancouver 2010 Olympic Games’ anti-ambush marketing provisions

by Abraham Mouritz attorney at SportsLawOne in The Netherlands

Sponsors & Ambush Marketers

“Less is more”
from the poem Andrea del Sarto
by Robert Browning, English poet
(1812-1889)

"[S]chools should not host "Mini Olympics" or "2012 Days", or use the Games' Marks in school literature"

When I read this statement on LOCOG’s website, various things came to mind, including terms such as “madness”, “nitpicking” and “so much for the Olympic Spirit”. Foremost I thought an Olympic committee should fight the fights worth fighting i.e. less is more. That is what this article is all about.

Sport represents a significant macro-economic sector, and it is growing year on year. A 2006 study suggested that sport generated revenue in the European Union was €407 (£302) billion i.e. 3.7% of the EU GDP. There is a lot of money going around in the sponsoring and broadcasting of sports events.6

Undoubtedly the greatest sporting event in terms of exposure and revenues is the Olympic Games.7 VANOC, the Vancouver Organizing Committee i.e. executive committee for the Vancouver 2010 Olympic and Paralympic Winter Games, estimates that, of the Vancouver 2010 total operating revenues of US$ 1.63 billion (£822 million), no less than US$ 760 million (£383 million) will be supplied by sponsors alone.7 As such the amount supplied by the sponsors represents the biggest portion of VANOC’s Operating Revenues.8

In short, there are clear sizeable interests at stake, which warrant protection against parasitic ambush marketers. In light of the Vancouver 2010 Olympic Games Canada has adopted sui generis,9 i.e. special purpose legislation, The ”Olympic and Paralympic Marks Act”, Bill C-47, (the “Bill”),10 to combat ambush marketing as much as possible.

As a “non-common law lawyer” educated in the civil law system of The Netherlands, the concept of sui generis legislation is fairly familiar to me. The vehicle of sui generis legislation on the face also seems a logical choice to help regulate an event of the magnitude of the Olympics. Given the enormous financial stakes at hand, it is quite understandable that the Bill contains very stringent, protective provisions. I will give a brief overview of the Bill and its provisions.

However, the way certain of these provisions have been drafted, makes it clear that the Canadian Legislator, undoubtedly with all the best intentions in mind, seems to have gone overboard in some of its protective endeavours. The object of this article is to address the Bill’s provisions, which are not just stringent, but whose legal validity could and should be challenged from an enforceability perspective in certain specific circumstances. In my view this typically is the case where the Bill’s provisions are being applied in relation to use for non-commercial purposes.11

I will also discuss to what extent the Bill outlaws nearly all use of Olympic trademarks and of certain generic Olympic terms (such as “Winter” and “Gold”). In addition I will discuss VANOC’s policies on this matter. Contrary to the London 2012 Olympic Games’ legislation, where such exceptions are more clearly presented in the legislation, the Bill appears to be overly restrictive.11 Additionally, I will look at the legal constraints of the Bill from the perspectives of trademarks, domain names and the ECHR.
Challenging the legal enforceability of the Vancouver 2010 Olympic Games’ anti-ambush marketing provisions

The question at hand is therefore whether the restrictive provisions in the Bill on the use of Olympic trademarks and of generic Olympic terms are legally enforceable under English law in a non-commercial setting.

VANOC has adopted policies in terms of tolerating and forbidding certain acts under the Bill. However if the answer to above question is negative, then as a consequence one should conclude that VANOC is not even at liberty to tolerate or forbid such acts in relation to non-commercial use if those acts cannot be legally forbidden in the first place.

Finally, I will make a recommendation with regard to more appropriate wording for the criticized provisions in question in order to avoid loss of the true aim and focus of the Bill.

Brief overview Vancouver 2010 Olympics’ legislation & Background

The Bill is a rather concise piece of legislation and its structure is simple:
- Sections 1 and 2: Definitions
- Sections 3 and 4: Infringements of trademarks and generic Olympic terms respectively
- Sections 5 and 7-10: Various clauses with regard to applications to and decisions by the Court
- Section 6: Burden of proof for obtaining an interim or interlocutory injunction
- Sections 11-15: Remaining provisions
- Schedule 1: Olympic and Paralympic trademarks
- Schedule 2: Trademarks specific to the Vancouver 2010 Olympic Games
- Schedule 3: Generic Olympic terms

In recent discussions in the Canadian media, the Bill is sometimes referred to as “Means-to-an-end” legislation or “special interest” legislation. After all, the Bill has been drafted to help protect very sizable financial interests of a few selected parties, notably the key sponsors to the Vancouver 2010 Olympic Games. VANOC has made legal commitments to the IOC and to its sponsors to protect against unauthorized use of the Olympics’ intellectual property rights and ambush marketing in Canada. VANOC fears that such unauthorized use threatens to undermine VANOC’s ability to raise the funds necessary to host and stage the 2010 Olympic Games.

The background and intentions to the Bill are explained in the “Legislative Summaries”, a document from the Law and Government Division of the Canadian Government. In the section Commentary of the Legislative Summaries a bold statement is being made:

“Bill C-47 enhances the protection for Olympic symbols beyond that normally afforded to trade-marks. Although existing intellectual property law could arguably be used to protect Olympic symbols and marks, the sheer volume of possible violations, within a short window of time, are presumed to be the justification for the enhanced protection.”

In other words, Canada’s intellectual property laws, which have long been regulating the use of intellectual property in Canada, now all of a sudden do not prove sufficient any more.

This may however be somewhat understandable with regard to one specific element: where it concerns the need for obtaining timely and sufficient i.e. preventive injunctive relief.

Though one can argue whether the lowering of this standard is undue, the past has proven a potential need for such powers to be available for events of the magnitude of the Olympics.

Without the lowering of said standard, VANOC would, for the most part, be powerless to act against ambush marketers.

In short, the Olympics’ financial stakes, as outlined earlier, are enormous and may well justify measures of timely and sufficient injunctive relief, provided of course that the safeguards of due process comparative to article 6 ECHR are being adhered to.

According to the closing wording in the Legislative Summaries, the Canadian Government seems to be aware of the extraordinary powers under the Bill: “Ultimately, however, public support for the proposed legislation is likely to depend on whether the COC, CPC and Organizing Committee are trusted to exercise their newfound powers with restraint. Incidents such as the one involving Dutch football fans would likely to be greeted with derision as they were in Europe.”
Challenging the legal enforceability of the Vancouver 2010 Olympic Games’ anti-ambush marketing provisions

The above is a very important statement. As I indicated, the Bill is being viewed by some as “means-to-an-end”-legislation or “special interest”-legislation. This description is very much fitting for Sections 3 and 4 of the Bill and time will tell whether VANOC et al will indeed exercise these new powers with restraint.

Next I will explain these very powers in more detail.

Olympic Trademarks and Generic Olympic Terms

Schedule 1 and 2 of the Bill contain various Olympic and Paralympic word and figurative trademarks (jointly the “Olympic Trademarks”). These trademarks, in varying degrees, each have a distinctive character. The latter is an essential characteristic for any trademark. However, the generic terms listed in Schedule 3 (the “Generic Olympic Terms”) lack any such distinctive character and are therefore not regarded as intellectual property rights. For this reason these generic terms do not have statutory legal protection and remedies similar to intellectual property rights.

Infringements pursuant to the Bill and VANOC’s policies

For this reason these generic terms do not have statutory legal protection and remedies similar to intellectual property rights. None the less the Bill has prohibited the use of such generic terms as “Gold”, “Winter”, “Vancouver”, “21st” and “Sponsor”. These terms do not just lack any distinctive character, but are in fact common everyday expressions. In ordinary life and under normal circumstances, one cannot forbid individuals and companies the use of such common expressions. The fear of ambush marketing at Olympic Games has sparked a certain creativity to try and limit the use of these generic terms where it is used in – mostly commercial – conjunction with the Olympics.

In light of the London 2012 Olympic Games the “London Olympic Games and Paralympic Games Act”, deals with this issue by introducing a term under the heading “The London Olympics Association Right”. Though the Bill does not use the heading of a separate association right, its Section 4 has in fact created the very same right.

The extent of the Bill’s protective regime can be well illustrated by a simple pin. In the top left corner of the title page of this article I have displayed a pin. This pin is one of many which VANOC has issued in light of the upcoming Vancouver 2010 Olympic Games. The pin itself is smaller than 3/4 inch in diameter, but none the less displays 9 protected Olympic Trademarks and Generic Olympic Terms:

• “OLYMPIC” is a word trademark (Schedule 1 of the Bill);
• The five Olympic rings (Schedule 1 of the Bill), both on their own and in conjunction with the Vancouver 2010 Olympic statue logo & “VANCOUVER 2010” (Schedule 2 of the Bill), are each individual figurative trademarks;
• Though Schedule 2 does not list it, the Vancouver 2010 Olympic statue logo, on its own, has also been registered as a figurative trademark;
• “Vancouver 2010” is a word trademark (Schedule 2 of the Bill); and
• “WINTER”, “GAMES”, “VANCOUVER” and “2010” are each Generic Olympic Terms (Schedule 3 of the Bill).

Forgive my sarcasm, but so much protected terminology on such a small surface could well be a new record!

Limitative exceptions stated in the Bill

Section 3(4) lists the exceptions and limitations to the general prohibition and lists people and entities that have the right to use the Olympic Trademarks or any mark that resembles these marks. More importantly, the Legislative Summaries makes it clear that the list of exceptions and limitations is exhaustive i.e. uses, other than listed, are prohibited:
Challenging the legal enforceability of the Vancouver 2010 Olympic Games’ anti-ambush marketing provisions

"The exceptions listed above are framed in legal terms that suggest they are exhaustive, which would mean that every mark falling outside of the exceptions would be prohibited."

By reasoning a contrario, non-commercial use does not fall under any of the listed exempted categories (e.g. it cannot be considered to be news reporting or criticism) and is therefore in apparent violation of the Bill. In other words, the term “business” also sees to non-commercial use of Olympic Trademarks.

Section 4(1) does not state a similar list of exceptions and limitations, simply by virtue that such is not possible. After all the amount of combinations one can make of the Generic Olympic Terms is infinite. According to Section 4 the Courts shall take into account any evidence a person has used in the form of:

(a) a combination of the Generic Olympic Terms in Part 1 of Schedule 3 to the Bill⁴¹;
(b) a combination of a Generic Olympic Term from Part 1 of Schedule 3 with Part 2 of Schedule 2.⁴²

Section 4 is clearly also silent on use of these terms in relation to non-commercial use.⁴³ This is all the more curious as many of these terms are ordinary everyday terms and such an exception would have been not just appropriate, but would also have taken away the public’s lack of clarity and uncertainty on this subject.

As the Bill and the Legislative Summaries are not clear on whether non-commercial use is allowed, it is therefore essential to in addition consider VANOC’s policies.

VANOC’s policies

LOCOG has issued clear policies on non-commercial use: such use will, generally, not be affected by the Olympic Symbol Protection Act 1995 or the London Olympics Association Right i.e. such use is in principle allowed.⁴⁴

This may however not be the case where non-commercial activities overlap with commercial activities, which is only logical.⁴⁵

Similarly VANOC has issued its policies, also in relation to non-commercial use.⁴⁶ VANOC certainly tackles ambush marketing related commercial activities and also where non-commercial activities coincide with commercial activities. Issues arise though in the examples given by VANOC in its document on non-commercial use.⁴⁷ One notable example that VANOC gives is of a public library that has setup a 2010 Winter Games book display and thereby using the official emblem of these games on the display stand. However, it is clear from the stand that the public library is not associated with these Olympic Games. It states on the stand: “Read more about Canada’s Olympic and Paralympic history”. None the less, VANOC gives this very example a score of 8 points, which renders this example on the border of it falling under the “Potential Infringement that could require Enforcement Assessment”- category.

A real life example is even more compelling.⁴⁸ Kimberly Baker, a Canadian artist, met with VANOC’s manager of Commercial Rights Management back in the summer of 2007. The outcome of this meeting illustrates that VANOC appears to even take a defensive stance against a 100% non-commercial art exhibition i.e. a graduate posters’ exhibition on the subject of “Vancouver 2010 Olympics and homelessness”. Though VANOC indicated not to have a problem with such posters being on display during an art exhibition,⁴⁹ VANOC did say it would however have a problem if the artist would put them up on bill boards across Vancouver’s Eastside: VANOC would consider such action in the light of the artist creating a “campaign” as opposed to displaying a work of art despite the lack of any commercial component.⁵⁰

If VANOC already seems to frown on the non-commercial exploitation of artistic works, which after all is already clearly exempted in the Bill, then it is only likely for VANOC to frown even more on non-commercial conferences for which there is no exception in the Bill among its exhaustive exceptions.

All of this leads me to conclude that the Bill does not allow for clear non-commercial use of the Olympic Trademarks or of the Generic Olympic Terms. Where VANOC tries to provide clarity on this subject, it really achieves quite the opposite. Furthermore VANOC seems to confirm the Bill’s non-lenient position on non-commercial use.

In the following Section I will get into the legal constraints of the matter.

Legal constraints of the Bill on non-commercial use

The Section examines on what legal grounds one could challenge the Bill and VANOC’s policies in relation to clear non-commercial use of the Olympic Trademarks or of the Generic Olympic Terms.
Trademark constraints: The Bill and VANOC’s policies vs. statutory trademark laws

The most obvious challenge comes from statutory trademark provisions. The scope of the UK Trade Marks Act 1994 is confined to infringements “in the course of trade”.51 To constitute an infringement the sign must therefore be used in the course of trade. “Trade” is defined in Section 103 (1) of the Trade Marks Act 1994 as including “any business or profession”. The Canadian “Trade-marks Act”, similar to the Trade Marks Act 1994, also only sees to infringements taking place “in the normal course of trade”.52 Above practice is in addition followed by civil law countries such as The Netherlands and Belgium. The “Benelux Intellectual Property Treaty” also only sees to infringements, which occur “in the course of trade”.53

Essential to note is that use “in the course of trade” clearly calls for use in the context of a commercial activity with a view to economic advantage, and NOT as a private matter (i.e. non-commercial use).54 This has been confirmed by the landmark case “Arsenal Football Club v. Matthew Reed”.55 This case was all about defining the essence and function of trademarks. Apart from the ECJ making it clear that trademarks are to be viewed in the context of one party clearly using the trademark owner’s mark in the hope of making profit, the ECJ held that the key consideration was not whether Mr. Reed’s use of the marks on unofficial merchandise was “trade mark use” (as opposed to being a “badge of allegiance”), but whether it was liable to jeopardize the guarantee of origin. This guarantee of origin is an essential function of the trade mark rights owned by Arsenal Football Club. The Court of Appeal held that Mr. Reed’s actions did jeopardize this guarantee of origin.

In other words, non-commercial use of the Olympic Trademarks would fall outside of the scope of ECJ case law and, in any event, the UK Trade Marks Act 1994 and the Canadian Trade-marks Act and should therefore be allowed in absence of the Bill.

There is thus a conflict between the Bill and VANOC’s policies on one hand and UK and Canadian intellectual property laws and ECJ case law on the other hand in relation to non-commercial use.

The Canadian Government also seems recognize this, but appears to be applying the legal principle of “Lex specialis derogat lex generalis” in order to justify its departure from its own general trademark legislation. It may then also hold that common trademark defences, as I described earlier, do not apply in case of enforcement of the Bill’s sui generis legislation. However, the Courts will have final say in this. It is plausible that in such extreme cases as VANOC possibly forbidding strictly non-commercial matters, such as for example Olympic fan clubs and website forums, the Courts will prevent or stop enforcement of the Bill. One argument of the Court could be that the legislation is in fact “Contra legem”.56

Domain name constraints

A similar challenge comes from the realm of domain name law, which is very closely linked to trademark law. The announcement of the conference on the title page includes a reference to two domain names i.e. www.olympicsfanclub.com and www.olympicsfanclub.org. I have taken the liberty to register these domain names in my name for the purpose of this article. I have done so to demonstrate the enforcement inability of the Bill in respect of trademark infringements in relation to domain names.

The Bill forbids the use of both the trademarks “Olympic” and “Olympics”. As I have demonstrated in Section III, a non-commercial organization would not be exempt from this prohibition, which also entails a prohibition in relation to use of these trademarks in domain names. However, as explained further on, the Bill has no authority to deal with domain names and as such cannot enforce its provisions.

These .com domain names have been registered under and are regulated by ICANN’s Uniform Domain Name Dispute Resolution Policy (“UDNDRP”).61 This policy makes it clear that VANOC or another plaintiff can challenge a domain name registration via an “administrative-dispute-resolution service provider” (online dispute resolution) or via the local Courts, either of which will in principle follow ICANN’s criteria in determining whether a domain name registration is legitimate.62

The fact that ICANN’s UDNDRP will be applied and NOT the Bill’s provisions, already demonstrates an area where the Bill CANNOT be enforced.

Furthermore VANOC’s chances of success in reclaiming the two domain names on the basis of the UDNDRP are quite remote:
- VANOC will have a hard time trying to demonstrate that the non-commercial defendant “has no rights or legitimate interests in respect of the domain name”: Section 4 (c), (iii) of the UDNDRP makes clear that such legitimate interests will be considered to exist if
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the registrant is “... making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.”;

- The same applies to VANOC being able to demonstrate “Evidence of Registration and Use in Bad Faith”. It will be burdensome for VANOC to demonstrate the typical bad faith circumstances.

For this purpose I have drafted a document, the “Statement of principles in relation to domain names”. Should matters come to a head with VANOC, then this document clarifies the non-commercial nature and intentions, thereby making it clear there is no bad faith. To be able to prove the authenticity and time of execution of the Statement, I have deposited it with the Dutch Tax Authorities, who have confirmed the Statement being deposited on November 28, 2007.

I base my above assessment on case law involving nearly identical circumstances. The rule thus appears to be that non-commercial use of trademarks, including Olympic Trademarks, in domain names, despite possibly infringing upon an owner’s trademarks, may well result in non-commercial organizations being able to hold on to those domain names. This applies even stronger in case of non-commercial use of Generic Olympic Terms in domain names (e.g. www.winter2010.com) where no trademark is even being infringed upon.

The above makes it clear that in respect of non-commercial use of domain names, enforcement of the Bill’s provisions may well fall short.

**ECHR constraints: Freedom of expression and Freedom of association**

A non-commercial organization may justify use of the Olympic Trademarks on the basis of trademark law. Where Olympic Trademarks and Generic Olympic Terms are used in domain names, it may do so via the UDNDRP.

However, the ECHR provides also provides possibilities.

The Human Rights Act 1998 (“HRA”) gives further effect to the rights and freedoms protected by the ECHR. The ECHR has held that the State has a positive obligation to prevent a person’s rights being breached by another private person. This obligation is not just upon the State. A Court should at all appropriate times consider and apply, with wide discretionary powers, the ECHR in proceedings between private persons and not merely in actions against a public body allegedly acting against it.

The right to Freedom of Expression is set out in article 10 ECHR. The article also covers commercial free speech. Section 12 HRA places an obligation upon the Court, where it is considering any relief in a case, to consider whether such relief may adversely affect the right to freedom of expression. This consideration was also explicitly stated in “Douglas v Hello!”.

As such it may be possible for a non-commercial organization to request, in case of alleged infringement on either the Olympic Trademarks or Generic Olympic Terms, that the Court protects its right to freedom of expression and to have this prevail over the trademark rights VANOC would be invoking.

In “Consorzio de Prosciutto di Parma v Marks & Spencer” Marks & Spencer’s right to freedom of expression, to not be prevented by the trademark owner to truthfully informing the public on what type of ham they were selling, prevailed over the trademark owner’s rights.

If such protection is already enjoyed by commercial free speech, then certainly non-commercial speech would receive an even greater protection.

Non-commercial organizations are often associations. As such their protection of freedom of expression could possibly be reinforced even more through Freedom of Association set out in article 11 ECHR. This right when concerned with the freedom to take part in a demonstration or join a political party is very closely linked to freedom of expression and draws heavily on the principles developed by the ECJ under article 10 ECHR. Though I have not come across cases where the freedom of association on its own prevails over such rights as trademarks, it does strengthen non-commercial organizations’ rights to freedom of expression in this respect.

Based on these findings, when combining the protection of the freedom of expression in conjunction with the freedom of association (where applicable), VANOC should not be able to prevent non-commercial use of the Olympic Trademarks and Generic Olympic Terms.
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Conclusions
VANOC’s intentions are not bad. To the contrary, VANOC is trying to safeguard justified interests of the main sponsors who are in fact making the Vancouver 2010 Olympic Games possible. VANOC surely wants to go after the “big fish” because those certain big ambush marketers jeopardize VANOC’s current sponsor contracts as well as sponsor contracts for future Olympic Games.

However, if VANOC is truly only interested in such big fish, then it would only be logical for VANOC to also make this clear in the Bill. Currently the text of the Bill is, pursuant to an expression from my country, a “cure for an elephant”.

The down-sides of the overly broad wording is not just that it is too restrictive towards individuals and clubs who have good intentions i.e. who are making supportive or otherwise non-commercial use of the Olympics’ intellectual property rights. There is also really no advantage to outlawing such non-commercial use. If VANOC pursues such “infringers”, then, apart from potential public ridicule and mockery, it is likely to lose many of such legal battles. If however VANOC chooses not to pursue, then it may set precedents and this may well prevent VANOC being able to undertake future actions in similar cases.

The key issue here is the apparent lack of focus and clarity. A distinction needs to be made between friend and foe. After all, will VANOC really go after schools, fans, etc? So far the Bill and VANOC have not been successful in conveying the right message. It should be made clear to the public that the aim is to prevent and combat the real “commercial parasites” truly posing a genuine threat. In this respect I strongly suggest VANOC to “puts its money where its mouth is” i.e. to make it clear to the public that pure non-commercial use of the Olympics’ intellectual property rights is, in principle, allowed.

There is little point to VANOC’s policies with regard to it tolerating or forbidding non-commercial use if such use cannot be legally forbidden in the first place: there is nothing for VANOC to tolerate or to forbid. Less, i.e. not conveying a mixed message but demonstrating a clear focus on combating the “Nikes of this world”, truly is more in this respect. Or in the words of golf legend Jack Nicklaus, “Focus on remedies, not faults”.

I have taken the liberty to make this recommendation to VANOC.
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1. See: http://www.ymnetnews.london2010.com/content/about/iq.aspx. LOOG stands for the "London Organising Committee of the Olympic and Paralympic Games".


4. In Latin “suigeneris” literally means “of its own kind”.

5. The official Vancovuer 2010 Olympic Games home page can be found at http://www.vancouver2010.com/e n/OrganizingCommittee/SponsorsPartners/Sponsors all.

6. My analysis will for the most part be based on English law and the ECHR. From time to time I do w ith it being an intellectual property right due to a lack of key elements, such as originality and distinctiveness.

7. An athlete that is nota sponsor, where the entity seeks commercial benefit from associating itself with an event, is referred to as an "sink the meal" is a Dutch saying which is in fact quite fitting for this type of situation where the plaintiff can only rely on a repressive, not but radical Court Order.

8. For example, LOCOG announces a sponsorship target of £650 million (US$1.3 billion) on its website http://www.london2012.com/. This target has also been confirmed by The Telegraph on February 6, 2008.


10. In relation to domain names i will be addressing the “Uniform Domain Name Dispute Resolution Policy” and its case law.

11. For example, the London 2012 Olympic Games’ legislation: "Mustard after the meal" is a Dutch saying which is in fact quite fitting for this type of situation where the plaintiff can only rely on a repressive, not but radical Court Order.

12. Only if the court rules that the mark is not “suigeneris” meaning it is of its own kind.

13. The London 2012 Olympic Games’ legislation: "Mustard after the meal" is a Dutch saying which is in fact quite fitting for this type of situation where the plaintiff can only rely on a repressive, not but radical Court Order.

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17. In this respect it is the subject introduced in Section 6 the possibility for "an applicant" typically VANOC to be able to very quickly obtain an interim or interim-like injunction without being required to show more than insurance payable.


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25. These abbreviations refer to the “Canadian Olympic Committee”, “Canadian Paralympic Committee” and VANOC respectively.

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31. The organizers of Olympic Games will for the most part seek the following relief. Obtaining an order for (a)an injunction restraining further infringement of the claimant’s rights; (b)the delivery up for the destruction of, or for the erasure of the marks from, any goods already marked with the infringing mark or sign, and in the possession or under control of the defendant, as well as deceptivelabels, advertising materials, etc.;(c)and (an account of)dam ages in respect of the past infringement, or in lieu, the profits made by the defendant by the sale of the infringing goods.

32. Even if VANOC could meet this standard normally required by Canada’s intellectual property laws, the time VANOC members have to treat a client is unceremonial. In the face of official opposition to this presumption, the Bill was withdrawn.

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36. The London 2012 Olympic Games’ legislation: "Mustard after the meal" is a Dutch saying which is in fact quite fitting for this type of situation where the plaintiff can only rely on a repressive, not but radical Court Order.

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(4) The Bill in concert with the Legislative Summaries (see Section II) state the following exemptions and limitations:

- Approved users: A person who has obtained written approval from the Organizing Committee, the CCO, or the OCO to use the mark and acts accordingly.
- Trade-mark users before 2 March 2007: Anyone with a trade-mark – or license to use a trade-mark – where that trade-mark was used before 2 March 2007.
- Public authorities: The federal or provincial governments, a university or a public authority, or a person authorized by any of these entities, may use trade-marks on any badge, crest, emblem or other mark provided those entities have given notice under the Trade-marks Act before 2 March 2007 or before publication in Part 1 of the Canada Gazette of an order that adds an Olympic or Paralympic Games or any of those Games to Schedule 1 or 2.
- Wine or Spirit Labels: Section 34(4) exempts wine or spirits bottles provided the labels use a "protected geographical indication" and provided the wine or spirits come from the indicated territory.
- Addresses, Geographic Place Names: Section 34(4) exempts addresses and geographic place names for buildings or streets in any jurisdiction in any province, city, town, etc., the names of which are in "proximity" to printed or electronic material containing an Olympic trademark, which is not too harmful.

6.11 In all the circumstances the Panel is not satisfied that the Complainant has established that the original registration of the Domain Name was in bad faith. On the evidence before the Panel, it appears to be a bona fide registration of a name intended to operate as a genuine fan site for the team, not an individual or individuals supporting the football club.

6.12 The use of the Domain Name is clearly directed at attracting internet users to the website operated for commercial benefit. As indicated above, the Respondent’s evidence is to the contrary in that the Respondent argues that the Respondent was not aware of the origination of the Domain Name and that the Respondent had no knowledge of the Respondent’s use until after the Complainant’s action. This is not considered to be evidence of bad faith registration or use.

6.13 In addition, it is not clear to the Panel that the Respondent in any way used the mark in connection with a business, as a trade-mark or otherwise, an Olympic Trademark, or a service mark that involves the placing of advertisements on a commercial scale for rental (iii) the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and
- the registrant has no rights or legitimate interests in respect of the domain name; and
- the domain name has been registered and is being used in bad faith.

6.12 The use of the Domain Name is clearly directed at attracting internet users to the website operated for commercial benefit. It is not clear to the Panel that the Respondent had no knowledge of the Complainant’s use of the mark until after the Complainant’s action. This is not considered to be evidence of bad faith registration or use.

6.13 In addition, it is not clear to the Panel that the Respondent in any way used the mark in connection with a business, as a trade-mark or otherwise, an Olympic Trademark, or a service mark that involves the placing of advertisements on a commercial scale for rental.

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6.13 In addition, it is not clear to the Panel that the Respondent in any way used the mark in connection with a business, as a trade-mark or otherwise, an Olympic Trademark, or a service mark that involves the placing of advertisements on a commercial scale for rental.
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The facts and outcome were nearly identical to the Besiktas case. The Panel found that the fan site provided a wide range of information concerning Pat Benatar, the recording artist. There were clear disclaimers on the website stating that it is not endorsed by or an official website of the recording artist. The Panel thus determined that the fan site had rights or legitimate interests in the disputed domain name. Also the Panel found no evidence that the fan site has registered or used the domain name intentionally for commercial gain or to create confusion. As such the complainant had failed to establish that the fan site had registered and used the disputed domain name in bad faith.

The outcome was that also here the fan site could continue to hold on to the domain name.

I am planning to transfer the domain names back to the IOC in the coming months. I will make the suggestion that the IOC uses these domain names for fan activities, such as fan forums, etc. In fact, in addition to being an ex-athlete, I am a huge fan of the Olympics and I would greatly welcome the IOC undertaking matters also for the benefit of the many fans, not just for the few sponsors.

Oddly the IOC did register i.a. the domain names www.olympicsfan.com and www.olympicsfan.org, but did not do so for my domain names with the -club extension.

The HRA came into force on October 2, 2000. From that date all legislation must be read and given effect to by the Courts in a way compatible with the ECHR and taking into account the decisions of the European Court of Human Rights. The HRA can in principle not be involved by individuals directly, but rather aims at the protection of human rights of individuals against the abuse of power by the State. Under the HRA it would be unlawful for a public authority to act in a manner which is incompatible with the ECHR.

This was stated for example in “Keel Strauss & Co v Tesco Stores Ltd” [2003] R.P.C. 319.

This states article that: “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers .

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary ... for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence ...”

However, it should be noted that commercial speech enjoys less protection than non-commercial speech. In “R v Secretary of State for Health Ex.p British American Tobacco” [2004] E.W.H.C. 2983 it was noted that “[i]t is accepted that freedom of commercial expression has been treated traditionally as of less significance than freedom of political or artistic expression.”

In “Strauss & Co v Tesco Stores Ltd”, quoted earlier, it was held that: “[t]he legislature must hold the balance ... between the right of the owner of the trade mark on one hand, and the right to convey information about the origin of the goods on the other”. In “[1991] R.P.C. 351, CA. The Court of first instance stated that it did not consider that the claimant’s case “warrants the interference with free speech which the grant of injunctions would involve”.

For example, in “Gustafson v Sweden” [April 25, 1998; [1998] 22 EHRR 408] the ECJ has recognized that positive obligations can rest upon States in securing individuals’ freedom of association. The right to freedom of association applies only to private law organizations, thereby excluding professional and other associations established by the State and governed by public law.

Copyright law is also relevant in this area. In a famous copyright law case, “Church of Scientology v Databased at al” [Dutch Supreme Court, December 16, 2005, LUN AI2598, Hoge Raad, C04/020 /HR], the right to freedom of expression also prevailed over the rights of the copyright owner to prevent disclosure of the works protected through copyright. Dutch writer Karin Spande had published text of Scientology Church’s founder Ron Hubbard. While the Court recognized the copyright of Scientology on those texts and subsequent infringement thereof, the Court determined that in a particular case such as this, “the enforcement of copyright must give way to the freedom of information”. The Court felt that the interests of the defendants to disclose the text to the public outweighed those of the copyright owner on the basis of Article 10 ECHR, especially since the disclosure was done in an informative, non-commercial basis, and the text of the Church of Scientology showed anti-democratic objectives. The verdict is well reasoned and can be found at: http://creolen.rechtspraak.nl/resultpage.aspx?docno0€=2&zoektype=kenmerken&kind=ja _tekst=sientology.

I am referring to contractual claw-back provisions, which place last efforts obligations upon VANOC to prevent and combat ambush marketing as much as possible, fearing which the sponsor can reclaim or withhold a certain amount of the sponsorship fee.
Gender testing at the Beijing Olympics

By Laura Donnellan, School of Law, University of Limerick

Introduction

The Beijing Olympics has been shrouded in controversy since it was announced on July 2001 at the 112th International Olympic Committee (IOC) Session that the Games of the XXIX Olympiad would be held in China. Recent attempts by the Chinese government to restrict broadcasting from Tiananmen Square has caused one IOC Commissioner to question the decision of the IOC to allow the Olympic Games to be held in China. The Commissioner, who remains anonymous, remarked:

"Had the I.O.C., and those vested with the decision to award the host city contract, known seven years ago that there would be severe restrictions on people being able to enter China simply to watch the Olympics, or that live broadcasting from Tiananmen Square would essentially be banned, or that reporters would be corralled at the whim of local security, then I seriously doubt whether Beijing would have been awarded the Olympics".

In June 2008 the Ministry of Culture issued a ban on all foreign entertainers who have attended any event that has “threatened national sovereignty”, such as a Free Tibet Rally, from performing in China. Foreigners are not permitted to procure the services of prostitutes; police are raiding bars on a daily basis checking visas, excess partying and tables outside bars have been prohibited. A deep distrust of foreigners permeates the city of Beijing.

Against this backdrop of suspicion, a gender testing laboratory has been established which will carry out tests on “suspect” female athletes. The laboratory is similar to ones established for the Sydney and Atlanta Games and will be conducted by four leading experts from the Peking Union Medical College Hospital. The laboratory will examine the outward appearance, genes and hormones of suspected female athletes using a series of four tests, including blood, gene and chromosome tests. Professor Tian Qinjie informed the media of the process and spoke of the need to “to make tests in an entirely scientific manner. The purpose of sex-determination works to ensure a more scientific, more fair and more humane system”. Initial results will be available within three days, however official confirmation may take up to seven days.

The IOC had suspended gender testing at its 112th Session in Seoul in June 1999. However, the IOC reserves the right to examine individual athletes if it is suspicious as to the gender of that particular athlete. While the IOC reserves this right, the creation of a specific laboratory implies a more extensive use of testing than a re-application of testing in regard to suspected individuals. Unlike the situation in the 1960s, where all female athletes were tested, in Beijing only “suspect” female athletes will be tested. Gender is not simply determined by chromosome properties, other factors must be considered including the environment in which the person was raised; the gender identity that the individual presumes her or himself to be; the external genitalia; and the gender of the individual presumed by others.

Participation in sport is viewed as a privilege and not a right. Sports governing bodies are private organisations that create their own rules and regulations. Elite athletes accept that certain rules and regulations, while being somewhat invasive, are a basic part of their profession. Drug testing has become an integral part of both amateur and professional sport over the last few decades. It is viewed as a fundamental component of maintaining the element of fairness in sport. Drug testing also serves to protect the athlete’s health and endeavours to ensure that the image of the sport is not undermined by allegations of drug use.

Drug testing became an important issue for the IOC in the 1960s. Danish cyclist Knud Jensen collapsed during a race and died shortly after in a hospital in Rome in August 1960. Tests revealed the presence of amphetamines in Jensen’s body. In the aftermath of Jensen’s death, drug use in sport became highly topical. There were rumours of drug use and gender fraud among athletes. In response, the IOC became the first sporting organisation to establish a Medical Commission (1967) that was entrusted with the task of policing the use of banned substances and of verifying gender. In 1968 the IOC carried out drug and gender tests at the Games in Mexico City.
Gender testing at the Beijing Olympics

Irrespective of the arguments against drug testing, there is some merit to drug testing. The old Corinthian ideal of athletes succeeding through their own endeavours and natural ability epitomises the Olympic dream. Drug testing is non-discriminatory as it applies equally to male athletes as it does female competitors. However, gender testing is a discriminatory practice that compromises the rights and dignity of intersexed persons. There is no evidence to suggest that intersexed persons have an unfair advantage over other typical females and males. Medical evidence shows that the combination of hormone therapy and surgery eliminates any advantage a transsexual woman would have over natal females.

This article will examine the historical background of gender testing and will refer to a number of high profile cases. The IOC in 2004 recognised the status of transsexual athletes. Safeguards have been put in place for these athletes. However, athletes with chromosome abnormalities are viewed in a similar vein as athletes who have committed a doping violation. The repercussions for an athlete who fails a sex test are far-reaching both in personal and professional terms. Medical opinion provides useful arguments against the use of chromosome or DNA testing. The article will conclude with a discussion of the (UK) Gender Recognition Act, 2004 and its application to sport. For comparative purposes, recent developments in Ireland will be discussed.

Background

The 1936 Olympics in Berlin witnessed Hermann Ratjen bind up his genitals and compete as a female high jumper called Dora. Ratjen came fourth in the final and his deception was not discovered until 1967. Ratjen argued that he was forced by the Nazi Youth Movement to pose as a woman in the hope of winning the Gold medal for Germany. He had competed as a woman for three years, from 1933 to 1936. A number of theories have been advanced in relation to Ratjen. For those who argue that Ratjen was biologically male, this would make him the only documented case in modern Olympic history of a male athlete posing as a female. However, it has also been suggested that Ratjen was a hermaphrodite. Although, this would seem to be inconsistent with a statement made by Ratjen. Ratjen is quoted as finding his three years posing as a woman to be “most dull” and returned to live as a man after the Berlin Games. Ratjen competed at a time before the advent of drug testing. It would be very difficult in light of current drug testing methods for a male athlete to pose as a woman while urinating in the presence of an official. Stanislawa Walasiewicz, a Polish sprinter, competed in the 1932 and 1936 Olympics. She moved to the United States and changed her name to Stella Walsh. In 1980 she was accidentally shot during an armed robbery and her autopsy revealed that she had male genitalia. She was found to have both male and female chromosomes, a genetic condition known as mosaicism. She had spent her entire life as woman and everyone else viewed her as a woman. Walsh’s athletic prowess has been overshadowed by a genetic condition. Walsh was the fastest woman in the world at one time. Helen Stephens beat Walsh in the 100 meter final at the 1936 Games. Suspicion was directed towards her Stephens, resulting in Stephens undergoing a sex test. Her record beating time of 11.4 (to Walsh’s 11.7) seconds cast doubt on the ability of a woman who appeared feminine but ran faster than any woman in the world. Ironically, it was Walsh who was declared male by the County Coroner’s Office some 40 years later.

In 1948 the British Women’s Amateur Athletic Association required certification from a doctor to attest the athlete’s gender before being permitted to compete in women’s events. This method was subsequently abandoned as letters from doctors could be falsified. In 1966 the International Amateur Athletic Association (IAAF) introduced gender testing in the European Athletic Championships in Budapest as an increasing number of female athletes began to compete. All 243 female athletes were required to take part in “nude parades” where female doctors inspected to see if they were biologically female by examining the vaginal opening. The existence of overlarge clitorises, testes and penises would have roused much suspicion. All 243 athletes were certified as female. The method was not without criticism not least from the athletes who found the test to be humiliating and degrading. It is interesting to note that five or six female athletes who had been competing until 1966 failed to appear for examination citing illness and retirement as the reason. Two Russian sisters, Irina and Tamara Press, who between them had set 26 world records and had won five Gold medals, unexpectedly retired at this time. The idea that a female athlete could possess such superiority over their competitors caused much disquiet. Culturally and socially, women had traditionally been viewed as being “athletically inferior” to men and by excelling in their sport; it cast doubt on Irina and Tamara’s femininity. Both sisters presumably were intersexed and were not male impostors. After Budapest, female athletes were subjected once again to physical examination by a gynaecologist in the Commonwealth Games in Kingston, Jamaica in 1967.
Gender testing at the Beijing Olympics

Female athletes resented the use of physical examination. In 1987 the IAAF introduced the sex chromatin test at the European Athletics Cup in Kiev. This “femininity control” test marked a turning point in gender testing. The criteria for assessing a female athlete’s gender changed from one of physical examination to a more radical, though less invasive, test. Gender testing assumed a more sinister role. It was no longer concerned with men posing as women athletes but with athletes that externally appeared as women but whose genetic properties claimed otherwise. An abnormality in an individual’s chromosomes could render a person who has the outward appearance of one sex to be that of the other sex. The sex chromatin involves the collection of cells (a buccal smear) from inside the cheek to determine the chromosome properties. Usually, men and women have 46 chromosomes; men have one X and one Y chromosome, whereas women have two X chromosomes. Only those who were found to have two X chromosomes were deemed to be eligible to compete in women’s events. It is estimated that 1 in 500 people have abnormalities when chromatin tested.

Some women have what is known as androgen insensitivity and as a result have a Y chromosome. Those affected “are resistant to androgenic hormones and therefore cannot benefit from the administration (doping) or endogenous presence of such hormones.”

Polish sprinter and Olympic Champion Ewa Klobukowska was gender tested at Kiev and was found to have “one chromosome too many to be declared a woman for the purposes of athletic competition.” Klobukowska had successfully passed the nude parade the previous year. Eduardo Hay, a gynaecologist at the 1988 Games in Mexico City, defended the use of chromatin testing. The tests were not introduced to uncover men posing as women, but were there to protect female athletes from athletes who were registered as female but may have “anatomical advantages of masculinisation” due to “a genetic alteration.” Hay views doping and genetic advantage as “moral equivalents.” In support of this, Hay argues that hermaphrodites are justifiably excluded from competing, as it would result in a competitive advantage. Arguably, genetic advantage could be claimed in the case of a 7 feet tall American basketball player in comparison with a Chinese player who is 5 feet 7. This leads to the question: where does one draw the line?

Klobukowska was stripped of her medals and titles and was banned from competing for life. Medical experts differ in their conclusions in regard to Klobukowska.

Alan Ryan, an American gynaecologist and obstetrician, argues that one too many chromosomes could mean that Klobukowska had three X chromosomes. John S. Fox, a British gynaecologist and medical adviser to the British Amateur Athletic Board, and Ryan argue that Klobukowska was deemed ineligible by virtue of the appearance of masculine genitalia and not by the chromatin test. Others argue that Klobukowska had a genetic defect that made her neither XX or XY but XXXXY. Elizabeth A. Ferris maintains that Klobukowska was aware of this genetic defect and had availed of surgery to correct it. However, it was reported that Klobukowska had “abdominal testes” which had been removed. Perhaps Klobukowska had been taking “female” hormones and this was the reason for her lifetime ban. However, it seems that Klobukowska had a rare genetic condition that gave her no competitive advantage over her fellow competitors.

At the Atlanta Games in 1996, eight female athletes failed the test, although were all cleared by subsequent examinations. It was found that seven out of the eight were intersexed and that they did not have any unfair competitive advantage. Edinanci Silva, a Brazilian judo competitor, was born with both male and female organs and had surgery to correct this in the mid-1990s. The IOC allowed her to compete as a woman in the 1996, 2000 and 2004 Olympics, much to the chagrin of her Australian opponent, who constantly referred to Silva as “he” in press conferences. A mouth swab confirmed that Silva was female.

Attitudes to Gender Testing

Leading medical academics and practitioners have long called for the abolition of gender testing. The test has been referred to as “unscientific”, “nonsense”, “morally destitute” and it is claimed that there is no definitive test for determining gender. Questioning a person’s gender can have serious repercussions. The Indian middle distance runner Santhi Soundarajan failed a sex test in 2006 after being observed by an official during a urine test for doping. She was stripped of the silver medal she had won in Qatar at the Asian Games. Soundarajan was diagnosed with androgen insensitivity. Suffers of this condition do not gain any competitive advantage through increased levels of testosterone. It is a genetic defect that does not produce testosterone. Similarly in 1988 Patino, a Spanish hurdler was reinstated after it was discovered she had androgen insensitivity. The Olympic Council of Asia’s decision to disqualify Soundarajan is questionable on both grounds of ethics and efficacy. Soundarajan is believed to attempted suicide as a result of her gender being
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questioned. Although, as a small token the state government of Tamil Nadu supported her and awarded her 1.5 million rupees (approximately €23,800) for her performance in the Asian Games.41

Mary Peters, the British Gold medallist pent-athlete, was tested at the Munich Games in 1972 and wrote about her experience in her autobiography. She described it as the "most crude and degrading experience" of her life. She found the test to be almost voyeuristic, stating, “The doctors proceeded to undertake an examination which, in modern parlance, amounted to a grope”.43

Improved training and sociological changes have been cited as the reasons behind "striking improvement in athletic achievement by women". At the 1984 Games in Los Angeles marathon as an event for women was first introduced. The winner, Joan Benoit, recorded a time that was faster than all men’s time from the 1956 Olympics.45 As women’s sport became increasingly popular and accepted in the 1960s, it lead some to question the femininity of these women. Of particular importance was the competition between the US and former Soviet Union during the Cold War period. The US placed pressure on the IOC to introduce mandatory gender testing as Soviet athletes were dominating the Games. A number of Soviet athletes and former East German athletes were rumoured to be intersexed owing to their masculine physique. It was later discovered that a number of these athletes were using steroids. A notable example is that of Heidi Krieger, the former East German shot putter, now known as Andreas. Her coach put Heidi on steroids and the contraceptive pill at the age of 17. With the combination of the pill and steroids, Krieger’s weight increased as did her muscle mass. At 19 Krieger became conscious of her urge to become male. In 1997, Krieger had gender reassignment and is quoted as saying that the combination of the drugs and her own confusion in regard to her gender caused her to request a sex change.47

Dusty Rhodes, project manager of the Women’s Sports Federation in London, views gender testing to be "demeaning" and "points to homophobia in sport as fuelling the search for ‘deviant’ women”.48 Sport seems ill at ease with anyone who is “different” or outside the accepted norms of what constitutes femininity or masculinity. Individuals that defy gendered stereotypes are faced with numerous challenges, and the sporting domain is no exception. Alison Carlson makes the point that physically men and women are more alike than different.49 Elizabeth A. Ferris refers to a study on American college students that found men to be fitter and are more active than their female counterparts. However, when the study examined elite athletes, it found much more similarity and overlap.50

Many female athletes do not object to gender testing as they see it as a way of protecting their sports. This lack of objection may be attributed to a lack of knowledge on the part of the athlete. The more informed the athlete, the less likely they are to support testing, according to a survey carried out at the Lillehammer Games in 1994.51

The Games in Lillehammer were somewhat controversial as Norwegian scientists refused to conduct gender test as prescribed by the IOC.52 The IOC had to bring the medical team from Albertville to carry out the tests. In 1995 at the junior world championships in alpine skiing, the Norwegian medics again refused to carry out the tests. In 1997 a law was enacted that prohibits gender testing in Norway.53

Failed Tests in Recent Years

Up until the early 1990s, when an athlete was chosen for a gender test, she would be tested using the chromatin test. If the results were inconclusive, she would be asked to provide a blood sample. If the blood sample were inconclusive, the athlete would be examined physically. Once the athlete had passed the test, she would be given a sex certificate. The sex chromatin test could result in a failed test in the situation involving a female athlete with the appearance of a woman but who is found to have a Y chromosome. Evidence suggests that the buccal smear does not always present a clear picture. It is estimated that 30% of the cells will be positive and accordingly judged as female. The subjectivity of the examiner is also an important factor to consider.54

Maria Jose Martinez-Patino provides an illuminating example of the inconsistencies in sex testing. Patino argues that as an athlete, the sex test adds “an obstacle to the already demanding course that women had to take to participate in sport”.55 Patino had passed a sex test in 1983 and was issued with a Certificate of Femininity. In 1985 she forgot to bring her certificate to the World University Games in Japan. Patino was re-tested and was informed by the team doctor that there were problems with her result. As further tests were required, Patino was told that this could take months and that she should feign an injury and not compete the next day in her scheduled event. Patino followed the advice of the doctor and two months later her results arrived. She was diagnosed with androgen insensitivity.
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In 1986 she was about to enter the national championships in Spain, when her doctor once again advised her to feign an injury but this time Patino refused. On crossing the line, her story was leaked to the press. Her records were erased; her scholarship was revoked; and she was expelled from her athlete’s residence. For two years she challenged the results of her test. With the help of an American coach and journalist, Alison Carlson, and a Spanish professor, Patino gathered enough medical evidence to support her arguments, namely that she was a woman and that she had in no way cheated. In 1988 she was re-instated but failed to qualify for the 1992 Olympics. However, Patino is bittersweet. Her case was instrumental in ending the chromatin test, although by the time she was re-instated she had lost her momentum and never returned to form.

Testing Methods Reconsidered

In the late 1980s and early 1990s, the IOC and IAAF convened a number of workshops. It was stressed that the objective of gender testing was not to stigmatise women but to prevent male athletes masquerading as women. It was on this tenuous hook the continued use of the chromatin test rested. Under current drug testing methods, officials observe the athlete urinating so it would seem highly improbable that a male could masquerade as a woman. Despite its stated objectives, the IOC continued to exclude intersexed athletes and those suffering from androgen insensitivity in situations where there was a perceived competitive advantage. A group of international professionals attended an IAAF Workshop on Methods of Femininity Verification held in Monaco in the latter part of 1990. They recommended the discontinuation of gender testing. In 1991 the IAAF duly followed the recommendation and in place introduced medical examinations for the purposes of checking the health of the athlete, both male and female. In 1992 a conference was held in London, and at this conference the IAAF discussed feasibility of continuing with medical examinations. The IAAF decided to dispense with the requirement of medical examinations and opted not to replace it with any other form of screening or examination. It reserves right to assess an athlete’s gender in the event of suspicion arising in relation to an individual; however, it has yet to employ this provision. The IAAF recommends continued health checks although they are not mandatory.

The IOC remained committed to gender testing and introduced a DNA based method called polymerase chain reaction (PRC) to detect Y chromosomal properties. PRC allows scientists to produce unlimited copies of a DNA strand in a very short space of time. This new method replaced the chromatin test and first used at the 1992 Winter Games in Albertville. If the results are found to be abnormal, the athlete must undergo a gynaecological examination.

The PRC method is not without its critics. The supposedly sophisticated method excluded as many female competitors as its chromatin predecessor. Initially, the PRC method was supposed to “identify uniquely male DNA sequences, further investigation revealed that at least one of the DNA sequences used to prime the PCR was in fact not specific to males, and may have contributed to an unfortunate number of false positive test results”. In 1992, five female athletes failed the test and eight failed in 1996. As already stated, seven of those cases involved androgen insensitivity, a condition that actually places a woman at a competitive disadvantage. The eighth athlete was diagnosed as having a less common intersexed condition. All were furnished with gender verification certificates and allowed to compete.

In the aftermath of the 1996 Games, an increasing number of medical organisations were calling for the abolition of gender testing. The organisations included the American Medical Association, the American College of Physicians and the American Society of Human Genetics. The organisations made the point that the clothing worn by athletes and the direct supervision of officials in observing urination for doping purposes made it impossible for men to compete in women’s events. It was concluded that gender testing was expensive, unnecessary and futile. At its 112th Session in 1999, the IOC decided to abandon its policy of gender testing. It still reserves the right to investigate suspect individuals. It is still used in national and regional events. However, the creation of a gender lab in Beijing implies a more permanent state of affairs. Arguably, drug testing would be a less expensive, less invasive and less controversial method. More importantly, there is no documentary evidence to be found which shows when and why it was decided to establish a gender laboratory in Beijing.

It is interesting to note the change in approach. The IAAF had first introduced gender testing and the IOC followed suite. The IOC continued with the practice until 1999. However, in 2004 the IOC introduced provisions allowing transsexuals to compete subject to certain criteria, while the IAAF has continued to deal with transsexuals on a case-by-case basis. It provides for similar guidelines as the IOC in regard to transsexuals who have surgery prior to puberty,
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however the IAAF leaves it up to the relevant medical body within the sport’s organisation in question to decide on cases involving post-puberty gender reassignment. 77

The Position of Transsexual Athletes
The Supreme Court of New York decided the legal status of a transsexual athlete in 1977. 78 In 1934 Renee Richards was born male and called Richard Raskind. In 1975 Raskind had a gender re-assignment operation and changed his name to Renee Richards. Richards had a successful career as a tennis player and in 1976 was refused entry as a female competitor into the US Open by the US Tennis Association (USTA). Richards has refused to be physically examined to verify her biological gender. She successfully challenged the decision of the Tennis Association with the Court holding that there was overwhelming medical evidence that supported the contention that Richards was in fact female. The USTA compared the position of transsexuals to “drug cheats” and “female impersonators” and impostors”. 79 The Court rejected this comparison, and held “there to be very few biological males, who are accomplished tennis players, who are also either preoperative or postoperative transsexual”. 80 The Court was satisfied that:

“Medical science has not found any organic cause or cure (other than sex reassignment surgery and hormone therapy) for transsexualism, nor has psychotherapy been successful in altering the transsexual’s identification with the other sex or his desire for surgical change.” 81

McArdle notes that in the 30 years since the judgment in Richards, there have been no transgender athletes competing at elite level. 82 The fears that athletes would capitalise by changing their gender in the hope of “a shortcut to sporting glory” have proved unfounded. There are a number of health risks associated hormone therapy and where the patient is not under medical supervision or is sharing needles, the risks increase even more. 83 A person undergoing hormone treatment is advised to take exercise to minimise the effects of weight gain and to maximise bone density. 84

While transgender persons have expressed a willingness to compete in sport, sport remains “hostile” and almost homophobic.” A recent example can be seen in the Gender Recognition Act, 2004. Under this Act an exemption has been given to sporting bodies (who would seem to be public bodies for the purposes of the Human Rights Act, 1998) under section 19. Section 19 provides that transgender persons can be restricted from participation in sport on the grounds of “competitive fairness” and “safety”. Medical opinion has shown that a male to female transsexual would not pose any competitive advantage. In the example of Renee Richards, she had moderate success as a female tennis player and is perhaps better known for coaching Martina Navratilova. Participation in sport is beneficial for both physical and mental health and by denying a transsexual individual from participating raises concern among advocates of human rights. 85 While section 19 may not impact upon elite level sport, it has the potential to affect participation in low-level recreational sport. It is questionable whether unfair advantage and indeed safety can be reconciled with such low-level sport.

Ironically, the 2004 Act was enacted to address previous cases where it was found that that the UK had breached Articles 8 and 12 of the European Convention on Human Rights. 86 Under the ECHR a transgender person has the right to be recognised as their postoperative sex. Neither the House of Lords nor the Joint Committee on Human Rights (JCHR) voiced any objections to section 19. 87 It was argued that the new clause does not prevent transsexuals in general from participating, only those who present an unfair advantage or a threat to the safety of others. 88 Section 19 (4) provides that a sport is a gender-affected sport if the physical strength, stamina or physique of average persons of the other gender as competitors in events involving sport. This subsection largely replicates section 44 of the Sex Discrimination Act, 1975. 89 McArdle notes that section 44 was considered “dead law” and its replication in the form of section 19 “heralds an unwelcome return to the concept of the ‘average’ person in legislation otherwise concerned with affording opportunity rather than denying it”. 90 This leads to the question: what constitutes average? In a similar vein to the study referred to by Elizabeth A. Ferris above, McArdle proffers that athletes are fitter and stronger than the average person. 91 Among competitors, there will always be ones that are a taller than the average, yet these athletes are not prevented from playing due to an unfair advantage or due to a lack of safety. 92 Renee Richards at six feet two inches is the same height as Maria Sharapova. 93 Reeser (see below) gives the example of the volleyball player suffering from Marfan’s syndrome, a condition whereby the sufferer has long arms and is tall; her situation could equally be viewed as an unfair advantage or a safety issue.” Yet, because her condition is not related to some “deviant” condition, it is seen as socially acceptable.

Recognition of Transsexuals by the IAAF and IOC
In the wake of the Richards’ decision, there were no clear rules in regard to athletes that had changed sex. In 1990, the IAAF became the first International Federation to recognise that the gender assumed after
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the sex change was the gender of the athlete. However, those that had undergone post-pubertal surgery posed problems as a former male could still have the hormone levels of a man, which could result in an unfair advantage for that athlete competing with women. The IAAF decided that in post-pubertal cases that the individual would be assessed on a case-by-case basis. As yet there were no clear guidelines for post-pubertal transsexuals.

On May 17th 2004, the IOC approved proposals recommended by the IOC Medical Commission in relation to athletes who have changed sex. If a pre-pubertal male undergoes gender reassignment to become female, she will be considered female. The same applies to a pre-pubertal female who becomes male, he will compete as a male. For athletes who change sex after puberty, a number of conditions must be fulfilled:

- The individual concerned has completed the surgical reconstruction of the body, including the removal of the gonads and the genitalia.
- Legal recognition of their assigned sex has been conferred by the appropriate official authorities.
- Hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and for a sufficient length of time to minimise gender-related advantages in sport competitions.

An individual will not be eligible to compete for at least two years after the removal of the gonads. If an individual's sex is questioned, the medical committee of the relevant sport will be permitted to carry out further tests to determine the gender.

Men are typically taller than women and male to female transsexuals may have an unfair advantage when it comes to sports where height is an important factor, such as volleyball, netball and basketball. As a precautionary measure, some international associations including the IOC and the IAAF (as shown above) distinguish between pre- and post puberty surgery. If a male has surgery after puberty he may have "residual testosterone induced attributes could influence performance capacity." It thus follows that in this case; the decision on participation should be decided on a sport-by-sport basis. In general female, volleyball players are on average taller than non-volleyball playing females. Olympic volleyball players are taller than the previous generation of players. Height, while being an important factor, is not the only requirement. Studies reveal that physiological factors can be as important as psychological factors. Although "whether or not these performance and success related traits are hormonally mediated remains to be seen". Reeser gives the example of a volleyball player who had a condition known as Marfan’s syndrome. A sufferer of Marfan’s will typically be tall and have long arms, important traits for volleyball. The athlete differed from the vast majority of her fellow players yet she was never, to the knowledge of Reeser, restricted from pursuing her sport. Parallels can be drawn between this case and a case involving an intersexed athlete.

Marfan’s syndrome was genetic in same way as Stella Walsh had genetic abnormalities in the form of male genitalia. Yet, no rule was created that banned the volleyball player from competing. Her height and long limbs could be said to have given her an unfair competitive advantage.

Mianne Bagger, a Danish golfer, became the first transsexual to play at a professional golf tournament (Australian Open) in 2004. The Australian Ladies Professional Golf Association (ALPGA) changed its conditions that required a player to be “female at birth” thus allowing Bagger to compete. In 2005, a number of golfing associations dispensed with the female at birth criteria including the USGA, Ladies Golf Union, and the European Ladies Tour and Bagger became the first transsexual to avail of this change in policy. Bagger’s competitors, including Laura Davies had no issue with Bagger competing. Bagger maintains that she has no physical advantage over her competitors as her hormone therapy caused muscle loss.

Since the 2004 IOC rules, no transsexual athlete has competed or at least no athlete that is open about his or her transsexuality. Kristen Worley, a Canadian cyclist narrowly missed out on qualifying. Had she qualified she would be the first transsexual to compete under the new rules. Given that the IOC recognises the right of transsexual athletes to compete, why has a gender lab being created at Beijing? The presence of the laboratory is even more questionable in light of the frequency of erroneous results in gender testing.

Legal Status of Transsexuals
The sporting world has made some strides in recognising transsexual athletes. While confusion still pervades, this is understandable in light of differing medical opinion on transsexuality. Aside from settled medical opinion, some legal systems have been slow to recognise the legal status of transsexuals. The legal position of transsexual individuals has been the subject of recent litigation in Ireland. In the case of Lydia Foy, the High Court ruled that the Irish State was in breach of the European Convention of Human Rights (ECHR) by failing to recognise Foy’s sex change. The Court
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held that it was a basic human right for an individual to: “develop his being as he sees fit; subject only to the most minimal interference of the State being essential for the convergence of the common good. Together with human freedom, a person, subject to the acquired rights of others, should be free to shape his personality in the way best suited to his person and to his life”.

As yet, Ireland has not introduced legislation similar to the Gender Act, 2004. It may be only be a matter of time before it is required to so under its ECHR obligations. However, caution must be exercised on the part of the legislature as the Criminal Law Sexual Offences Act, 2006 was rushed through resulting in subsequent amendments having to be made. It would seem that the Irish legislature should not be tempted to “copy and paste” the Gender Recognition Act into Irish law.

Conclusion and Recommendations

Gender testing is a highly contentious and complex issue. Its original objective to prevent men from masquerading as a woman athlete was based on a noble premise. In pre-drug testing days, it was possible for a male to pose as a woman athlete. With the advent of drug testing and light sportswear used by competitors, a person’s gender can easily be assessed. The nude parades were considered humiliating and degrading to female athletes. The change to chromatin sex testing came about a time when athletes were being drug tested. Its use has been questioned in light of it being virtually impossible that a male athlete could pose as a woman. Nevertheless, the chromatin testing continued and “exposed” a number of intersexed athletes. Fearing vilification by the press and sporting community, many of these world champions retired or feigned injuries instead of challenging the method of testing. Medical opinion highlights the fact that intersexed athletes and those with androgen insensitivity do not have competitive advantage over other athletes. In fact, some may be at a disadvantage. Errors have been found in both the chromatin test and the PCR test. The sporting world is suspicious of female athletes that excel in their sport. Women athletes have achieved increasing success due to improved training and involvement in competitive sport. The traditional view of women as being physically inferior to men pervades competitive sport. This is not only a derogatory view of women’s sport but it is used as an excuse to question the femininity of a number of high profile athletes.

The re-instatement of gender testing at the Beijing Olympics denotes a disappointing departure from recent developments, most notably the recognition of transsexual athletes. The IOC’s approach to transsexuals and intersexed persons is paradoxical. The IOC accepts transsexual athletes, who in most cases are male to female, but has disqualified a number of female athletes who have a Y chromosome. These athletes are female except for a slight genetic defect. One could argue that transsexuals have a competitive advantage over intersexed persons, as men are generally taller and stronger than women. Yet, the IOC has focused on unfounded evidence that increased testosterone levels in an intersexed person or sufferer of androgen insensitivity gives an unfair advantage. Doctors and scientists argue that while theseathleteshave increased testosterone, their body does not respond to it.

Recent developments in the UK and Ireland are welcome. While the 2004 Act has been criticised, it nevertheless has brought the issue of gender recognition to the fore. A number of countries have yet to legislate, including Ireland, on the recognition of the transsexual person’s changed sex. In light of this, the efforts of the IOC to deal with the issue, is welcoming.

Perhaps a more egalitarian way of testing for gender fraud could be the re-introduction of random testing of all athletes. A similar practice was used by the IAAF in 1991 but was soon abandoned as it became cumbersome with regard to its organisation and administration. If clearer guidelines were introduced, it may be an option worth exploring.

Drug testing not only tests for prohibited substances but can also detect genital abnormalities. Drug testing applies to both male and female athletes. In obtaining the urine sample the athlete is observed by an official. Drug testing could be used as a two-fold detection method. This would decrease costs and dispense with the need for a gender laboratory. More importantly, it would be a more sensitive method of dealing with athletes suffering from genetic conditions.
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1 Broadcasters including NBC have been told that they can only broadcast for 6 hours a day for Tiananmen Square, from 6-10am and 9-11pm. NBC have paid $900 million in broadcast rights of the Beijing Olympics.


4 Ibid.

5 Human rights organisations including Amnesty had protested against China hosting the Olympics. Some protesters called for teams and diplomat to boycott the Games. Dick Pound, a former Olym pics commissioner, and others went as far as to say that the IOC should be held responsible.


7 Ibid, at p.183.


9 Ljungqvistfn 8 above, at p.185.

10 Although competitive sport is based on the premise that one competitor is better than another. This may be due to physiological or psychological differences between athletes. For example, there is a natural advantage of an American basketball player who is 7 foot tall over a Chinese player who is 5 foot 7.


13 It has been suggested that the segregation of sport into male and female events provides an advantage to female events. For example, women and by 2000, 4,069 women competed out of a total participation of 10,651 (38%). At this level, most governing bodies use only one of the eight criteria, the chromosome pattern.

14 In the Ancient Olympics, women were not permitted to participate in men's events.

15 Ljungqvistfn 8 above, at p.182.

16 Boylan, fn 13 above.

17 Women competed in the Olympics for the first time in 1900. Out of the 1225 participants, 19 were women. Women competed in tennis, yachting and golf. In 1910 the IOC added gymnastics and swimming for women for the 1912 Olympics. In 1984, 811 women competed in Rome. This figure represented only 11.5% of the total participation. By 1980, 38% of the participants were women and by 2000, 4,069 women competed out of a total participation of 10,661 (38%). As the Games in Athens in 2004, 44% of the participants were women. See Found, fn 6 above, at p.134 and Francis, Women in Sport, Olympic Review, Official Publication of the Olympic Movement, February 2004.

18 Ljungqvistfn 8 above, at p.184.

19 Ibid, at p.185. Ljungqvist notes that it is five a side according to some commentators and six according to others. Reesor, fn 13 above, states that there were six athletes.

20 J. Duncan, Sport in American Culture From All to X Games (ABC-CLIO, California, 2004), at pp.150-151.


24 This raises the question: would an athlete be listed as male but suffering from a genetic defect which meant he had to K chromosome, would this allow him to compete as a woman?

25 Interestingly, Reesor refers to the situation of a male to female transsexual who is receiving hormone treatment could still compete as a man, whereas a hormonally treated female to male athlete would be prohibited from competing against women. Because the presence of anogenital testostosterone would identify them as having ‘dopa’, a protein called ‘22z’ situation, Reesor, fn 13 above.

26 See G. Vines, "Last Olympics for the sex test? The world’s biggest sports body has just banned sex tests, breeding them unfair and unnecessary. But the test at this year’s Olympics still insists the practice must go on", New Scientist, July 4, 1992. Vines notes that genes can swap from one sex to the other, and this may cause physiological or psychological differences between males and females. For example, two of the physical differences that are observed, the female athlete is generally taller than the average man.

27 Ljungqvistfn 8 above, at p.187.

28 According to the AAA: See Cite fn 23 above, at p.129.

29 Ibid.

30 Ibid.

31 Ibid.

32 Ibid.

33 Ibid.

34 Ibid.

35 Ibid.

36 Ibid.

37 Ibid.

38 Ibid.

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121 Ibid.
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Obituaries

Bobby Fischer
Some may feel that the term “controversial” is applied a little too liberally in relation to certain larger-than-life sporting figures. However, one can fairly say that the one personality who fully merits this description is the former chess champion, Bobby Fischer, who has died aged 64. A fanatical purist as regards his sport, possessing a game which was based on mathematical simplicity and logic, Mr. Fischer was without doubt the finest player of his generation. However, his prowess at the board was matched by his ability to arouse ill feeling off it.

His reputation as a rebellious customer started when he was a junior player. Thus in 1961, he withdrew from a tournament because his match had been rescheduled, and, following the Candidates’ Tournament in Curacao the same year, he complained in Sports Illustrated that his Russian rivals had colluded by drawing games against each other, thus ensuring that he could not win. Although this view was not universally accepted, his voice was thus added to a rumble of discontent amongst top players which resulted in the system being reformed. In 1967, competing in the Interzonal Tournament in Tunisia, he became embroiled in a series of arguments with other players and officials as a result of which he withdrew once again, rendering him ineligible for the 1969 World Championship, which was won by his arch-rival Boris Spassky (The Daily Telegraph of 19/1/2008, p. 31). He returned to the international arena in 1972, when he became entitled to challenge the Russian for the world title – once again amidst a flurry of mercurial negotiations and threats of cancellation. Fischer then refused to play Spassky in front of the cameras, even though it had been he who had insisted on television coverage in the first place (Ibid).

It has been suggested that this objection was part of a cynical strategy to unsettle his opponent – and to keep the searching eye of the cameras well away from Fischer’s tantrums and mood changes. Be that as it may, he won decisively and became a media celebrity, the more so since he had done his utmost to transform this encounter into a symbol for the Cold War. He then refused to defend his title against Anatoly Karpov, and joined an obscure fundamentalist church, gradually becoming more and more of a recluse. In 1992 he once again agreed to play Boris Spassky in Montenegro, for which act he was threatened with arrest by the US authorities, who had made Yugoslavia subject to sanctions because of the Bosnian crisis. He turned against his own country in other ways, even going so far as to hail the events of 11 September 2001 as “wonderful news”. This was naturally not well received in the country of his birth. Three years later he was arrested as he attempted to leave Japan, where he was living at the time, for the Philippines after the US authorities had revoked his passport, given that they were seeking to have him deported in order to face charges of breaking the Yugoslav sanctions. Eventually, as was reported in these columns at the time (2005) 2 Sport and the Law Journal, p. 23) he was issued with an Icelandic passport. The authorities of that country decided to do so for humanitarian reasons, arguing that Mr. Fischer was being persecuted for his political beliefs. He left Tokyo for Reykjavik, where he eventually died (The Daily Telegraph, loc. cit.).

Jean-Marie Balestre
Another prominent personality whose place in the world of sport was replete with controversy was this former president of the FIA (being the world governing body in motor sport) who has died aged 86. He began his career as a sub-editor of two French car magazines. He went on to build a vast publishing empire, and in 1952 established the French motor sport federation (FFSA). In 1959, he laid claim to founding the French national karting authority, which was soon to be followed by the International Karting Commission, to which he appointed himself founder and honorary president. He became secretary-general of the FFSA in 1968, and its President five years later. However, his most notable feat was to establish the Fédération Internationale du Sport Automobile (FISA) in 1978 as an independent section existing within the FIA (The Independent of 31/3/2008, p. 34).

Much of his time in this capacity he spent locked in a bitter dispute with Formula One supremo Bernie Ecclestone concerning the right to control the flow of cash from the commercial contracts governing F1 racing. He felt that not only Ecclestone, but also his associates – including his legal right-hand man, Max Mosley – wielded too much influence at the most senior levels of the sport. The battle between the two power blocks was eventually resolved by the signing of the so-called Concorde Agreement, which acknowledged the FISA as the governing body for the sport, although most of the income from the
commercial rights accrued to Ecclestone and the F1 teams (The Guardian of 31/3/2008, p. 35). There were other aspects of his rule which caused controversy, more particularly the seemingly arbitrary decisions made by the governing body, and the accusations issuing from various quarters that he was inclined to display partiality towards Alain Prost, when the French rider was contending for his third world title against his McLaren team-mate Ayrton Senna in 1989. Mr Balestre’s reign as the most powerful man in world motor sport ended in 1991. Having last faced a challenge to his presidency of FISA ten years before, when he defeated Britain’s RAC representative Basil Tye, Balestre had been re-elected unopposed on two occasions. However, in November 1991 he was ousted when Max Mosley was elected president by 43 votes to 29 (Ibid).

Lawyers in sport

[None]

Digest of other sports law journals

**Latest issue of Zeitschrift für Sport und Recht**
The second issue for 2008 of our German sister journal contains in the first instance a status report by Andreas Stein on the application of the rules of EU competition law to the realm of sport, entitled “The European Commission’s White Paper on Sport”. He sets out the basic tenets and key provisions of the White Paper, which essentially seek to enable regulatory intervention on the part of the European Commission aimed atremedying any economic disputes which may arise because of the specific characteristics of the sporting realm. On the basis of the ECJ case law to date, and the Meca-Medina decision in particular, he arrives at the conclusion that the Commission can only intervene to regulate sport subject to severe conditions. In “Assessing the Value of Footballers in Sporting Clubs’ Balance Sheets”, the author Lukas Handschin examines the question as to how the transfer values of players can be entered into the clubs’ balance sheets. On the basis of the relevant case law, the author sets out the successive procedures applied when performing such valuations (which essentially amount to assessing the economic value of the player, then evaluating his loss of value). He also examines other accounting procedures which apply in such cases, for the benefit of practitioners in this area. In their contribution entitled “The Commercial Utilization of Sporting Performers’ Names”, the authors Christian Kusulis and Joachim Wichert concern themselves with the various aspects of personality rights. In so doing, they examine, on the basis of the voluminous case law on the subject, the various forms which the law on name protection can take, as well as the valuation of image rights and the transferability of the latter. The article in question points out the various legal uncertainties and financial risks which are inherent in this subject. In “The Case Law relating to Asian Martial Arts and Sports”, the relevant court decisions are exhaustively analysed by the author, Jörg-Michael Günther – ranging from issues of liability to the subject of legitimate self-defence. Against the background of the increasing popularity enjoyed by such sports, the author sets out the copious case law which exists in this field. Finally, the authors Anne Jakob and Anja Beminger provide a clear synopsis of the most significant changes to have occurred in the WADA Anti-doping Code (reviewed in [2008] 14 Neue Juristische Wochenschrift p. XVIII).

Sport and international relations

**Kosovans compete under their own flag – amid protests**
Since time immemorial, the Balkans have been an area which – even by European standards – has experienced more than its fair share of politico-military strife which has claimed countless lives. One of its most embattled focal points has been Kosovo, particularly towards the end of the last century, when NATO troops intervened in order to arrest what appeared to be a process of brutal “ethnic cleansing” of the Albanian-speaking majority by the Serb minority. This intervention effectively ensured that Serbia was no longer in control of the province. In early February 2008, Kosovo decided to declare its independence from Serbia, even though this move has not been recognized by the United Nations. The International Olympic Committee has emphatically stated that Kosovo will not be allowed to compete in the Games until UN recognition is forthcoming. In spite of this, the province’s table tennis players competed in an international tournament in China just weeks after their unilateral declaration of independence (The Daily Telegraph of 25/2/2008, p. 26).

This move has naturally given rise to a great deal of opposition in Serbia itself – not least on the part of some of its leading sporting performers. This was spectacularly brought to public attention during the European swimming championships in Eindhoven,
when Milorad Cavic, one of Serbia’s medal-winning hopes, wore a T-shirt bearing the words “Kosovo is Serbia” on the victor’s rostrum following his win in the 50-metres butterfly event. The disciplinary panel of the European governing body for the sport, the LEN, promptly suspended Mr. Cavic, on the basis that his action constituted a “clear political action”. In addition, the Serbian Swimming Federation was fined the sum of £5,451 (The Daily Telegraph of 22/3/2008, p. S23).

This predictably elicited a reaction from the Serbian authorities, with Sports Minister Snezana Samardzic-Markovic describing the decision as “scandalous” (Associated Press, at www.findlaw.com of 21/3/2008).

Gaza conflict continues to cause sporting victims

The Gaza strip, being the modest piece of land which houses the Palestinian state, is seldom out of the news for all the wrong reasons, and frequently sees its civilian population suffer the hardships of military intervention. In particular the regular air strikes visited upon the territory by Israeli forces have been known to take a heavy toll in this respect – as has been reported in earlier issues of this Journal. Tragically, history has repeated itself during the period under review, for in late February 2008 it was reported that four boys playing football were killed by air strikes, as Israel responded to a number of bomb attacks which had resulted in the death of a man the previous day (The Independent of 29/2/2008, p. 32).

Whilst the Israeli military command maintained that it had been targeting militants and rocket-launching squads, the Palestinian officials claimed that the boys were merely playing football close to their homes in Jebalya, northern Gaza (Ibid). This incident has yet again highlighted the extreme difficulties Palestinian sporting performers are facing in attempting to reach any standard at all in their chosen medium. The public was given a clear idea of the dire conditions in which these athletes had to train and perform by means of a feature article in a leading British newspaper (The Independent of 11/4/2008, p. 33). It highlighted the circumstances of Nader al-Masri, the fastest distance runner in Gaza, who has recently been allowed by the Israeli authorities to leave for the West Bank. This put him on the path towards realizing his 10-year-old dream of competing in the 5,000-metres event at the Beijing Olympics later this year. His home town of Beit Hanoun had been placed under curfew by Israel, as a result of which only those possessing special permits have been allowed to leave. One of the reasons for this restriction is the fact that, allegedly, Beit Hanoun is frequently used for launching heavy rockets into the Israeli border town of Sderot. It has been the scene of heavy fighting, not only between Israeli forces and Palestinian militants, but also between rival Palestinian groups Hamas and Fatah, which reached a climax with the latter’s bloody seizure of control in Gaza in June 2007.

However delighted Mr. al-Masri may be at this turn of events, he recognizes that he is entirely exceptional in being able to escape from what he himself, in common with most Gazans, describes as a “big prison”. For thousands of other Palestinians, who have all the travel papers they require except for an exit permit issued by Israel, there is little hope of even temporary escape (Ibid).

Koreans to form joint Olympic cheer squad

The Korean war, which was the original “conflict by proxy” fought out between the post-war superpowers, raged from 1950 to 1953 and ended in a truce rather than a peace treaty – as a result of which the two conflicting parties, North and South Korea, are technically still at war with each other. However, relations have thawed somewhat in recent years, to the extent that the possibility of joint efforts in areas such as sport has been mooted with increasing seriousness. Although these proposals stop a long way short of entering joint teams for major events, more modest endeavours have given rise to hopes and expectations that relations will be placed on a more fraternal footing. Thus in early February 2008, it was announced that North and South had agreed to send their first joint cheering squads, with a total of 600 members, to this summer’s Beijing Olympics. One squad will travel to Beijing for the first half of the Olympics, and a second will do likewise for the other half. Each will travel by train over a reconnected rail line linking the rival Koreas, and consist of 150 people from each side (Associated Press, at www.findlaw.com of 4/2/2008).

Zimbabwe question continues to cause havoc in international cricket

Background

Ever since the political regime which has ruled Zimbabwe since 1980 started to attract world-wide opprobrium because of its seemingly ceaseless and violent abuse of human rights, the question has arisen as to how the international community should handle relations with that country and its government. The world of sport may seem somewhat trivial amid the
1. General

tragedies which have afflicted Zimbabwe during Robert Mugabe’s despotic reign. However, sport, and more particularly cricket, has been a major flag-bearer of the Mugabe regime long enough for the governing bodies for this sport to have become implicated in the ructions caused by these abuses.

It will be recalled that a crisis point in this regard was reached five years ago, when the cricket World Cup, held in Southern Africa, was seriously disrupted when the English Cricket Board (ECB) decided to pull out of the England team’s group matches, which pitted them against Zimbabwe [(2003) 2 Sport and the Law Journal p. 12 et seq.]. Since then, other major cricketing nations – including Australia, have also boycotted fixtures against the representatives of that country. However, this has opened up a deep divide within the cricketing world, it being mainly the Anglo-Saxon countries which have been seeking to ostracise Zimbabwe from world cricket, whereas the latter have political allies within the boardroom of the International Cricket Council (ICC), in particular neighbouring South Africa.

Because of the close connection between the Mugabe regime and the leadership of Zimbabwe Cricket (ZC), the organization which governs the sport in that country, there was some expectation that the outcome of the general election, held in April 2008 might produce some change in this area. At the time of writing, the outcome of this contest was still in doubt. This does not mean, however, that the period under review has been bereft of developments in relation to Zimbabwe which have once again caused considerable havoc at several levels.

**ICC left in turmoil after ZC is cleared of irregularities**

It will be recalled from the previous issue [(2007) 3 Sport and the Law Journal p. 34] that, despite the support from South Africa and the Asian countries referred to above, the patience of the international cricketing community was beginning to run out on ZC. On the one hand, it retained its full-member voting status in the ICC and was in receipt of multi-million receipts from the ill-fated 2007 World Cup, even though it no longer features in the Test arena. Amid allegations of corruption, the ICC had commissioned international accountants KPMG to conduct an audit into the financial affairs of ZC, which was to be presented to the ICC Board in February of this year.

Once this report had been presented, the ICC announced that it had cleared ZC of any financial wrongdoing. It was understood that the report had found that no money had gone missing, but that some paperwork had been stolen. The report was further said to have “highlighted serious financial irregularities”, but “found no evidence of criminality” and concluded that “no individuals had gained financially” (The Guardian of 19/3/2008, p. S2). The reason for the indirect manner in which the above is reported is that, the next day, it was learned that the report itself would not be made public, and that it had not been distributed to the ICC Council’s constituent nations (The Guardian of 20/3/2008, p. S2).

This news was always likely to cause some controversy – in fact, the handling of the issue had given rise to fractious debate at the Dubai headquarters of the ICC on the occasion of its March board meeting, and it emerged that the decision not to open the KPMG report to public scrutiny had been far from unanimous. The discontent surrounding the issue was reflected in the refusal by ICC Chief Executive, Malcolm Speed, to attend a press conference, which was understood to have been caused by his displeasure at the manner in which the Zimbabwe issue had been handled (ibid). In fact, the whole affair had dramatic consequences for Mr. Speed, in that, the following month, he was ousted from his position. The Australian administrator, who had been due to retire from his position at the end of July, had been placed on paid leave for the remainder of his tenure following a series of disagreements over the handling of this question. He was understood to have fallen out irrevocably with the acting ICC president Ray Mali, who is said to be a close ally of Peter Chingoka, the controversial figure who heads ZC. Mr Speed was known to have become increasingly uncomfortable with what he considered to be Mr. Mali’s policy of protecting ZC (The Guardian of 26/4/2008, p. S12).

It then emerged that Mr. Speed had been at the centre of the contentious vote on the KPMG report referred to above. Mr. Speed had recommended that the KPMG report be referred to the ICC’s Ethics Committee, but he was overruled by the Board – hence its non-publication, The South African and Indian representatives had insisted that no copies of the document be allowed to leave the room, and the ICC has since declined to share its findings with the British Government, which was at that point deliberating whether or not to allow the Zimbabwean team to tour England in the summer of 2009 (ibid). This is an issue which will be returned to later. The manner in which the ICC had handled the Speed affair came in from strong criticism from its former president, Ehsan Mani, who described his treatment as “disgraceful” (The Daily Telegraph of 29/4/2008, p. S11).
1. General

It was also learned that, in spite of the decision not to publicise the contents of the KPMG report, several copies of the document were taken from the meeting. This resulted in two testimonies to a leading British newspaper, which purported to reveal that the "financial irregularities" had centred on large sums run up on credit cards issued by a well-known bank. The audit, however, had stopped short of listing the individual transactions and naming the people involved. According to David Morgan, the ICC president-elect who gave a press conference at Lord's the next day, the audit "essentially reflected the extremely difficult trading position in Zimbabwe" – meaning that the hyperinflation which afflicted the country had made accounting even more complex – and "identified no particular individuals who were guilty of malpractice". It is believed that Oliver Stocken, the ICC Ethics Officer, wished to continue the investigation (The Sunday Telegraph of 27/4/2008, p. S8).

**English cricket dithers over Zimbabwe question – yet again**

As the scenario depicted above was being played out on the world stage, the British authorities, both governmental and sporting, were once again bracing themselves for a period of turmoil on what to do in relation to the planned visit by Zimbabwe’s cricketers in the course of 2009 – first as participants in a general tour, then as competitors in the ICC World 20/20 tournament which was scheduled to be played on English soil that same year. An indication of the turmoil to come was given early in the New Year, when it was being widely reported that the Zimbabwe tour had been vetoed by the Brown Government (The Times of 3/1/2008, p. 71). This was not unwelcome news for the ECB, for it would only be a firm directive from the Government which would enable them to cancel the tour without incurring a $2 million fine from the ICC. It may be recalled from a previous issue ([2003] 2 Sport and the Law Journal p. 17) that the Government’s failure to intervene over the question of previous tours had caused problems in this regard.

The new ECB Chairman, Giles Clarke, had seized the initiative by holding talks in Cape Town in December 2007 with Mr. Chingoka in a bid to cancel the 2009 trip. There had been accusations levelled at Mr. Clarke that he had offered Zimbabwean cricket a £200,000 “bribe” in return for their agreement to cancel the tour. This was hotly denied by Mr. Clarke, who claimed that any money in this regard would emanate from the ICC compensation scheme. It soon appeared, however, that Mr. Clark was on the horns of a dilemma. On the one hand, he was clearly hoping that Dr. Brown would follow the example of his erstwhile Australian colleague, John Howard, who last year instructed his team not to visit Zimbabwe whilst Robert Mugabe remained in power. However, such a stance would have repercussions for the 20/20 World Cup, for which the ICC would probably find an alternative venue if the Prime Minister prevented Zimbabwe from competing (Daily Mail of 4/1/2008, p. 83).

The signs that the tour would be cancelled became more intense as the first month of the year progressed. British Foreign Secretary David Miliband cast doubt on the tour by declaring that it would not "send out the right message", and confirmed that ministers would be holding talks with the ECB concerning the tour (The Guardian of 8/1/2008, p. S2). The pressure intensified a few days later when Henry Olonga, the former Zimbabwe Test bowler, openly called for the British Government to cancel the tour. It will be recalled ([2003] 2 Sport and the Law Journal p. 17) that Mr. Olonga had been exiled in England ever since he had, together with batsman Andy Flower, led a black armband protest in which they "mourned the death of democracy" during the 2003 World Cup. He commented:

“Robert Mugabe has turned what was once a paradise homeland for us all into a desolate wasteland. I’m delighted that Gordon Brown is prepared to take a more involved role concerning Zimbabwe. Previously, Tony Blair sat on the fence, advising the ECB not to send England teams to Zimbabwe without giving them any protection from the draconian sanctions they’d face from the ICC for taking such action. Banning tours brought South Africa’s dreadful apartheid regime into the public consciousness around the world. It was the right thing to do then, and it is valid now in Zimbabwe” (The Mail on Sunday of 13/1/2008, p. 90).

He went on to state his belief that English cricket should be prepared to risk losing the 20/20 World Cup for the benefits of the “bigger picture” (ibid). However, Mr. Olonga’s confidence that the current British government was motivated by principle rather than expediency appeared to be dented when it emerged that, during the talks announced by Mr. Miliband, the ECB were still being urged by Government ministers to seek a financial peace deal with Zimbabwe which would avert yet another diplomatic crisis. It was also learned that if the tour were to be cancelled without good cause, England would not only face a hefty fine and lose the 20/20 tournament, as described earlier, but could even be temporarily banned from the international arena – being a risk which the ECB could not afford to take, with Australia due to defend the Ashes during the
second half of the 2009 season. In addition, there were fears that any action taken against Zimbabwe could invite retaliatory boycotts of the 2012 London Olympics by African countries (The Daily Telegraph of 24/1/2008, p. S9).

One of the factors which probably explained the hesitancy on the part of the British government to make a firm commitment was the imminence of the general election in Zimbabwe which, if it resulted in a defeat for Mr. Mugabe, would obviously change the picture entirely. One almost certain outcome of Mugabe’s party losing the election would be the instantaneous removal of Mr. Chingoka as ZC President. This would solve the thorny visa question, to which reference has already been made above. Mr. Chingoka had been refused a visa to visit Britain last year when seeking to give evidence at the tribunal which was investigating the claim for unfair dismissal brought by international umpire Darrell Hair (Journals passim). Mr. Chingoka would, if he were still in post, also be seeking a visa for the Annual Conference of the ICC, to be held in late June 2008. Chingoka duly made his application, but at the time of writing it looked as though this would once again be refused. As a result, the conference would have to be relocated to Dubai – as was the March meeting of the ICC Board, as is reported above (The Sunday Telegraph of 6/4/2008, loc. cit).

David Morgan, the incoming president of the ICC and former chairman of the ECB, certainly intimated that drastic action may be taken if the ZC president was again denied a visa. Asked whether England could lose the 20/20 tournament as a result, he commented

“It could happen. The chairman of Zimbabwe Cricket, whoever that may be, will want to come to see the truly wonderful event. My own opinion is that it will go ahead and be staged in England” (Daily Mail of 28/4/2008, p. 73).

As this issue went to press, it was unclear as to whether Mr. Morgan’s optimism would be vindicated. Certainly the outcome of the Zimbabwe election looks far from settled, it having been decided to hold a second “run-off” ballot in order to settle the issue. Obviously this column will keep its readership duly informed.

Other issues

North Korea host first cricket tournament

Although the centre of gravity in the sport is gradually shifting towards Asia, few people expected the game of cricket to spread itself to the far-east of that continent – and still less to a country which not only appears to be labouring under a somewhat forbidding political regime, but has also been the flashpoint for East/West relations for many a decade. However, in late April 2008 the news broke that North Korea was to host its first tournament, with an English team taking on the host state’s finest in the capital Pyongyang. The tournament will, almost inevitably, assume the 20/20 format, and its three visiting teams will be largely composed of expatriates from England, Australia, South Africa and the Netherlands who are based in Shanghai. The North Korean side will be boosted by staff from the Indian and Pakistan embassies (The Daily Telegraph of 24/4/2008, p. 19).

It has emerged that this venture was planned by Bryan Clark, a British employee of the logistics firm DHL, which has an office in the North Korean capital, and by the Shanghai Cricket Club, which has been to the forefront of attempts to develop the sport in China. There is currently a cricket league in Shanghai which includes teams from the city’s universities (Ibid).
2. Criminal Law

Corruption in sport

Tennis corruption scandal – an update

Background
Tennis is a sport which hitherto has succeeded in keeping out of the news headlines for the wrong reasons – give or take the odd tantrum on court (rather than in court). In recent months, however, a sinister element seems to have crept into the professional game, with various allegations of betting rings intervening in order to fix matches – inevitably raising the spectre of players being bribed on a major scale. Obviously this has been of considerable concern to the sport’s authorities, whose responsibility it is to uphold the game’s integrity.

It will be recalled from the last issue (2007) 3 Sport and the Law Journal p. 29 that a development which dramatically raised world-wide awareness of the problem was the case of Nikolay Davydenko, a top Russian player whose surprise defeat by unfancied Martin Vassallo at the Sopot Open in August 2007 came under investigation by the Association of Tennis Professionals following irregular betting patterns on an on-line gambling site. It will also be recalled that the Russian, who was ranked No 4 in the world at the time, was required to submit his telephone records whilst competing in the US Open later that year, as well as being controversially fined for not competing hard enough against Marin Cilic during the St. Petersburg Open. Since then, a number of players have been suspended for their involvement in match-fixing attempts.

During the period under review, there have been further dramatic developments, both in the Davydenko case and as regards other players caught in the commission of corrupt practices. These will be examined at length. First, however, it is necessary to examine some general developments in the manner in which the sport’s authorities are setting about tackling the problem.

Tennis authorities take various initiatives
One idiosyncratic aspect of this sport is the balkanized manner in which it is organized and invigilated – which may explain the somewhat leaden-footed character of official reaction to this potential scandal to date. However, as the New Year 2008 broke, it appeared that these various bodies were about to act as a purposeful unit in this respect when it was learned that the Association of Tour Professionals (ATP), the International Tennis Federation (ITF), the Women’s Tennis Association (WTA) were joining forces with the organizers of the four Grand Slam tournaments in order to launch a review of their anti-corruption policies. To emphasise the seriousness of their intent, they announced that the review was to be led by former Metropolitan Police officers Jeffrey Rees and Ben Gunn (sic). Steps were also being taken towards creating uniform integrity rules (The Daily Telegraph of 8/1/2008, p. S18).

The two former Scotland Yard detectives seemed to be uniquely placed to investigate this problem. Following 25 years of service with the Metropolitan Police, Mr. Gunn had moved to the British Horseracing Authority (a body presiding over a sport which has also had its share of corruption controversy – see Journals passim), whilst Mr. Rees, following his departure from the Yard, had been involved in investigating the cricket match-fixing scandal (also extensively reported in these columns). The two spent the next three months travelling to global tournaments, in the course of which they interviewed players, coaches, officials and staff in order to assess the extent of the problem. They then returned to London to compile their reports, which they were expected to present to the various tennis authorities during the 2008 French Open at Roland Garros, Paris (The Guardian of 14/3/2008, p. S10).

Thus far, this matter had remained outside the scope of the official judicial authorities. However, this appeared about to change when it was learned, in late February 2008, that the French Tennis Federation was taking legal action in an attempt to ban online betting on the said French Open. The case was actually launched in Belgium, before the court located in Liège, which is the European Union headquarters of the three major betting websites involved (The Guardian of 27/2/2008, p. S6). The outcome of this case was not yet known at the time of writing,

In fact this was not the first time that the French tennis authorities had sought to invoke the assistance of the official authorities in order to counter suspect internet betting. The previous autumn, they had invited undercover police into the stands and corridors of the Paris Masters series event at Bercy in order to clamp down on suspicious betting activity. Various spectators were removed from the stadium after they had allegedly attempted to make online bets through their mobile telephones. However, they had little control over what happened outside the ground. According to its own estimates, the tournament in question gave rise to wagers worth anything up to £750 million, with around 150 sites offering bets on the fixtures. According to
François Vilotte, the managing director of the Federation, bets worth £170 million were placed on Betfair alone (ibid).

Although hundreds of websites offer online betting, the FFT is concentrating its legal action on the Belgian courts against three major sites, Bwin, Betfair and Ladbrokes. It is doing so in the hope that a decision in its favour will set a precedent, or at least deter others. The federation is planning similar legal action in Germany, and has already brought an action against two other firms, Unibet and Expekt, accusing them of having offered betting on the premises of Roland Garros. This series of court actions is based on the claim by the Federation that, as the organizers of the French Open, they have the exclusive legal right to its commercial earnings. It also argues that the risk of match-fixing is directly linked to the threat of corruption (ibid). The outcome of these cases was not yet known at the time of writing.

The Australian authorities also seemed to be taking the problem seriously. Acting on police advice, the organizers of the Australian Open, held in January 2008, took steps to ensure that no access to gambling websites was possible on site, and that there was no longer any bookmaker inside the grounds. They also displayed warning signs advising players that Tennis Australia had a “zero tolerance policy” on illegal gambling, match-fixing and the communication of sensitive information which could affect the outcome of a match (The Guardian of 16/1/2008, p. S2).

Davydenko “to be cleared of charges”
In the meantime, of course, Nikolay Davydenko, the player whose surprise defeat had given rise to the anxieties described above, was awaiting a decision in the investigation conducted into this affair by the ATP. The Russian was growing increasingly frustrated at this course of events, going so far as to declare that he had no longer any trust in the body. He even hinted that they might be persecuting him in order to boost a player ranked lower than him – a claim which was dismissed by the ATP Chief Executive, Etienne de Villiers, as “fanciful” (The Guardian of 12/1/2008, p. S13). However, his case received a considerable boost when Roger Federer, the world No. 1, declared his belief that the Russian player was innocent (The Guardian of 22/2/2008, p. 38).

One of the reasons for Mr. Davydenko’s frustration was undoubtedly the length of time it was taking the tennis authorities to conclude the case. In the first instance, this was due to a dispute over the extent of the evidence which Mr. Davydenko could reasonably be expected to provide. This had led him to question the validity of a request by the body’s anti-corruption team that he provide records of his wife’s and brother’s telephone conversations. His legal adviser, Dr. Frank Imminga, indicated his dissatisfaction with the conditions surrounding this request by demanding the following: “They need to provide a statement of how long this will take and to accept they will pay legal costs. If they had a 1 per cent chance of proving a link to corruption, they would say they’d take over the costs and give a decision within one month. But they can’t do that” (The Guardian of 27/3/2008, p. S2).

There was also a separate dispute over the question whether the ATP actually had the right to conduct the procedure in such a way as to involve Davydenko’s family. In support of its right to do so, the Association relied on a clause in its rulebook, which states: “Any coach, trainer, manager, agent, family member, tournament guest or other affiliate or associate of any player – collectively, ‘Player Support Personnel’ – shall also be bound by and shall comply with all of the provisions of this program” (Ibid)

However, even though he had agreed to the tenets of the rule book in question, Mr. Davydenko had received the advice that to comply with them would infringe privacy laws (ibid). The very next day, a leading British newspaper announced that the Russian player was set to be cleared as a result of the inquiry (Daily Mail of 28/3/2008, p. 67). However, at the time of writing this had not yet been officially confirmed. The manner in which the investigation had been held was also one of the elements which raised doubts over Mr. de Villiers’ future – the other factors being a number of controversial decisions on tournament formats. Davydenko and Rafael Nadal, the world No. 2, were among 20 leading players to the ATP board demanding that de Villiers’ contract be not renewed at the end of the year without a proper application process (The Guardian of 7/4/2008, p. S16).

More suspected bettors removed from courts
Because of the new guidelines on the prevention of betting scandals, tournament organizers had considerably increased their vigilance as to any betting activity detected within the premises over which they had jurisdiction.

Thus in mid-February 2008, three men were ejected by organizers at the Diamond Games in Antwerp after they...
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had been found to be gambling from the stands, using laptop computers and logged onto a gambling website, gambling on matches in progress. More particularly they had been suspected of “exploiting the delay” between the time when a point was won and the time when it appeared on the official tournament website. The decision to remove the men had been taken following consultations with the governing body, in this case the WTA. These were the first ejections made since the guidelines referred to above had been put into operation (The Guardian of 13/2/2008, p. S8).

Two weeks later, another spectator suspected of involvement in illegal betting was threatened with eviction during the Dubai Open – more particularly on the occasion of the defeat Justine Henin, the women’s world no. 1 player, by the unfancied Francesca Schiavone. During this match, a man in the stands was watched at length whilst he was talking on his mobile phone. He was then addressed by a WTA tour official, before the two left to continue the discussion elsewhere. It was reported to have been the second such incident in two days (The Daily Telegraph of 29/2/2008, p. S18).

Other players investigated and/or banned

During the period under review, Mr. Davydenko has not been the only player to have been investigated in connection with accusations of corruption – actual or potential. Thus in early March 2008, it was learned that Federico Luzzi, ranked 139 in the world, had been banned for 200 days and fined £25,000 after having been found guilty of gambling on fixtures. An ATP investigation had found that the Italian player had wagered 273 times on 836 tennis matches between May 2004 and April 2007. In one case, Mr. Luzzi was found to have placed a bet on himself to win a match, although the ATP conceded that he was not found to have attempted to affect the outcome of any fixture (The Guardian of 1/3/2008, p. S12). This followed the revelation, made a month earlier, that Giorgio Galimberti, a compatriot of Mr. Luzzi, had been suspended for 100 days and fined $35,000 for having placed bets on tennis matches between June 2003 and January 2006 (Associated Press, at www.findlaw.com of 18/2/2008). It will be recalled from the previous issue ([2007] 3 Sport and the Law Journal p. 32) that another three Italians, Alessio di Mauro, Daniele Bracciale and Potito Starace, had also been banned for betting on the outcome of matches.

In the meantime, attention had also focused on the other player involved in the Davydenko affair, to wit Martin Vassall Arguello, from Argentina, whose shock win over the Russian had sparked off the inquiry. It came to light that the South American’s name had featured a further eight times in a file of matches which bookmakers considered worthy of further investigation. Mr. Arguello vehemently denied any impropriety, saying that he had never been approached or asked to fix a result, adding: “They were all matches that I was winning and then lost or that I was losing and then I won. Every moment of Davydenko was normal to me, was nothing weird. I think if you will look at the history of tennis, I think you will find 2,000 matches like these” (The Guardian of 16/1/2008, p. S8).

The Argentinian also bitterly criticized the ATP over the manner in which it was handling the betting crisis, accusing them of overreacting and of conducting a campaign of “political terrorism” and of using scare tactics to obtain co-operation from the players (Ibid).

The present author naturally undertakes to keep his readership informed of any further developments in this saga.

Cricket corruption scandal – an update

Samuels found guilty of links with bookmaker (West Indies)

Another sport which has had to cope with a spate of corruption allegations over the past few years is cricket. As has been extensively reported in these columns, the sport’s governing bodies have taken this aspect extremely seriously and made a number of appropriate decisions. In the course of May 2008, it was the turn of the West Indies Cricket Board to have to turn its attention to this problem, when it saw itself compelled to investigate alleged links between Test batsman Marlon Samuels and a certain bookmaker. More particularly Mr. Samuels had been accused of passing on team information to the bookmaker during a one-day series in India in the course of January 2007. In mid-May 2008, the Board’s Disciplinary Committee found that he has breached the relevant rules of the International Cricket Council (ICC) (The Daily Telegraph of 13/5/2008, p. S23). At the time of writing, the Board had yet to issue a penalty relating to this offence.

“I was offered bribes” claims Shoaib

Pakistan fast bowler Shoaib Akhtar is a player whose relations with the cricketing authorities have been on the difficult side, and has recently been subject to disciplinary action (discussed elsewhere in this issue, see below p. 000). Incensed at what he perceives to be his unfair treatment, Mr. Shoaib claims that he deserved
better, particularly because he had: “rejected many offers in the past to underperform. It happened in Johannesburg and in India but I never accepted them because I can’t betray my country” (The Daily Telegraph of 3/4/2008, p. S14).

He went on to complain that not even players who were being investigated on match-fixing allegations were subjected to this kind of penalty.

Belgian court grants footballers injunction in football corruption case

Germany and Italy, whose refereeing scandal has been reported extensively in previous issues of this organ and elsewhere, are unfortunately not the only countries in which the probity of match results at the top level has been called into question. Belgian football has also suffered a number of allegations and suspicions in this direction. Thus two years ago, criminal court proceedings were started against three professional footballers on accusations of having participated actively or passively in match-fixing. Whilst these criminal proceedings were pending, the Belgian Football federation, the URBSFA, brought disciplinary proceedings against these players arising from these charges. The players in question applied for an injunction against the Federation before the Chairman of the Brussels Court of First Instance, requesting the latter to quash or at least suspend the disciplinary proceedings against the appellants until such time as a decision was made in the main action.

The Chairman having dismissed this application, the claimants challenged this decision before the Brussels Court of Appeal. The latter, sitting in summary proceedings (en référé), awarded the appeal to the applicants on the following grounds:

Under a Law of 1921, which guarantees the principle of free speech, anyone who becomes a member of an association, by this very fact undertakes to be governed by its regulations as well as by its decisions and any penalties issued under such regulations. There was, however, no prima facie evidence that the applicants were bound by the Federation’s regulations, under which the disciplinary proceedings had been brought. The applicants were not voting members of the URBSFA, which was merely a method of administrative identification of the applicants within the association, but did not result in membership. Accordingly, no disciplinary proceedings could prima facie be brought against the applicants. The federation was not affected by the contract of employment between the club and the player, since the former had failed to furnish any evidence that the corresponding contracts of employment had been notified to the URBSFA in the form required; nor had any requests been forthcoming from the players for affiliation to the Federation.

The Federation regulations lay down that, where a case is pending before the ordinary courts, the URBSFA will merely decide on such disciplinary measures as are necessary in order to assure the homogeneity of the competition. Accordingly, the Court of Appeal ruled prima facie that the disciplinary proceedings could not be reopened until the outcome of the main criminal law action was known, unless the disciplinary measures were necessary for the purpose of safeguarding the normal course of the competition.

Assessing the URBSFA disciplinary proceedings in the light of Article 6 of the European Convention on Human Rights (ECHR), which lays down the principle of the right to a fair trial, as well as the case law of the European Court of Human Rights (ECtHR) on the subject, the Court considered that certain URBSFA regulations formed an obstacle to bringing proceedings before a judicial body which could establish whether the principles of Article 6 had been respected and, more particularly, whether the penalties imposed by the disciplinary authorities at the last resort were based on the established facts, if no rules had been violated, and finally whether the penalties imposed were proportionate to the offences as established. The Court repeated the settled case law of the ECtHR which held that it is not necessary for the disciplinary or administrative authorities themselves to observe all the guarantees laid down in Article 6, provided that the persons affected have a right to have their case reviewed on its full merits, so that the conditions laid down in Article 6 had been fully respected (Decision of the Brussels Court of Appeal (Cour d’appel) dated 8/2/2007 (2008) ISLR 13).

Fabio Capello in tax evasion and corruption allegations (Italy)

(For the sake of convenience, the fiscal issues are dealt with under this heading instead of under Item 13).

Some consternation was expressed in footballing circles when the English FA decided to appoint Fabio Capello as the new manager of the national side – not least because some critics have alleged that the Italian’s mastery of the English language is quite negligible and therefore would be likely to affect his ability to communicate. However, there were also accusations that the entire appointment procedure had not been properly conducted – to the point where it was alleged that some members of the English FA Board had not been fully informed of certain facts surrounding
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Capello’s financial circumstances. This was narrowly linked to the new manager’s nationality, which implied the possibility – however remote – of direct or indirect involvement with the football corruption scandal which had racked the nation during the previous two years (Journals passim), particularly since he had been the manager of Juventus, one of the clubs most seriously implicated in the scandal. In fact, not only has Mr. Capello been the subject-matter of such accusations; he has also been accused of tax evasion on a considerable scale by the fiscal authorities of the country of his birth. Barely two weeks of Mr. Capello’s new tenure had elapsed when the news broke that he was under investigation for fiscal irregularities. Moreover, the Turin prosecutor in charge of the case made a statement which strongly suggested that a jail sentence might be the outcome if the allegations – which involved sums amounting to €2 million – were proved to be correct. In a further twist, Italy’s customs department claimed that the sum which Mr. Capello had failed to declare could be as high as £7.5 million. In addition, it appeared that these allegations were to a certain extent connected to the football corruption scandal. As Marco Gianoglio, the public prosecutor concerned, explained:

“This all started a year ago when we had information from the fiscal authorities who were looking into the Juventus affair. They informed us of these offshore companies used by Capello and we asked for the paperwork. In essence, we are talking about earnings of around two million euros that were not declared and on which 45 per cent in tax should have been paid. (…) Capello could face three years in jail but as sentences of three years and under are not enforced (…) he would not go to jail” (Daily Mail of 17/1/2008, p. 90).

Mr. Capello was in charge of Juventus between 2004 and 2006, guiding them to the Seria A title, but the club was relegated to Serie B following the infamous match-fixing scandal, which involved bribes to referees. According to a leading Italian newspaper, the public prosecutors were examining a complex web of offshore companies established for Mr. Capello by his sons Pierfilippo and Edoardo, and through which payments were allegedly passed from sponsorship deals. More particularly the authorities were investigating payments made to Mr. Capello through the Capello Family Trust, which is registered in Guernsey. This apparently is linked to another company, Sport 3000, which is based in Luxembourg and has money invested in Ireland, as well as properties in Milan, Marbella and the Italian island of Pantelleria. The probe had been launched following close scrutiny of the Juventus accounts during the said match-fixing scandal (Ibid).

It also emerged that this was not the first occasion on which Mr. Capello had found himself at the centre of a prosecution. In the course of 2003 he entered into a plea bargain and was issued with a £3,000 fine after it had emerged that he had signed a false residency declaration – again for tax purposes. He claimed to be a resident of the fiscal haven of Campione d’Italia in Switzerland, but during the relevant hearing could not even recall the address of his residence. His co-accused, Roberto Salmoiraghi, was issued with a six-month jail sentence (Ibid).

All this was naturally extremely embarrassing for the English FA, who were quick to issue a statement that Mr. Capello had informed its chief executive, Brian Barwick, of the possibility of the tax investigation issue being made public during his interview aimed at becoming Steve McLaren’s successor in December 2007. They added that Mr. Capello had given the assurance that his tax payments were “in order”. Mr. Capello’s lawyer, for his part, expressed his astonishment at the various accusations made against his client, stating:

“We have already offered to come to speak to the judge in order to explain, but we were told that the court was waiting for a final calculation from the Financial Police. I do not know where this suspicion has arisen from” (The Daily Telegraph of 17/1/2008, p. S7).

That same week, it was learned that Italian police had raided several properties belonging to the new England manager, as well as the office of his accountant, as part of the investigation. Search warrants were issued by the police in June and notified to Capello in June 2007, and therefore well before the latter’s appointment, which took place in December 2007. Although the Football Association continued to play down the significance of the investigation, some members of its Board are believed to have been extremely unhappy at having been kept in the dark about these goings-on. Certainly chairman Brian Barwick was informed by Capello during the negotiations leading up to his appointment, but this information was not, according to a leading British newspaper, disclosed when the Board were asked to confirm the Italian’s contract, worth approximately £6 million per annum (The Daily Telegraph of 18/1/2008, p. S6).

As the month wore on, more details of the companies and financial structures investigated in this affair began to emerge. Thus it was learned that the main focus of the inquiry had become the aforementioned Sport 3000 company which, in spite of its name, was established for the production of “perfumery items”. The firm’s
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assets reportedly included the brand name “Don Fabio”, valued at £115,000, and its operation represented the main source of income for the holding company of the same name. Details also began to emerge of the “amnesty” claimed by Capello’s lawyers (referred to above), which allegedly would protect him from any threat of a jail sentence. Certainly the pardon, approved in 2006 by Italy’s then centre-left government, covered not only offences for which people had been convicted, but also other which had not even been investigated, let alone tried. However, the amnesty would not have any effect on a separate investigation being conducted by tax inspectors (The Guardian of 19/1/2008, p.S4).

Matters looked even worse for Mr. Capello a few weeks later, when it was announced by a prosecutor in Rome that he wished to charge the England manager for allegedly withholding evidence. In Italy, this offence carries the same sentence as killing someone by dangerous driving – which can amount to a six-year jail sentence (The Daily Telegraph of 1/4/2008, p. S5). Crucially, this was related, not to any allegations of fiscal impropriety, but to a trial of six men accused of promoting unfair competition through the use of threats of violence on behalf of Italy’s formerly all-powerful players’ agency Gea World – which had been featured prominently during the Calciopoli corruption scandal reported in previous issues of this Journal. It will be recalled that this affair was centred on accusations that the then Juventus general manager, Luciano Moggi, headed a powerful network of allies who pressurized referees into giving favourable decisions on the field of play. The trial referred to above, however, had yet more to reveal. The Italian court heard accusations that Gea World (operated by Mr. Moggi’s son Alessandro) bullied players into joining the agency, and then pressurized them into signing contracts against their will. Moggi jr. and sr. were both in the dock, as was Davide Lipi, the son of the former Italy coach Marcello (The Guardian of 1/4/2008, p. S1).

Questions addressed to Mr. Cappello in connection with this trial revolved around the period which he spent as manager of AS Roma between 1999 and 2004, particularly in the light of an interview which he gave in 2002 in which he criticized Gea World for monopolising Italian football. The England coach, however, informed the court:

“I know nothing about Gea or another agent pressurizing players into going to a particular team. I was never under pressure to buy a Gea player. I have never heard of Alessandro Moggi threatening players” (Ibid).

More specifically, it was learned that, at this trial, the prosecutors were attempting to prove that Gea World were steering young players into the orbit of Juventus, then moved them on when it suited the Turin side. Zdenek Zeman, the former AS Roma coach, described to the court the grip exerted by Gea on Serie A (the top Italian football division) through its handling of dozens of players, and claimed that Alessandro Moggi went around with a list of players, informing the various teams that they should buy specific players. Also in the witness box with Capello was the latter’s assistant coach, Franco Baldini, who also acted in this capacity when at AS Roma. Whilst Capello denied noticing the effects of the “Moggi system”, Mr. Baldini was more forthcoming, describing the Moggis as a father-and-son team who used Gea World as a tool for boosting Juventus’s position in the top division (Ibid). It seems that it took considerable courage on Mr. Baldini’s part to say this, since he had to endure from Mr. Moggi a gesture with his arm stretched in front of him and his palm turned towards the ground. This, in Italian society, is a mafia-like threat conveying the message that its recipient should be careful what to say, or face the consequences. Later, after being threatened with expulsion from the court by the judge, Moggi Sr. apologized (The Independent of 1/4/2008, p. S6).

There came a further dramatic development in this affair the following week, when it was learned that his wife, Laura Ghisi, and two sons, Pierfilippo and Eduardo, would also face questioning over the complex web of offshore companies described above – as would the accountants used by the family. This was announced merely as part of “completing the file” by the public prosecutor (The Daily Telegraph of 9/4/2008, p. S6). Nevertheless, Mr. Capello remained confident that he would be cleared of wrongdoing (The Independent of 11/4/2008, p. 59).

The position of the new England manager, however, seemed to worsen considerably during the second week of May, when he was formally placed under investigation for perjury. If the investigation finds that Capello’s testimony in court differs from the evidence which he has given elsewhere – including the 2002 interview referred to above – he will be put on trial and could face the six-year jail sentence described above (The Daily Telegraph of 8/5/2008, p. S7). From a purely footballing point of view, this affair was beginning to impinge on the England team’s preparations, particularly for their important friendly fixture with the US at the end of the month, since it was learned that Capello had been instructed to appear before the public prosecutor in Turin on the day prior to the match. However, it was
understood that the Italian authorities were making every effort to find an alternative date (The Daily Telegraph of 9/6/2008, p. S1).

At the time of writing, the issue was as yet unresolved – naturally the present writer will keep his readership updated on the latest developments in the next issue of this Journal.

ISL collapse trial gets under way (Switzerland)
The realm inhabited by the top world governing bodies in sport has always been mired in controversy over their financial affairs, none more so than the organization which presides over the multi-billion enterprise known as professional football.

The reader may recall that, seven years ago, this unwelcome spotlight fell on the marketing agency International Sport and Leisure (ISL), which was run under the auspices of world governing body FIFA, and which collapsed in the course of 2001 with debts totaling some £153 million (2001) 2 Sport and the Law Journal p. 38). During the week which followed ISL going into liquidation, the Swiss prosecuting authorities investigated the question why FIFA had failed to receive the 75 per cent of a £30 million media rights sale arranged by the company, ISL, which also had marketing deals with the International Olympic Committee (IOC) and the men’s tennis tour, the ATP, had brokered the sale of television rights for the 2002 World Cup to the Brazilian broadcaster O Globo on behalf of FIFA.

However, it later transpired that the money due to the world governing body had gone missing. It had allegedly been diverted into a bank account for the use if ISL executives, including the former chairman of the group, Jean-Marie Weber. The respected Swiss investigating judge Thomas Hildebrand spent seven years picking over the details of this affair, and finally succeeded in bringing the case to court at the beginning of 2008 (The Guardian of 31/1/2008, p. S2).

At the trial, the six former ISL executives involved were indicted on a series of charges which included fraud, embezzlement and the forgery of documents. The inquiries thus far had already brought to light the role played by a senior FIFA official, the Paraguayan Nicolas Leoz, who was found to have received two separate payments from ISL totaling £86,000. His name had been included in a list of payments made to various sports officials via bank accounts in offshore tax havens such as Liechtenstein which was released to the court at the start of the two-day hearing. The list revealed that approximately £9 million had been paid to various sports officials between 1999 and 2001. However, this was before new evidence was disclosed which revealed that the total amounts paid by ISL by way of bribes (schmiergeld) was greater, and extended over a much longer period. Marc Siegwart, one of the three judges presiding over the case, informed the district court at Zug that one of the defendants had admitted in the course of the investigation that a total of £58 million had been paid out by ISL between 1989 and 1999 (The Daily Telegraph of 13/3/2008, p. S13).

Curiously, none of the defendants faced charges of actual bribery, since, under Swiss law, this was not an offence at the time, which is why the trial did not reveal the identities of the officials who received the “sweeteners” in order to secure contracts worth billions. At the time of writing, the trial was far from over – as usual, this correspondent will keep the reader fully abreast of further developments.

Chinese F1 boss jailed for corruption
Formula One racing is not a sport which is readily associated with the People’s Republic of China. Nevertheless, the sport has recently been introduced in that country, thanks mainly to Yu Zhifei, a sporting entrepreneur who directed Shanghai’s Sherhua football club for seven years and brought Manchester United to play in that city in 1999. Following construction of a $240 million track, Mr. Zhifei had given this particular brand of motor racing a window of opportunity in this corner of East Asia.

However, this was an enterprise which was to turn extremely sour for the Chinese buccaneer, since he was brought to trial for the embezzlement of public funds. He had been dismissed as chief of the Formula One enterprise after he had been arrested last year, and as a result of the trial was found guilty of abstracting over 1 million yuan (approximately £70,000) in public funds in order to buy state-owned property cheaply, according to the Xinhua news agency. He was the latest casualty of a city-wide corruption scandal which had already toppled the local Communist Party chief, Chen Liangyu, as well as implicating top figures from the world of government and business (The Guardian of 4/1/2008, p. 8). He was sentenced to four years’ imprisonment and fined 300,000 yuan (The Daily Telegraph of 4/1/2008, p. B8).
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Porto under investigation for corruption (Portugal)

Porto are one of Portugal’s top football sides, who won enduring admiration for their capture of the European Champions League in 2004. However, it would appear that there is also a seamiest aspect to the club, judging by recent developments. In early April 2008, Porto were notified that they, as well as their club President, Pinto da Costa, had come under investigation for match-fixing alleged to have taken place in the course of the 2003-4 season – the very period in which José Mourinho, later to become Chelsea’s controversial manager, led them to European glory (The Guardian of 2/4/2008, p. 50).

The matches under investigation were those between FC Porto and Estrela de Amadora and Beira-Mar. Porto won the first game 2-0, whereas they drew 0-0 at Beira-Mar. Both results are under investigation over allegations that the referees in question were subject to corruption. This case, referred to in Portugal as “the golden whistle”, has been monitored for nearly four years. It is the product of extensive co-operation between the Portuguese Football League disciplinary committee and the legal system of that country. At the time of writing, Porto had referred the accusations to their lawyers and were in the process of formulating a reply (The Daily Telegraph of 1/4/2008, p. S1). No further details are available at the time of writing.

Nastase resigns in protest at corruption allegations (Romania)

Ilie Nastase is a tennis player who, although he never fully realized the promise which his obvious talent anticipated, nevertheless made his mark on the sport as a stylist and entertainer. However, he has become embroiled in controversy of a more serious kind in his native Romania when the local media accused the nation’s Tennis Federation, of which he was the President, of fraud on the occasion of a Davis Cup tie with France (The Daily Telegraph of 13/2/2008, p. S5). He resigned in protest at these allegations, even threatening to leave his native land because “nobody needs me here” (The Guardian of 13/2/2008, p. S2). It transpired that the Romanian newspaper, Evenementul Zilei, had cited documents obtained from the Romanian federation stating that the body in question had requested local officials to pay £25,000 for a second-hand playing surface, when the real cost was £10,00 below that figure. Mr. Nastase vehemently denied any wrongdoing (Ibid).

Argentinian footballers in corruption probe (Brazil/Argentina)

Corruption in sport knows no boundaries, and South America is no exception. In March 2008, it was learned that the former president of one of Brazil’s most illustrious football clubs, Corinthians, had been charged by the criminal authorities with fraudulently diverting money from the transfers of several players. This has had implications for two prominent Argentinian players who were employed by the club from 2005-2007, to wit Carlos Tevez and Javier Mascherano, who currently play for English Premier League clubs. Both have interviewed by Brazilian federal police in connection with this case (although to date there is nothing to suggest any impropriety on the part of either player) (The Sunday Telegraph of 16/3/2008, p. S5). The outcome of this case was not yet known at the time of writing.

Accusations of bribery mar African Nations Cup

Often described as the “sleeping giant of football”, Africa has generated increasing world-wide interest through its periodic international competition called the Africa Cup of Nations, which invariably produces a diet of exciting and passionate football. However, on this occasion the events on the field were overshadowed by suspect developments off it when it was learned that Namibia’s players came forward to declare that they had been offered the sum of £15,000 per man to lose a fixture against Guinea. The previous week, Benin’s coach, Reinhart Farbisch, had revealed that he had been approached by a man claiming to represent a betting syndicate offering to pay him in order to ensure that his side were defeated by Mali on the occasion of their opening game in the 2008 tournament (The Sunday Telegraph of 27/1/2008, p. S6).

The President of the Namibia Football Association, John Muinjo, said that he had immediately called a meeting with the squad, warning them against the dangers of bribery (Ibid). No further details are available at the time of writing.

Rogue tickets for Beijing 2008 abound

Sports fans desperate for tickets to the major events have always been easy targets, not only for the ticket “touts”, but also for those purveying tickets of no legal value whatsoever. This is what appears to have been happening en masse over the past few months, with hundreds of online touts operating from anonymous offshore tax havens heaving offered British sports fans illegal tickets for this year’s Olympic Games at
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thousands of dollars each. In addition, a leading British Sunday newspaper has revealed that firms behind the black-market trade have a history of cheating customers (The Observer of 9/3/2008, p. 8).

This investigation yielded the information that, during the past two years, scores of firms selling concert and sports tickets have gone bankrupt or failed to deliver, leaving fans ticketless. Such agencies recently failed to provide tickets for the Carling Cup final at Wembley and concerts by pop groups Take That and Led Zeppelin. Many of these online firms are operating multiple sites and now consider the Olympics as a lucrative new way of targeting victims. Some of the sites have been investigated by the British Olympics Association, which is working with authorities in China to clamp down on such rogue practices. One particular online firm, beijingticketing.com, is offering tickets to the opening ceremony for $2,150 each, even though all passes to the event will be issued with the buyers’ photographs, making it difficult for them to be transferred.

Posing as a prospective client, a reporter from the newspaper enquired how the firm could promise to adhere to its “guarantee” that it could deliver tickets. He received the reply that they were dealing directly with the sponsors, who obtained 35 per cent of the ticket share; therefore, once the order was confirmed online – by communicating credit card details – they were allegedly secured. Although the Chinese Olympic authorities have stipulated that it is illegal for third parties to sell on tickets, the company seems extremely professional. Its website, like that of many other ticket resellers, carries the official Olympic logo and is consistently near the top of Google search lists when the words “Olympics and tickets” are inserted.

However, closer scrutiny reveals that the company is not what it seems. Although it uses a British telephone number for its sales operations, and lists its address at Companies House as 202 Blackfriars Road, Southwark, London, beijingticketing.com informs potential customers on its website that its headquarters are in Phoenix, Arizona, which proved to be the offices of a corporate lawyer who specialises in company start-ups. In addition, close examination of its small print reveals that beijingticketing.com’s parent company, XL&H, a giant in the online touting business, is actually based in Delaware in the US, a favoured location for firms seeking low taxes and whose authorities apply a light touch when it comes to regulatory oversight.

The firm described as XL&H – which stands for Xclusive Leisure and Hospitality – is well known in the ticketing world, although not always for the right reasons. Online chatrooms abound with hostile testimony from sport and music fans who have been left disappointed after the company failed to meet its “guarantees”. Thus some fans who paid hundreds of pounds to see Take That in concert in Glasgow late last year ended up being escorted from their seats by security guards after it turned out the tickets they had bought from a company acquired by Xclusive had actually been stolen. Others were not even issued with fake tickets, but with empty envelopes. Another site that has attracted the attention of the British Olympics Association makes similarly lavish claims. Beijing-2008tickets.com guarantees it can get tickets for all the big events (ibid).

Accordingly, potential customers have been warned to steer clear. In terms of the 2008 Olympic Games, the Chinese authorities are adamant: reselling tickets – bought from sponsors or individual applicants – is in breach of the rules set out by the International Olympic Committee (IOC). The British Olympics Association is equally firm on this issue, pointing out on its website that the Sportsworld Group, based in Oxfordshire, is the only official British ticket agency for the games. The association told newspaper in question that it was working with the IOC and the Chinese Olympics committee to take action against rogue traders who, by using the Games’ famous rings logo, are also breaching copyright laws. But, given the plethora of online sites now targeting the Olympics, it is proving to be a herculean task.

Clients were to a certain extent reassured to learn that they could claim their money back from their Visa or Mastercard providers if they don’t receive their tickets. But this applies only to credit cards, not debit cards. And the process of recovering the lost money can be prolonged and difficult. Often many online ticket tout sites say they reserve the right to accept only a bank transfer from a client, meaning that customers instantly waive the consumer protection that comes with credit card purchases. Many of the sites also insist on issuing ‘credit notes’ instead of cash refunds if they fail to deliver – which makes it more difficult for customers who agree to their terms to recover their money.

Given a mounting backlash against the touts, the authorities are starting to take the black market industry, which is estimated to have an annual £1bn turnover in the UK, more seriously. Thus the English Premier League has written to 140 websites warning them to stop trading or risk prosecution. In addition, the UK government has openly considered extending legislation to make it illegal not just to resell football
tickets in the UK but those for other “crown jewel” sporting occasions. However, given the vast profits involved, it is debatable whether anything will deter the biggest touts whose companies have an unnerving habit of going bankrupt, leaving punters and other creditors with little hope of seeing their money again. One notorious tout, Michael Rangos, operated at least three ticketing companies, including the much reviled Get Me Tickets, which was fined several times after actions brought by trading standards officials before being put into compulsory liquidation in 2006. In February 2008, Londonticketmarket.co.uk and its sister company, Londonticketshop.co.uk, both based in Cyprus and linked to Mr. Rangos, went into liquidation, leaving Led Zeppelin fans who paid thousands of pounds for tickets they never received extremely frustrated (Ibid).

Hooliganism and related issues

Mixed fortunes for Italian capital’s hooligan record

Roma/United hooligan clampdown successful… AS Roma and Manchester United are teams of whom a great deal is expected in the European football arenas, and their fans have been known to allow their expectations to boil over into violence – as indeed occurred when these two giants met last year in the European Champions’ league quarter finals. Several arrests were made during the return match in Rome, resulting in the jailing of four United “fans” (2007) 1 Sport and the Law Journal p. 43). Obviously when the two were paired again during this year’s top European club competition, fears abounded that some of the less mature supporters on both sides would merely see this as an opportunity to resume hostilities off the pitch.

In the event, such fears proved to be largely misplaced. This was due in no small part to the extensive preparations made by the authorities, both official and sporting, in order to head off any trouble. With a month to go before the fixture, a delegation from Old Trafford headed for Italy in order to plan the various security measures in co-operation with the Italian official and club authorities. During their visit, the United officials stressed the need for extra security, and ensured that they returned to Manchester in a position to brief the fans on where to go and what to do in the Italian capital (Daily Mail of 18/3/2008, p. 82). It would seem that the pleas by the United officials were heeded to the full, since the fixture in Rome passed off with hardly any trouble. This was due mainly to the draconian security measures taken, involving 1,400 Italian police as well as a number of police and stewards from Manchester. Police detained four Roma fans who refused to identify themselves and “responded physically” when challenged. Italian reports said that William Gaillard, a spokesman for European governing body UEFA, had earlier given warning that AS Roma risked losing next year’s Champions’ League final if the fixture were to be marred by violence (The Times of 2/4/2008, p. 77).

…. but Roma fans are banned from domestic fixtures…

However, this does not mean that all has been sweetness and light as far as the behaviour of the Italian capital’s football fans is concerned. In mid-May 2008, it was learned that the Italian football officials’ patience with AS Roma fans had run out, to the extent that they banned them from their club’s final match of the season at Catania, even though the title for the top division (Serie A) being at stake. Although Internazionale Milan led Roma by a mere point at that stage, it was decided that away supporters would be excluded from the Stadio Angelo Massimino thanks to the violent fringe which had attached itself to both clubs. Internazionale fans, on the other hand, were allowed to attend their final game at Parma (The Daily Telegraph of 14/5/2008, p. S7).

In the event, Internazionale secured the Scudetto by winning their final match, so the ban cannot really be said to have affected the outcome – even though AS Roma were held to a 1-1 draw at Catania.

… and the authorities even crack down on rowdy Vatican fans

Earlier in the, football fans in the Vatican enclave within the Italian capital seemed determined to give new meaning to the expression “unholy row” when it was learned that a football tournament for Rome seminarians and priests, which had already witnessed its share of red cards and altercations in the pitch, had been forced to come down hard on rowdy supporters in the stands. After residents living near the ground complained of the noise, trainee priests supporting their teams in the Clericus Cup tournament were informed that they would be banned from entering the ground if they continued to cause a nuisance with their drums, megaphones, trumpets, maracas and ghetto blasters. Loud chanting – in Latin, of course – was also discouraged in order to avoid causing a disturbance (The Guardian of 24/1/2008, p. 25).

Despite the ban, supporters of the current Cup holders, the Redemptoris Mater Seminary, indicated that they refused to refrain from singing a hymn from the stands before each game (Ibid).
2. Criminal Law

UEFA to investigate sectarian Celtic chanting (Spain)
The two top Glasgow clubs, Celtic and Rangers, have acquired a notorious reputation for an age-old rivalry which, long before the modern wave of hooliganism began to engulf British football in the 1970s, had already established itself as part of an unlovely tradition in the largest Scottish city. Occasionally this has also caused a nuisance abroad – as witness the complaints made against Rangers fans regarding their behaviour in Spain in the course of last year ([2007] 3 Sport and the Law Journal p. 46). Recently, however, it has been the turn of Celtic supporters for their behaviour to come under official scrutiny, after videos of supporters allegedly chanting sectarian songs during a fixture with Barcelona in early March were passed to European governing body UEFA, which pledged to investigate the matter (The Guardian of 29/3/2008, p. S9).

In fact, six videos were communicated to UEFA’s disciplinary unit, but a spokesperson later confirmed that only two of these could be used as evidence, since they showed fans chanting within Barcelona’s Camp Nou stadium. At the time of writing, the Scottish champions were facing an anxious wait to see whether disciplinary proceedings were to be initiated against them. Earlier this year, they had already been handed a partially suspended fine by UEFA after a supporter succeeded in invading the Celtic Park pitch during a fixture with AC Milan (Ibid).

Paris fans’ offensive banner prompts calls for tough action (France)
Although French football fans are hardly ever noted for their hooligan tendencies, there is a number of top clubs whose supporters have been known to cause trouble. One such club is Paris St Germain, whose behaviour was once again subjected to public scrutiny when, during the French League Cup final which pitted them against northern rivals Lens, displayed a banner which accused people from that region of being “jobless, inbred paedophiles”. The French Head of State, President Sarkozy, who was present at the game, described the “hate mongering” of these fans as unacceptable, and called for “tough measures”. Other politicians went so far as to call for the game, won by the Parisians by 2-1, to be replayed in order to teach the fans in question a lesson (The Independent of 1/4/2008, p. 56).

The banner in question has to be seen in the context of the roaring success earned by the film Bienvenue chez les Ch’tis, a comedy which mocks the anti-northern prejudices of Parisians and southerners, and gives a largely good-humoured portrait of the oddities of language and culture of the natives of the Nord-Pas de Calais. Later, a spokesman for one of the more excitable of PSG fan groups, the “Boulogne Boys”, apologised and blamed a small minority of hotheads. However, the banner had been draped across many seats allocated to PSG fans, and had been smuggled into the Stade de France in squares of cloth before being assembled inside – a process which did not suggest the actions of a small minority (Ibid).

Real Betis abandon match after bottle incident (Spain)
In mid-March 2008, Spanish top club real Betis were compelled to abandon their league home fixture against Athletic Bilbao after the visiting goalkeeper Armando was struck by a bottle thrown from the stands (The Sunday Telegraph of 16/3/2008, p. S5).

Belgian court decisions on football disorder legislation
(See below, under the heading “Procedural law”, p. 000).

“On-field” crime

“Spygate” scandal: an update (Italy/UK)
The reader will recall from the previous issue ([2007] 3 Sport and the Law Journal p. 000) that the struggle in the top echelons of Formula 1 motor racing has recently been tainted by allegations and rumours of industrial espionage, particularly between the “Big Two”, i.e. Ferrari and McLaren. The affair centred mainly around the allegation that Nigel Stepney, a top engineer in the employ of the Italian firm, had passed valuable technical information to arch-rivals McLaren in a 780-page dossier. This had led to an investigation by the Italian authorities, which was still in progress when this Journal last visited this issue. McLaren were fined £50 million and stripped of all their 2007 constructors’ points after being found guilty of illegally possessing Ferrari technical data. However, their drivers, Lewis Hamilton and Fernando Alonso, were allowed to retain their championship points and to compete for the top prize. Since then, there have been further developments, but none which have as yet brought this episode to a definitive conclusion.

Mr. Stepney himself, it will be recalled, has at all times protested his innocence, and has continued so to do during the period under review. In his first television interview since the affair burst into the open, shown on
2. Criminal Law

the Sky channel, he claimed that his motive for establishing contact with McLaren chief designer Mike Coughlan was linked to the prospect of his obtaining a senior position at a team other than Ferrari or McLaren. He did not feel responsible for the chain of events which led to one of the darkest episodes in the history of McLaren and Formula 1. Instead, he blamed the political situation at McLaren, as well as an over-dramatic interpretation of events, for the intensification of the dispute which first came to public attention the previous summer. He commented:

“There is a lot being said, but I think there is a lot underneath that hasn’t been said that should have been. It’s been dramatised for various other reasons, which we will have to go into at a later date. Some stuff has been done politically. Some stuff should have been brought out probably in a different way. (…) I think at the end of 2007 I was looking to get out of Ferrari anyway, whether it was going to be in Formula One I wasn’t quite sure”


It is known that Mr. Stepney was extremely saddened by the fact that he had been overlooked by Ferrari following the departure in 2006 of technical director Ross Brawn, currently working at Honda. It is believed that he expected to be promoted, or at least secure a more senior position in the Ferrari hierarchy. Messrs. Stepney and Coughlan had met the Honda team principal, Nick Fry, the previous summer with a view to securing a senior position at the Japanese firm, which at the time was engaged in a recruitment drive for high-calibre technical staff (Ibid).

In the wake of this affair, the world governing body in the sport, the FIA, perhaps stung by the criticism that the penalties issued to McLaren were too lenient, issued, through its President Max Mosley, a general warning that in future, any Formula One team involved in such spying activity would be likely to be removed from the championship completely. He added that the chances of being found out were quite high, since in modern F1 racing it was virtually impossible to engage in such actions without leaving traces, which would be discovered by the authorities (The Guardian of 23/1/2008, p. S8).

Meanwhile, of course, the Italian investigation was pursuing its course, and in early February 2008 the news broke that the McLaren team principal, Ron Dennis, as well as the chief operating officer, Martin Whitmarsh, had been “invited” by the Italian investigating judge to answer questions in connection with the affair. The judge in question, Giuseppe Tibis, who is attached to the Modena court, was actually in the process of questioning all the individuals involved, including McLaren drivers Fernando Alonso and Pedro de la Rosa. In fact Mr. Tibis informed McLaren’s Italian lawyers that they wished to speak not only to Messrs. Dennis and Whitmarsh, but also to Mike Coughlan and engineering director Paddy Lowe. Nigel Stepney was also asked to appear (The Independent of 8/2/2008, p. 71). (Italian law is based on the French model, under which the prosecutor conducts the preliminary investigation, with police carrying out their instructions. Evidence obtained during questioning is intended to be used later in court – assuming charges are brought – but it can be withdrawn by the defendant.)

The case took on a further dramatic twist later that month when Italian investigators, accompanied by British police, searched the homes of Mr. Dennis and four senior executives of McLaren. The shock raid took place during the early hours of the morning, with the team of investigators looking for any documents stored on computers which might link Dennis and his high-ranking team of designers and engineers to the spy scandal. The Italian team accordingly removed a number of computer files for further investigation. The McLaren team later declared that the police were “satisfied with the co-operation which they had received (The Daily Telegraph of 28/2/2008, p. S18).

Your correspondent will naturally continue to follow further developments in this saga for the benefit of his readership.

“Spygate” US style – New England Patriots caught and penalised

The use of illegal information in sport does not appear to have been confined to this side of the Atlantic, judging by recent developments in the world of American football.

In late January 2008, it was learned that security staff of the National (American) Football League in the US had confiscated a video camera and tape from an employee of top side New England Patriots during the latter’s victory over the New York Jets by 38-14. The employee in question had been accused of aiming his camera at the Jets’ defensive coaches as they signalled to players on the field. The NFL Commissioner in charge of the case, Roger Goodell, fined New England coach Bill Belichick $500,000, the maximum amount possible, docked the team $250,000 and ordered their forfeiture of their 2008 first-round draft choice. It was the largest fine ever for a coach, and the first time in NFL history that a first-round draft choice had been confiscated as a penalty. Following the investigation,
2. Criminal Law

the NFL announced that it had destroyed all the materials it had received from the Patriots (Associated Press, www.findlaw.com of 1/2/2008).

There the manner might have rested, but for the concern expressed by certain people at the manner in which the affair had been handled. More particularly, they appeared to be worried that this might not have been a unique case, and could form part of a trend which was worthy of investigation and possible further prosecution. This was the worry expressed by no lesser person than Arlen Specter, the powerful senator who is the top Republican representative on the Senate Judiciary Committee, who pronounced himself very concerned about the “underlying facts on the taping”, the reasons for the judgment imposing what he regarded as “limited” penalties, and, most of all, on the inexplicable destruction of the tapes (ibid). These concerns seemed to be perfectly justified, in view of reports in the media that Matt Walsh, a former Patriots employee, had videotaped a “walkthrough” practice of the Louis Rams before a key fixture in 2002, which was won 20-17 by the patriots.

This naturally upset the Patriots’ opponents, who started to threaten the New England team with legal action on several fronts. There followed intensive negotiations between lawyers on both sides, during which attempts were made to pressurise Mr. Walsh – now a golf professional living in Hawaii – into revelations about his part in the affair. In mid-March, Mr. Goodell confirmed that Walsh had not been interviewed as part of the NFL investigation into the original “Spygate” affair described above. It was also announced that Walsh was close to an agreement on providing relevant information to the NFL (Associated Press, www.findlaw.com of 10/3/2008). Two months later, however, this particular saga drew to a close when the Boston Herald, the newspaper which had made the allegations about the 2002 fixture, issued an apology for having falsely printed the videotape story. This news broke shortly after a meeting between Commissioner Goodell and Mr. Walsh produced no major revelations about the team’s taping procedures.

By way of excuse, the newspaper claimed that it had based its story on “sources it believed to be credible” (Associated Press, www.findlaw.com of 14/5/2008).

All this naturally did nothing to enhance the prestige of the NFL and its procedures, which is why Mr. Specter intensified his calls for an independent investigation into the affair – similar in intensity to the Mitchell Report on performance-enhancing drugs in baseball (Journals passim). The senator again bitterly criticised the NFL handling of the investigation, and even threatened the possibility of revoking the League’s anti-trust exemption. He extended his dissatisfaction to the Walsh affair, citing the fact that a Patriots lawyer participated in the meeting between Messrs Walsh and Goodell as evidence that the investigation had not been impartial. He also repeated his disapproval of the decision by Commissioner Goodell to destroy the notes and tapes confiscated during the initial investigation (see above) (Associated Press, www.findlaw.com of 14/5/2008).

It was not known at the time of writing whether there was any chance of Mr. Specter’s demands being satisfied.

Sumo trainer arrested over death (Japan)
It will be recalled from a previous issue of this Journal (2007) 2 Sport and the Law Journal p. 59) that the ancient Japanese sport of sumo wrestling received a serious setback when it was learned that a junior wrestler had died following an assault at a training camp. This naturally aroused the interest of the criminal authorities, who launched an investigation which resulted in the trainer involved in the incident, Junichi Yamamoto, as well as three wrestlers from his stable, being arrested on suspicion of inflicting bodily harm resulting in the death of 17-year-old Takashi Saito, a novice who fought under the name Tokitaizan (The Daily Telegraph of 8/2/2008, p. 20). Mr. Yamamoto is alleged to have struck Mr. Saito with a beer bottle after he attempted to leave in June 2007. He is than alleged to have ordered three senior wrestlers to assault him. The next day, the teenager collapsed and died after an exhausting sparring session. His death prompted the Japanese Government to order a review of the gruelling training regime which prevails in this sport, and has tarnished sumo wrestling’s image at a time when many promising athletes are turning away from the sport (The Guardian of 8/2/2008, p. 13).

Clerk admits hoax call on NFL terrorist attacks (US)
In late February 2008, a former Wisconsin grocery clerk pleaded guilty to making false internet postings warning of imminent terrorist attacks against seven stadiums of the NFL American Football league. Jake Brahm admitted that he posted bogus information that so-called dirty bombs would be detonated at stadiums at which games were to be played on 22 October 2006. He had indicated that the grounds in question were located in Miami, Atlanta, Houston, Oakland, Cleveland and New York. He also admitted that the reference to
New York was intended to indicate the Giants Stadium, where the Jets played the Detroit Lions that day. Mr. Brahm pleaded guilty to a one-charge indictment which had been issued a year earlier. The charge, brought under the Patriot Act, accused him of wilfully conveying false information that the stadiums would be attacked by terrorists using weapons of mass destruction as well as “radiological dispersal devices” (Associated Press, www.findlaw.com of 28/2/2008).

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

Dutch footballer given suspended sentence over tackle (Netherlands)
In late April 2008, Rachid Bouazuzan, a Dutch player who currently plays for English premiership team Wigan Athletic, was issued with a six-month suspended jail sentence by a Netherlands court for ending an opponent’s career. He was found guilty of causing bodily harm when, playing for Sparta Rotterdam in 2004, he broke the leg of Go Ahead Eagles defender Niels Kokmeijer in two places (Daily Mail of 25/4/2008, p.99).

Italian rider accused of headbutting rival (Australia)
In late January 2008, it was learned that race officials of Tour Down Under, an annual cycling event in Australia, had accused the Italian rider Elia Rigotto of headbutting Australian Mathew Hayman in a frantic sprint to the finishing line. The Italian was fined for causing the injury, which left Mr. Hayman with a broken collarbone. Although Rigotto later apologised to Mr. Hayman, the race officials described this as a “very serious incident” (The Guardian of 26/1/2008, p. 23). At the time of writing, it was not known whether this affair would give rise to any prosecution.

Swiss Supreme Court rescinds jail sentence for ice hockey player
It is not often that events in the Swiss ice hockey leagues give rise to serious court litigation, but this is exactly what occurred as a result of a fractious encounter played in the course of 2000. During a fixture between the Hockey Club Davos and the Zurich Lions Skating Club, Kevin Miller, playing for the former, fouled Andrew McKim, of the latter. McKim was in possession of the puck when Miller approached him at high speed and tackled him hard from behind half a second after McKim had propelled the puck goalwards. This tackle caused Mr. McKim to fall over and hit the ice hard with his forehead. He remained unconscious for a while, having suffered severe concussion, which ultimately compelled him to retire from the sport. In the meantime, he had not succeeded in obtaining a full-time occupation of any kind. As a result of the incident, Mr. Miller was sent off for the remainder of the match, and was later suspended for eight further games, as well as being fined SF 3,000 by the disciplinary authorities of the Swiss Ice Hockey Federation ([2008] 1 ISLR p. 12).

The prosecuting authorities took an interest, and as a result Mr. Miller was found guilty of wilful assault as well as negligent aggravated assault, and was sentenced to a three-month term of imprisonment, suspended for two years. Having appealed this decision; he was found not guilty by the Zurich cantonal court of appeal. That decision was subsequently challenged before the Swiss Federal Supreme Court by Mr. McKim. Initially, there was some doubt as to whether McKim had standing to appeal, which was dispelled by the Court, ruling that a victim was entitled to appeal against a decision by a criminal court in a matter which concerned his assailant if the decision in question could influence the outcome of the civil action brought by the victim.

On the substance of the claim, the Court analysed a number of general questions relating to the applicability of the criminal law. It highlighted the difference between a deliberate and a negligent assault. Under the Swiss criminal law an assault is committed deliberately where the accused is aware of the potential implications of his/her actions and decides to act in the face of such knowledge, thereby risking the consequences. Negligent assault, on the other hand, occurs where the accused has failed to apply the necessary precautions when acting in a manner which could be detrimental to others. Whilst he/she may be aware of the fact that he/she may be causing harm to others, he/she does not wilfully decide to risk the consequences but, lacking the necessary common sense, is confident that the negative implications of his actions will not materialise.

The Court took into consideration the fact that certain leading authors argue that any ice hockey player had agreed to being potentially assaulted simply by participating in an ice hockey game. The Court took the opportunity to state that this was not necessarily the case. Such implicit agreement will not, according to the court, be valid in a case where deliberate or serious infringements have been committed of sporting rules which have been enacted especially for the protection...
of participants. Mr. Miller had clearly and seriously infringed various rules of the International Ice Hockey Federation (IIHF). These rules had been enacted for the protection of the player’s well-being. Accordingly, the Federal Court refused to recognise the assumption that Mr. McKim had agreed to being assaulted – an assumption which would have made it impossible to find Kevin Miller guilty.

Also on the substance of the case, the Federal Supreme Court ruled that the consequences of Mr. Miller’s actions met the objective conditions not only for an assault, but also for an aggravated assault. However, the subjective element, which related to the distinction between deliberate, negligent or unintentional fulfilment of these conditions, was capable of further discussion. The Court found that the decision of the appeal court to find Miller not guilty of wilful assault to be unlawful. It held that, regardless of the question whether a tackle was intentional or not, an ice hockey player should control his movements on the pitch in such a way that he is always able to avoid hitting his opponent or becoming involved in other types of potentially dangerous situations. However, if he deliberately brings himself into a position where a body check will only be legal by coincidence, the wilfulness of his assault is present. Therefore, the Court of Appeal decision was set aside on this issue.

The Federal Court also annulled that part of the decision which dealt with negligent aggravated assault. It held that Mr. Miller, being a professional ice hockey player, had been able to anticipate that a body check from behind could result in severe and permanent physical injury for the victim. Had he acted more diligently, these injuries could have been avoided. Therefore there was negligence involved in this case, and that part of the decision was also set aside.

The Court accordingly referred the case back to a different court of first instance for a new decision (Ibid).

“Off-field” crime

“Pacman” Jones involved in public order offences (US)

Adam “Pacman” Jones is a cornerback for one of American football’s top teams, the Tennessee Titans, and has established something of a reputation for being the sport’s “bad boy” on account of several brushes with the sporting authorities. However, from time to time his excesses have earned him accusations and even prosecutions from the criminal authorities most of which have, however, ultimately not resulted in the imposition of any penalty. In the course of 2006, he was arrested on a drunken driving charge. Later that year, two Georgian men accused him of kicking and hitting them at a party. No charges were brought, however. A felony obstruction charge resulting from an altercation with a police officer in August 2006 was also dismissed, because the judge considered that had had already been penalised sufficiently by the disciplinary measures imposed by the sporting authorities, which resulted in his forfeiting $1.29 million in basic salary. Then came an alteration in which a female attorney accused him of hitting her in a strip club. However, she later withdrew the charges (Associated Press, www.findlaw.com of 31/1/2008).

A few months later, he was facing charges of public intoxication and disorderly conduct arising from an incident outside a nightclub in Nashville. He had been upset over losing his wallet and was arrested after cursing at officers before leaving. He was sentenced to three years’ probation by a Nashville court following a “no-contest plea” (Associated Press, www.findlaw.com of 14/2/2008).

Taylor murder case continues (US)

It will be recalled from a previous issue of this Journal (2007] 3 Sport and the Law Journal p. 000) that the world of American football was shocked to learn of the murder of top star Sean Taylor at his Miami home during a botched robbery. Four people were later arrested and charged in connection with this horrific crime. In May 2008, prosecutors announced that they would not be seeking the death penalty against those charged because the accused shooter was a minor at the time when the act was committed. The US Supreme Court had previously ruled that people cannot be executed for crimes committed whilst they are under the age of 18, and it is a well-established legal principle that other involved in the same case as a minor may not face the ultimate penalty if they are less directly liable. This means that the four suspects could face life imprisonment sentences as a result of the trial scheduled to commence in August 2008 (Associated Press, www.findlaw.com of 12/5/2008).

Miami prosecutors later announced that they had arrested and charged a fifth person, i.e. 16-year-old Timothy Brown, for the Taylor murder (Associated Press, www.findlaw.com of 14/5/2008).
2. Criminal Law

Thaksin couple face corruption charges (Thailand)

Thaksin Shinawatra is a former Prime Minister of Thailand who was deposed from his office through a military coup in 2006 and has since been living as an exile in London. He came to the attention of the sporting world that year when he became chairman of English Premier League club Manchester City. In his absence from his native land, he has faced several charges of corruption during his term of office as Prime Minister, which have also implicated his wife, Khunying Pojaman Shinawatra. In August 2007, they were both charged with corruption over the purchase of a prime plot of land in Bangkok from a government agency in 2003. Investigators have alleged that Pojaman used her husband’s political influence to purchase the land for 1/3rd of its estimated value. Later, the couple were also accused of failing to declare millions of pounds of shares assets. If they are convicted on all charges they could face up to 28 years in jail each (The Guardian of 9/1/2008, p. 22).

Ms. Shinawatra was arrested on these charges as she stepped off an aeroplane from Hong Kong in January 2008. Her husband was still in England at the time, but in late February he decided to fly to Thailand in order to face the charges and clear his name. He surrendered to the police on arrival, but was later bailed and appeared at a press conference (The Guardian of 31/3/2008, p. 24). At the time of writing, it was not known when his trial would commence.

Former basketball stars in trouble with the law (US)

Dennis Rodman

Dennis Rodman was an eminent US basketball star of a generation ago, and was a member of the highly successful Chicago Bulls and Detroit Pistons. In mid-May 2008, he was arrested and charged with domestic violence, having allegedly hit his girlfriend at a hotel the previous month. More particularly he was charged with spousal battery, brandishing a deadly weapon, and dissuading a witness. A spokesman for the former star later said that Mr. Rodman had been drinking heavily when he became involved with an altercation with Gina Petersen (Associated Press, www.findlaw.com of 16/5/2008). No further details are available at the time of writing.

Charles Barkley

Mr. Barkley was also a prominent player in his day, having competed in 16 NBA seasons for the Philadelphia 76ers, Phoenix Suns and Houston Rockets. He also played in the US “Dream Team” at the 1992 and 1996 Olympics. His little brush with the law, however, is of a totally different nature from that facing his colleague as described in the previous section. In mid-May 2008, it was learned that he would face criminal charges if he failed to repay a $400,000 gambling debt to a Las Vegas casino, according to Clark County District Attorney David Roger.

The Wynn Las Vegas casino filed a private complaint against Mr. Barkley on the grounds that he allegedly failed to repay four $100,000 casino “markers” (loans) which he received last October. The former star, who now works as a basketball analyst for Turner Network Television, has made no secret of his gambling activities over the years (Associated Press, www.findlaw.com of 15/5/2008). He later acknowledged the debt and pledged to repay it. He could be granted up to six months in order to repay the amount if he agrees to the standard attorney’s office restitution programme. He would thus become liable for the original $400,000 amount, as well as a 10 per cent programme fee (Associated Press, www.findlaw.com of 16/5/2008). However, no further details were available at the time of writing.

American footballer Michael Vick faces new charges (US)

The reader will recall from previous issues of this Journal the sad tale of Atlanta Falcons quarterback Michael Vick, who last year was sentenced to a prison term of 23 months on a federal dog fighting conviction ([2007] 3 Sport and the Law Journal p. 000). However, this was not the last of his legal troubles. He tested positive for marijuana in September 2007 whilst he was on supervised release. He has subsequently commenced a drug treatment programme at the prison in question (Associated Press, www.findlaw.com of 7/1/2008). However, he has yet to face other dog fighting charges, at the state level, the trial for which had yet to commence at the time of writing (Associated Press, www.findlaw.com of 14/3/2008). No further details are available as yet.

(On the subject of Mr. Vick’s contractual troubles, see below under Section 3, p. 000)
2. Criminal Law

Other cases involving US sporting performers (all months quoted refer to 2008 unless stated otherwise)

Dwayne Jarrett
The Carolina Panthers receiver (American football) pleaded not guilty to a charge of driving while impaired. He was arrested on 11/3/2008 after police claimed that he crossed the centre line and jumped a red light in the Charlotte district of Mint Hill, North Carolina. The police report stated that Mr. Jarrett’s blood-alcohol level was 0.12, i.e. above North Carolina’s legal limit of 0.08 (Associated Press, www.findlaw.com of 11/4/2008). No further details are available at the time of writing.

Tripp Isenhour
This PGA Tour golfer was charged with killing a hawk deliberately with a golf shot because it was making a noise as he videotaped a television show. He was charged with cruelty to animals and killing a migratory bird. The charges carry a maximum penalty of 14 months in jail and $1,500 in fines. According to court documents, Mr. Isenhour became upset when a red-shouldered hawk began making a noise, forcing another take. Thereupon he is alleged to have hitting golf balls at the bird from 300 yards, but abandoned his attempts. He then tried again when the hawk moved to within a range of 75 yards, and succeeded, according to the report compiled by the relevant Florida Fish and Wildlife Conservation Commission officer (Associated Press, www.findlaw.com of 6/3/2008). No further details are available at the time of writing.

(On this subject, see also the section devoted to animal rights, below p. 000)

Antonio Pierce
The New York Giants linebacker was accused of neglecting one of his dogs in the days leading up to the 2008 Super Bowl. According to the relevant animal protection society, his two pit bulls escaped from a fenced enclosure in his yard in late January. He was issued with a summons because one of his dogs was found to be underweight and suffering from a respiratory illness (Associated Press, www.findlaw.com of 14/2/2008).

Josh Booty
The former NFL quarterback had to be subdued by sheriff’s deputies with a Taser gun and ended with a black eye in mid-February after being arrested on suspicion of drunken driving. He was arrested after having been pulled over on the 55 Freeway in Santa Ana, California. In the course of the booking process, the ex-American footballer apparently became belligerent, which caused the deputies to apply the Taser gun. He was released several hours later with a citation advising him of a date to appear in court (Associated Press, www.findlaw.com of 14/2/2008).

Robert Dozier
In mid-April, a domestic assault complaint was dismissed against University of Memphis basketball player Robert Dozier. No charges were brought in the incident, which occurred two months earlier, and involved Mr. Dozier’s former girlfriend, LaParis Woods, outside a nightclub (Associated Press, www.findlaw.com of 16/4/2008).

Troy Hambrick
In mid-May, a judge in Tampa sentenced the former NFL running back to five years’ imprisonment for selling crack cocaine. The former Dallas Cowboys and Arizona Cardinals footballer had pleaded guilty to the charges. Court documents showed that Mr. Hambrick sold the drugs in 2007 to a confidential informant near his home in Lacochee, north of Tampa (Associated Press, www.findlaw.com of 13/5/2008).

Ronaldo questioned on transvestite altercation (Brazil)
In late April 2008, it was learned that Ronaldo, the Brazilian footballing star, was questioned by Sao Paulo police over allegations that he became involved in an altercation with three transvestite prostitutes he had taken back to a motel.

It is alleged that the AC Milan striker had left a nightclub in Rio de Janeiro with the three prostitutes only to discover they were all men. Mr. Ronaldo is claimed to have offered them £300 each not to inform the media about the incident, but only two of them apparently accepted the offer. According to Ronaldo, the third demanded the sum of £15,000 for remaining silent, at which an angry confrontation ensued. Carlo Augusto Noguiera, a local police officer, stated that he believed Mr. Ronaldo because the transvestite left the police station before being fully questioned. He added that the Brazil star had admitted commissioning prostitutes (which is not illegal in Brazil) but insisted that he believed them to be women. He later stated that he had been the victim of extortion and would take all possible steps to clear his name (The Daily Telegraph of 30/4/2008, p. 15). No further details are available at the time of writing.

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Kaka quizzed over links with corrupt church (Brazil)
In mid-January 2008, it was reported that another Brazilian football star who plies his trade with AC Milan, Kaka, crowned Player of the Year by world governing body FIFA, had been requested by the Brazilian authorities to explain his link with the leaders of an evangelical church who have pleaded guilty to money smuggling. The judge in question is seeking to discover what connection the footballer has with the Brazilian couple who were sentenced last year to almost five months’ imprisonment after pleading guilty to smuggling over £28,000 into the US. No accusations, however, were made against the player (The Guardian of 14/1/2008, p. S7).

Brazilian policy had announced that Estevam Hernandez Filho and Sonia Haddad Moraes Hernandez, founders of the Reborn in Christ Church – an evangelical church with hundreds of thousands of followers – have been using the worshippers’ donations to buy mansions and horse farms in Brazil and the US. The deeply religious Mr. Kaka had declared previously that he makes annual donations to this church. The judge, Mr. Marcelo Batliouni, issued Kaka with a questionnaire wishing to establish the level of friendship he had with the Brazilian couple the questions included whether he used to visit the couple’s home, and whether he knew that they had been arrested (ibid).

Argentinian rugby player robbed
In mid-January 2008, it was reported that Manuel Contepompi, the Argentinian rugby international, was robbed by four armed bandits at his home in Beccar, north of Buenos Aires, and deprived of a watch with which he was presented following his team’s World Cup performances in late 2007. He was tied up and locked in the bathroom along with his pregnant wife whilst the robbery took place (The Daily Telegraph of 24/1/2008, p. S5).

Security issues

Kenyan violence affects sport
Kenya is, unfortunately, one of the many African countries which have been stricken by political strife for several decades. Following disputed Presidential elections in the country early this year, several incidents of sickening violence causing the deaths of over 300 people have been reported. This has, not unexpectedly had a considerable impact on the world of sport. This is an aspect which is important to Kenyan society, in view of the success earned in the past by its runners, particularly over long distances. The full seriousness of the situation became quite clear in early January 2008, when it was learned that Ricky Sims, an agent who represents almost 50 Kenyan athletes, had admitted that he had instructed his clients to flee their training bases in Eldoret in order to ensure their safety amid the increasing levels of violence in their country. Eldoret accommodates more World and Olympic champions than any other place on this planet, and represents the cradle of Kenyan distance running (The Observer of 6/1/2008, p. 31).

Some senior Kenyan athletes have already experienced the sharp end of the violence. In one horrific case, Lucas Sang, a former Olympian, was allegedly stoned to death. Mr. Sang ran for Kenya in the 4x400m relay at the 1988 Olympics. His body had reportedly to be identified by Noah Ngeny, the 1500m gold medallist from the 2000 Sydney Games. Other reports claim that Luke Kibet, the world champion in the marathon discipline, required treatment after being hit on the head by a stone during a riot. Staff working for the world governing body, the IAAF, have experienced extreme difficulty in contacting their employers amidst the violence (ibid).

Even if they have not actually been harmed by the violence, top athletes in the country have suffered indirectly. Elite runners have informed the press that they were compelled to reduce their training after receiving death threats and being accused of fomenting post-election violence. This impact has naturally caused some concern that they will struggle at the Beijing Olympics and other major international events. One of those affected is Ezekiel Kemboi, the reigning Olympic 3,000 steeplechase champion, who told the Press that he was currently training only once per day instead of the usual three times. His coach, Moses Kiptanui, considered to have been the greatest steeplechaser ever, informed a leading British newspaper that he had been warned by the police that he could be killed at any time. Security officers had accused him of transporting petrol in order to burn down houses, and of ferrying guns and bows and arrows to gangs of youths targeting people from President Kibaki’s Kikuyu ethnic group. Mr. Kiptanui signed a statement dismissing these allegations (The Guardian of 26/1/2008, p. 26).

Although at the time of writing the fighting had become less intense, the country remained in a state of instability which will take some time to disappear. It has certainly done enough to persuade the English cricketing authority MCC to cancel their planned tour of Kenya (The Daily Telegraph of 14/1/2008, p. S12).
Terrorist violence continues to disrupt sporting activity

Sri Lanka
For several years now, this country has been riven by internecine fighting between the Sinhalese and Tamil ethnic groups. This has resulted in a good deal of terrorist violence which often finds its reflection in terrorist attacks. In early April 2008, there occurred a sickening reminder of the manner in which this can also affect the country’s top sporting performers, when it was learned that the national athletics coach, Lakshman de Alwis, and the former Olympic marathon runner K.A. Karunarate were amongst those killed in a suicide bomb attack in the capital Colombo. The bomber struck at the start of a marathon, killing 12 people (Daily Mail of 7/4/2008, p. 73).

Pakistan
The strife which has riddled this country has been more “international” by nature, in that the latter has been to the forefront of the “war on terrorism” in view of the presence of a large number of fundamentalist Muslims and their alleged involvement in the Afghanistan conflict, as well as other world-wide trouble spots. Previous issues of this Journal have already highlighted the effect which this situation has produced on a number of sporting activities, and the period under review has also produced a number of developments in this field.

Cricket, being a major sport in Pakistan, has not unexpectedly been to the forefront of these events, particularly in view of the planned tour, in March and April 2008, by the side currently rated as the best in the world, i.e. Australia. The latter were due to play three Tests, five one-day internationals and a Twenty20 fixture. It was initially decided by the Pakistan authorities to restrict the tour to four venues – Karachi, Lahore, Multan and Faisalabad (The Daily Telegraph of 7/2/2008, p. S5). However, in spite of these and other precautions, Cricket Australia, the national governing body, decided to postpone the tour on advice from their government. This was the direct result of a number of bomb explosions in the country since the assassination of the former Prime Minister Benazir Bhutto in January. The Australian players themselves had already voiced misgivings over the wisdom of the tour (The Independent of 12/3/2008, p. 57).

Nevertheless, Pakistani cricket received a much-needed boost when the world governing body, the International Cricket Council, announced that it had no immediate security concerns about staging the forthcoming Champions Trophy, scheduled for September, in Pakistan. A spokesman for the ICC stated that the possibility of moving the event from its originally scheduled venue was not on the agenda of its March Board meeting (The Guardian of 14/3/2008, p. S2).

However, a polo competition played on yaks in a remote corner of the country did fall prey to the “War on Terror”. In early May 2008, a Pakistani military intelligence agency has ordered that the festival, which is played in the mountainous area of Chitral, bordering Afghanistan, on the ancient Silk Road, be moved to a neighbouring district because it is too close to a listening post of the EU Central Intelligence Agency (CIA). Pakistan had built the spy station in order to monitor cross-border infiltration by Islamic militants in an area regarded by the CIA as a refuge for the international terrorist Osama bin Laden. The intelligence agency informed the government of the North West Frontier Province that the tournament, which is played on what is arguably the highest polo ground in the world at the 13,000 ft Boroghil Pass, had to be moved for “security reasons”. Locals, however, who belong to the semi-nomadic Wakhi people, have complained that the move would entail herding dozens of yaks over a glacier and the 15,000 ft Darkhot Pass in the Hindu Kush to Gilgit, a land alien to the Wakhi (The Daily Telegraph of 5/5/2008, p. 14).

Israel
This is another country which is constantly in the news in connection with terrorist violence, which nearly accounted for one of its brightest football stars in early February 2008. Yossi Benayoun, who plays for English Premier League club Liverpool, narrowly escaped death or serious injury when the southern town of Dimona was the target of a suicide attack. Mr. Benayoun was visiting his parents when the bombers struck, and killing one Israeli woman and the two Palestinian bombers themselves. He was in Israel on the eve of his country’s friendly home international with Romania (The Guardian of 5/2/2008, p. S6).

Other issues

Cruyff explains decision to abstain from 1978 finals (The Netherlands)
Johan Cruyff is by far the best-known footballer ever to emerge from the Low Countries, whose national side almost succeeded in winning the 1974 World Cup with his help. However, when the time came to make another attempt at winning football’s supreme trophy in Argentina, Mr. Cruyff refrained from joining the side – which once again reached the final, but fell at the last hurdle against the hosts. Hitherto, his decision not to
play had been interpreted as a gesture of protest against the military dictatorship which ruled Argentina at the time. However, after many years’ silence on this issue, Mr. Cruyff has decided to shed more light on the mystery when responding to accusations made by a former team-mate, Carlos Rexach, about his poor form during his final season with Barcelona, for whom the Dutchman played from 1973 to 1978. Blaming an assault in his Catalan home, he explained:

“To play a World Cup you have to be 200 per cent. Someone came and pointed a rifle at my head and tied up my wife while the children were in the flat. There are times when there are more important things in life. For four months my home was watched by the police and my children had to be protected when they went to school” (The Daily Telegraph of 17/4/2008, p. S9).

The Netherlands lost the final 3-1 after extra time. Many judges of the game have claimed that, with Cruyff in the team, Holland would probably have won.

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Media Rights Agreements

[None]

Legal issues arising from transfer deals

Chelsea in Italian “tapping up” row

This feature of our International Survey has frequently focused on the practice known as “tapping up”, i.e. illegal approaches made by football clubs to players employed by other sides. The period under review has yielded yet another such case, with Italian club Reggina accusing English Premier sides Chelsea of making such an approach to Vincenzo Camilleri. In late February 2008, the Italian club even threatened to make a formal complaint to European governing body UEFA, as well as to the Italian Football Association. More particularly, Reggina have alleged that they were going to offer the defender a professional contract when he turned 16 in March, but were then informed that Camilleri had agreed terms with the London club when he travelled to London in mid-February. The clubs had not agreed any compensation for the Italy under-16 international (The Times of 20/2/2008, p. 62).

The Reggina president, Pasquale Foti, expressed his concern at the English club’s allegedly “predatory” approach to youth recruitment, claiming that “another talented Italian footballer” had been stolen. Painting a somewhat chilling picture of the methods which can be deployed for such purposes, he continued:

“It has happened because a deal was started by a club, the Chelsea of Mr. Abramovich, at a time when it was not allowed because the player was not yet 16 years old. All this happened outside national and international rules. Frank Arnesen (Chelsea’s chief scout and director of youth development) used Abramovich’s helicopter to land in our training camp; they plundered him. They used power and money against our daily work and sacrifice. It is easy, on the other hand, to convince a boy who is not yet 16, who should be protected from such aggression” (Ibid).

The club president added that he would take up the matter with UEFA President Michel Platini, the Italian FA, and even the “courts of the Italian republic”. To date, however, there has been no news on any further developments in this saga.

(However, the European footballing body has been making definite attempts at regulating approaches made to minor footballers – see below, p. 000)

John Obi Mikel transfer dispute – an update (Norway/Britain)

Another disagreement over the transfer of an overseas player which has affected Chelsea concerns the long-running saga of Nigerian international John Obi Mikel. It will be recalled from previous issues of this Journal that this murky case, which has involved agents, reports of death threats and even kidnapping accusations, began three years ago when Manchester United claimed that they had signed Mr. Mikel from Norwegian club Lyn Oslo in April 2005, then loaned him back to the Scandinavian side. However, Chelsea, who had allegedly assisted with financing the Nigerian player’s education in Norway, insisted that they had their own agreement with the player’s agent. When the dispute over who exactly owned Mikel was at its most bitter, it was learned that charges had been brought against Lyn director Michael Andersen of forging a contract which indicated that the Norwegian side did have the rights to Mikel when the player was sold. During the period under review, the trial commenced, and, as was the case with the Camilleri case, has highlighted some of the less admirable aspects of the modern game.

Mr. Andersen has pleaded “not guilty” in the trial, and, when appearing before the court, has given details of a meeting with the Nigerian’s agent, John Shittu, as well as other representatives. He claimed that:

“It was like meeting the Sopranos. In the meeting, they behaved in a threatening way. We claimed that we had the rights to Mikel, but Shittu said we would regret that deal. We told them we had the right to Mikel, but Chelsea’s representative didn’t agree. John Shittu took him to the airport in Oslo. They went to London. Mikel was crying and we didn’t see him for a long time after that” (The Daily Telegraph of 13/2/2008, p. S8).

It is alleged that, once in London, Mr. Mikel signed for Chelsea and, during a television interview, claimed that he had previously been forced into signing for Manchester United and really wanted to play at Stamford Bridge (Chelsea). This is a version of events which Mr. Andersen denied during the trial. He claims that, following the interest in Mikel displayed by various clubs, he had shown the Nigerian all the relevant faxes, but that the latter did not wish to see them because his heart was set on joining Manchester United. He also alleged that United manager Sir Alex Ferguson had offered a contract which was even better than the one issued to their star Portuguese forward, Cristiano Ronaldo. Andersen had continued to inform Chelsea that his club Lyn had the rights to Mikel, but the Norwegian Football Federation decided that the contract with the African player was not valid. Eventually, Mr. Andersen
3. Contracts

handed over the relevant papers, but police in Norway then began to suspect that Mikel’s signature had been forged, and started to press charges. The player’s future was eventually resolved when Chelsea agreed to pay United the sum of £12 million for Mikel, with a further £4 million going to the Norwegian club (Ibid).

However, as the trial progressed, doubts arose as to the fate of this Chelsea/United deal when it was learned that Svein Holden, the Norwegian public prosecutor bringing the case against Mr. Andersen, was to argue that this financial settlement should be cancelled on the grounds that Mikel’s contract with Lyn was invalid, which would make him available as a free agent and not liable for any transfer fees. Whether the money would actually have to be repaid in the event of a guilty verdict was unclear. The world governing body, FIFA, had previously been reluctant to give a ruling on the validity of the contract which Mikel is alleged to have signed with Lyn contract during the original dispute, but may become involved again if, as expected, Chelsea demand a revised financial settlement (The Times of 19/2/2008, p. 58). The outcome of the trial was not yet known at the time of writing.

Employment law

Court of Arbitration issues landmark ruling on footballer contracts

(Please note: although this case concerns a British player, it has been included here because of its potential repercussions throughout the game worldwide).

The legal aspects of professional football are redolent of landmark decisions, such as the English Eastham ruling in the 1960s and, more recently, the Bosman decision by the European Court of Justice. Earlier this year, the Court of Arbitration for Sport (CAS) issued a ruling in the case of Scottish international Andy Webster which potentially has implications for the players' freedom of contract which are on a par with the other decisions mentioned. In effect, the Court has ruled that no player can be held to his contract for a period exceeding three years. For players who join clubs or renew their contracts after their 28th birthday this amounts to a period of two years.

The Webster test case came about after he left Heart of Midlothian, the Scottish Premier League club, for English side Wigan Athletic in May 2006, having spent three years of a four-year contract with the Scottish club. In so doing, he became the first player to rely on Article 17 of the transfer regulations issued by world governing body FIFA. A ruling by the latter had awarded Hearts the sum of £625,000, but the Scottish club were seeking £4.6 million – which they considered to be the player’s market value at the time of his departure – and challenged FIFA’s ruling before the CAS. Following the resulting trial, the Court, far from increasing the sum owed to Hearts, actually reduced it to £150,000, being the value attached to the remaining term of his contract when he crossed the border into England. It is true that FIFA’s disputes resolution chamber may multiply contract values by a factor of 1.5 in calculating compensation. However, with a player’s value being directly linked to his salary, the CAS ruling is likely to cause transfer fees to fall dramatically.

The CAS dismissed the Scottish club’s claims that the cost of replacing Mr. Webster should be a defining factor in determining the amount of the compensation. It also rejected Hearts’ suggestion that, as is the case under Scots law, commercial rather than basic employment values attached to footballers’ contracts should be the primary consideration. The club had unsuccessfully argued that the fact that they had developed Mr. Webster into an international player after he had arrived for £75,000 from Arbroath in 2001 should be taken into account.

The reaction by the footballers international trade union, FIFPRO, was not unnaturally positive. Said spokesman Tony Higgins:

“ My view has always been that this is the most significant case since Bosman. The Webster case allows players, after a set period of time and if they so wish, to decide who their future employer will be. We now have a degree of certainty about what the value in question will be. Clubs have to re-evaluate their strategies in dealing with players on long-term contracts. If they are on four- or five-year contracts and fall into the relevant age bracket, clubs may now have to renegotiate after two years. It is a bit like Bosman, there will be worried clubs, and clubs saying that this will ruin the game but after a period of time people will understand what their strategy will be and take due consideration. Once the clubs redefine their thinking, they will cope with this” (The Guardian of 31/1/2008, p. S6).

Mr. Higgins confirmed that clubs, as well as players, would be able to terminate unilaterally contracts under the same terms. However, it is likely that this decision will also cause clubs to suffer considerable accounting losses, since players’ contracts must henceforth depreciate over a maximum of three years – the so-called “protected period” for players under 28 – rather than over durations of up to five years, as is the case now (Ibid).
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**National federations to pay clubs for international players**

One of the hotly disputed contractual issues in the world of football – extensively documented in this organ and elsewhere – has been the vexed question of the compensation which the clubs whose players are called up for international duty should obtain from the governing bodies for the services of their employees. This was in fact one of the main issues which had led to the formation of the G14 group of top sides in Europe, who had joined forces in order to force an issue on this matter. However, early this year it looked as though, at least in the medium term, peace had broken out in this long-running sore when it was announced that the two main governing bodies involved – FIFA at the world level and UEFA at the level of Europe – had agreed a financial settlement which would result in payments to clubs amounting to £130 million for the use of their players over the next six years (The Times of 22/1/2008, p. 77).

The money in question will come from a fund specially constituted by FIFA and UEFA for this purpose. Under the terms of the settlement, UEFA was to pay £32 million during the Euro 2008 finals in Switzerland and Austria. They have also committed £40 million for the 2012 championship, to be played in Poland and the Ukraine. FIFA, for their part, have set aside £20 million for the 2010 World Cup in South Africa, and £36 million for the 2014 tournament in Brazil. However, this settlement does not cover other international tournaments such as the Africa Cup of Nations. The cash, to be split between approximately 150 clubs for the European Championships and 300 clubs for the World Cup, will be based on a standard daily rate for each player selected by his country. Clubs who release players for the Euro 2008 tournament will receive £3,000 per day per player, rising to £3,715 for the Euro 2012 event. However, the amount fixed for the 2010 and 2014 World Cups is expected to be significantly less (The Daily Telegraph of 22/1/2008, p. S4).

Although the maximum which a club could be paid for supplying a player for the duration of a competition would be less than £100,000 – less than a week’s salary for some of the English Premier League’s top earners – both club officials and UEFA stated that the decision had been motivated by principle rather than by purely financial considerations. UEFA president Michel Platini, for his part, said that the new funds did not constitute direct compensation for players selected for international duty, but a way of sharing profits from major tournaments with the trams who provide the players (Ibid).

(On the effects which this development has produced on the fate of the G14 group, see below under Section 17, p. 000.)

**Employee’s frequent football injuries may justify reduction in salary. Netherlands court decision**

In this decision (Case C06/278HR of 14/3/2008, [2008] 15 Nederlands Juristenblad 897), the dispute concerned the interpretation of a clause in a collective bargaining agreement which was relied upon by an employer to reduce the salary of an employee. The latter had been working as a chauffeur for the former since 1995, the terms of his employment being subject to a collective bargaining agreement (collectieve arbeidsovereenkomst) for that particular type of employment. The employee was prone to injury from his amateur footballing activity, resulting on several occasions in prolonged absence from work due to sickness. As a result, the employer made it clear to him on a number of occasions that he should discontinue playing football, failing which she (the employer) was considering no longer paying her part of the sickness insurance contributions. The employee ignored these requests and once again had to stop work for a considerable period owing to injury. As a result, the employer informed him that she would not pay him any salary for this period of unavailability for work. Later, she relented sufficiently to pay his basic salary and holiday money. Once the employer returned to work, he ceased playing football, and thereafter the employer paid him his basic salary as well as the additional payments laid down in the bargaining agreement.

The employee subsequently demanded payment of the amounts which he had forfeited during his periods of absence and which normally would have been due under the collective bargaining agreement. The employer refused, resulting in the employee taking her to court. The employer argued that the employee had deliberately caused his absence from work, as covered by Article 7-629 of the Civil Code (Burgerlijk Wetboek) or that, at least, his absence was due to his “negligence and contributory negligence” (schuld en toedoen) within the meaning of the bargaining agreement. The first court and the Court of Appeal had dismissed the employee’s action, which is why the matter landed before the Supreme Court (Hoge Raad).

The Supreme Court dismissed the application for review by the employee. The fact that Article 7-629 made the loss of additional payments dependent on the fact that the period of absence from work had been deliberately caused by the employee did not prevent the collective...
The majority of the facts alleged in the letter of termination were thus time-barred. As for the other facts, the Court found that none of the complaints made against the employee on the basis of these facts could be upheld. Therefore, the employer's failure to comply with the legal requirements for an anticipated termination made her liable to pay compensation to the employee to the amount of €2,000.

Fixed-term contract of professional basketball player cannot be transformed into indefinite contract. French court decision

In this case (Decision of 16/10/2007) the Social Division of the Riom Appeal Court ruled that a basketball player employed by a basketball club came within the area of professional sport as envisaged by Article D-121(2) of the Industrial Code (Code du travail) which allows the use of fixed-term contracts – even though the club in question is not professional team since it competes in the NF1 amateur championship – since it had been established (a) that the club routinely employed professional basketball players and (b) the contract of employment concluded by the employee in question made reference to a professional basketball player and laid down a number of obligations on the employee, such as participation in training sessions and competitions and (c) it made provision for monthly payment of a salary which represented the sole source of income for the employee. The fact that she was registered as a University student was irrelevant, since the date established thus far showed that she was a full-time employee of the club in whose exclusive service the employee was operating. Therefore, she was not entitled to have her fixed-term contract requalified as a contract concluded for an indefinite period.

Incentive bonus is not necessarily part of footballer’s contract of employment. Belgian court decision

In this case (R/S/Z v. VZW K.R.C.G.Z, [2007-8] Rechtskundig Weekblad 1456) the court decided that the payment of a modest incentive bonus which is pledged by a football club depending on the team

Absence of “keenness” on the part of handball player does not represent “serious error” on his part. French court decision

Under Article L122-3-8 of the French Employment Code (Code du travail), a fixed-term contract may only be terminated before its end date for reasons of “serious error” or force majeure. In the case before us, a termination letter – incorrectly described as a letter of dismissal – addressed to a professional handball player, justified this termination on the basis of a “serious error” on the employee’s part, which had consisted in his lack of keenness (défaut d’assiduité). The industrial court (conseil de prud’hommes) had ruled that this termination of the contract had not been based on a serious error, but constituted a dismissal without a real and serious reason. The Court of Appeal, however, rescinded this decision and qualified the letter in question as a premature termination of a fixed-term contract (Court of Appeal of Poitiers, decision dated 20/2/2007, JCP-La Semaine Juridique pf 23/1/2008. no. 1197).

In so doing, the Court of Appeal held that there had been no serious error on the employee’s part. The employer had attempted to bring disciplinary proceedings against the employee, but French industrial legislation prevents an employer from doing so more than two months following the date on which the employer knew about the allegedly erroneous action.
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Winning, losing or drawing, and which does not represent a repayment of expenses but rather payment for work performed, does not necessarily constitute the salary which forms an essential element of a contract of employment, because the existence of a contract or employment requires the existence of an agreement between the parties on such factors as work, payment and control.

American footballer brings arbitration complaint against Baltimore Ravens

In early March 2008, it was learned that top American footballer Terrell Suggs had filed a grievance against his club, the Baltimore Ravens, over the question whether he should be classified as a defensive end or a linebacker. The sum of $814,000 is at stake in the dispute. Mr. Suggs apparently wishes to receive the $8.879 million salary which is normally attached to the designation as defensive end. The club had assigned to Mr. Suggs the sum of $8,065 million which is normally paid to linebackers, being the sum representing the average of the top five linebackers’ salaries in the National Football League (NFL). The arbitration hearing was due to take place before an NFL Special Master. Mr. Suggs alleges that he played more than 50 per cent of his “snaps” in the position of defensive end during the previous year (Associated Press, www.findlaw.com of 7/3/2008). The outcome of this case was not yet known at the time of writing.

Sporting agencies

EU drags its feet on sporting agents…. but Ribéry court ruling may force an issue

That sporting agents are needed in order to smooth the path of transfers between clubs, especially in the world of football, is a proposition few would care to challenge. However, there has of late been a feeling abroad that some practitioners of the art have been operating in a way which is not entirely beneficial to the sport which they purport to serve, which is why several attempts – documented in this journal and elsewhere – have been made in the recent past to impose some form of official control over their activities. This has been the case not only in domestic terms, but also at the level of the international organisations – and the author is not only referring to the sporting bodies here. The European Union, in the shape of its executive arm, the European Commission, has attempted to grasp the nettle of regulating this particular world for some time now. However, for a while, particularly towards the middle of the past year, it looked as though its endeavours may, if the readership will allow the mixed metaphor, to have been kicked into the long grass.

In its original White Paper on the subject, the Commission had announced the imminence of an “impact assessment study” to be undertaken for the purpose of considering how the activities of agents could be codified. In its own words:

“repeated calls have been made on the EU to regulate the activity of players’ agents through an EU legislative initiative. The Commission will carry out an impact assessment to provide a clear overview of the activities of players agents in the EU” (The Guardian of 1/5/2008, p. S2).

However, these fine words were pronounced a year ago, and even allowing for the usual leaden-footed pace of international bureaucracy, within the next 12 months the wheels appeared to have ground almost to a halt. It is true that the Commission had embarked on the preparation of a public procurement process which would seek to recruit consultants or experts in order to conduct the study. However, that process was also a very elaborate one, with EU civil servants having to consider the contracts and evaluate whether they represented value to the EU ratepayer. At the time of writing, the contracts had yet to be signed, and even if everything goes according to plan, no results are expected before the second half of 2009. Appropriate legislation would, in those circumstances, still be a somewhat distant prospect (The Guardian of 1/5/2008, p. S2).

Nevertheless, there have been some recent judicial developments which might force an earlier issue on this matter – more particularly in the shape of court action which involved leading French international footballer Franck Ribéry. The World Cup finalist, who is currently one of the hottest transfer prospects for the forthcoming 2008-9 season, was the defendant in a breach of contract case initiated by his former agent. Bruno Heiderscheid, at the Court of Arbitration for Sport (CAS). The arbitrator presiding over the case, Jean-Jacques Bertrand, took an extended view of the contract in question, focusing on Mr. Heiderscheid’s criminal record. The case was brought under French law, which imposes a statutory obligation for all agents to hold an appropriate licence. Moreover, French law also provides that certain types of offence prevent the people who perpetrated them from holding a sporting agent licence. On this basis, Mr. Bertrand’s decision pointed out that Heiderscheid had been sentenced to a one-year term of imprisonment in respect of several financial offences (The Guardian of 2/5/2008, p. S2).
3. Contracts

Mr. Bertrand accordingly rejected Mr. Heiderscheid’s action, ordering the latter to repay the agency fees paid to him by the French international, and declaring the contract in question void. Accordingly, all representation contracts concluded with agents who have criminal records for financial misdemeanours will henceforth be held to be void by the Court. This has considerable implications for the world governing body FIFA, whose latest regulations governing agents, issued in January of this year, demanded that agents have an “impeccable reputation” throughout their career, defining this term as “no criminal sentence for a financial or violent crime ever (having) been passed against him”. (Ibid). The Ribéry case could therefore signal the start of a long overdue clean-up campaign in this sector.

Sponsorship agreements

Chinese footballer’s kit gives rise to court action

The clothing worn by a Charlton Athletic midfielder on the pitch rarely gives rise to controversy, whether legal or otherwise, but the case of Chinese international Zheng Zhi has proved to be a notable exception. In mid-April 2008, two of the world’s sportswear giants went head-to-head – or should that be toe-to-toe – in a Shanghai courtroom, with Nike and Adidas joining battle over the right to Mr. Zhi’s endorsement. It is understood that this legal tussle is merely a foretaste of their intensified struggle for Chinese consumers, which could have a decisive effect on the protagonists’ battle for worldwide supremacy. At the present moment, whilst Nike seems to have achieved a global lead, Adidas seems to be catching up in China. Both companies are expected to achieve a business figure of around $1 billion during the current year. Nike contracted the services of Mr. Zheng, who captains the Chinese national football team, as a “brand ambassador” in 2003. In its current court action, it is seeking the sum of £580,000 from the Chinese midfielder and from Adidas, on the grounds that the player allegedly breached his contract by appearing in clothing manufactured by the rival firm. In so doing, Nike are accusing the German company of recruiting famous players contracted to other brands (The Guardian of 17/4/2008, p. 22).

According to the state-run news organ China Daily, Nike’s lawyer, Yang Jun, informed the Shanghai No 1 Intermediate People’s Court that Zheng had undertaken to wear Nike products in public and to attend certain publicity events. He added that, after 2005, after Nike had rejected a request for more money, Mr. Zheng wore Adidas boots in Japan, adding subsequently that he wished to cancel his contract. On the other hand, Mr. Jiang Xian, the midfielder’s lawyer, argued that the action was not justified, and claimed that Nike had withdrawn a similar action accusing Adidas of unfair competition for want of evidence (Ibid).

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

Ambush marketing fears (real or exaggerated) at Beijing Olympics. Article in legal journal

Ambush marketing is a term which is loosely defined as the misappropriation of brand names which allows a market to take unfair advantage of the publicity surrounding a large-scale event, whether sporting or otherwise. Previous issues of this Journal have featured attempts to engage in this practice at successive Olympic Games – which appears to be a natural magnet for such activities given that there is no other sporting event (not even the football World Cup) which attracts more world-wide attention than this four-yearly jamboree. For some advertisers, a favourite Olympic sport has been to find ways of edging their brands into the Game’s spotlight without having to pay the multi-million dollar fee to become an Olympic sponsor. It is with an eye to these abuses that D. Wood has featured his article in a leading Chinese law journal (“Ambushing China and the Olympics”, in [2008] 4 China Law and Practice p. 44). Essentially, the author asks the question whether the commotion surrounding this aspect of the Games could be a trifle exaggerated, and whether ambush marketing is truly damaging to the organisers or official sponsors of this event.

In the first instance, the author points out that the International Olympic Committee (IOC) prohibits advertising in any shape or form at its official sporting venues, allowing sponsoring logos only in specific places. Athletes are merely allowed to wear clothing which bears one small trademark (i.e. three inches or less), and non-sponsors may not advertise at all in sight of the cameras. For the purpose of enforcing these rules, many deputized volunteers patrol events with duct tape in hand, monitoring offending logos on ski competitors’ helmets and ski jackets, reporters’ laptop computers, and even bathroom facilities. In addition to protecting the brand investment of the official sponsors, Olympic officials claim that the rules are also designed in such a way as to control the comprehensive commercialisation of the Games (Ibid).
3. Contracts

However, this has not prevented several attempts at circumventing these rules, and the media have been eager to cover the brand-wars as keenly as the events on the field of play – as witness the incident where a reporter was compelled to remove her sunglasses at a news conference because the logo was deemed to be visible. Another reporter was requested to place her branded bottle of water out of sight of the cameras. The author predicts that this kind of silliness is likely to get worse, with the city of London and the UK prepared to go further than ever before, which serious discussions being under way to outlaw the use of words such as “games”, “medal”, “gold” and “silver” except by official sponsors. He predicts that, in spite of the measures taken by the Chinese authorities so far, ingenious ambush marketers will still find ways of reaching their audience. This could make future organisers of the Games even more excessively vigilant.

Other issues

China legalises racing and betting

Having for a long period considered horse racing and betting to be a feudal and backward practice, the communist regime in China seems to have relaxed this somewhat doctrinaire stance of late. The city of Wuhan, in central China, once a European colonial settlement, will be the first to open a racing track next year. The decision is in response to a market-driven explosion in traditional popular culture – at least where it does not directly affect politics. The Orient Lucky Horse Group, the company granted the first licence to operate races, commented that the venture would start on a small basis, with jockey clubs around the country being invited to put forward 250 horses to compete (The Daily Telegraph of 12/1/2008, p. 22).

America’s Cup court battles continue

It will be recalled from a previous issue of this Journal (2007) 3 Sport and the Law Journal p. 48) that, in early July 2007, the Golden gate Yacht Club of San Francisco, run by Larry Ellison, put in a challenge to hold the most prestigious event in the international sailing calendar, to wit the America’s Cup. At the end of that month, the New Zealand Kiwis challenged for the honour of staging the race, and struck a “secondary deal” with the Swiss team Alinghi. The latter undertook to hold the Cup in 2009, to give the New Zealand team a payment holiday on their entry fee, and to offer them the right of first refusal on Ellison’s team base. However, a stand-off developed between the Swiss team, led by Ernesto Bertarelli, and the Golden Gate Club, one of the implications of which was the likely postponement of the 2009 Cup. This dispute was settled in late November 2007 before Mr. Justice Herman Cahn, of the New York Supreme Court, who found for Mr. Ellison against the Swiss businessman.

However, since then the dispute has flared up again, and is likely to continue for some considerable time. In March 2008, the Kiwi syndicate brought two court actions in the US. The first went to the New York State Supreme Court for breach of contract, on the basis that the team had signed up for the 33rd race with the pledge that it would be held in Spain (Valencia) in July 2009. The other was brought in a federal court under US anti-trust legislation, claiming that Alinghi had abused its power to “stifle competition” by accepting a Spanish yacht club’s invalid challenge in order to “gain an unfair competitive advantage” (Associated Press, www.findlaw.com of 6/3/2008).

Two weeks later, the Supreme Court found against Alinghi, thus confirming the court’s order made in November 2007, referred to above, which ruled that the San Francisco Golden Gate Yacht Club was the rightful Challenger of Record, rather than the Spanish club which had been selected by the Swiss (Associated Press, www.findlaw.com of 18/3/2008). At the same time, the judge, Herman Cahn, instructed the parties to settle the matter immediately (The Guardian of 19/3/2008, p. S2). However, following a meeting between representatives from both sides which was held during the next week, the matter remained unresolved, which means that the issue is likely to return to court in the near future (Associated Press, www.findlaw.com of 26/3/2008).

The anti-trust suit was unresolved at the time of writing.

US federal judge orders Vick to repay loan

Michael Vick, the American footballer, is no stranger to those columns, having been jailed for his involvement in a dog-fighting ring (see above, p. 000). He also appears to be in trouble under the private law, given that a Canadian bank brought an action against him for defaulting on a $2.4 million loan. The Royal Bank of Canada had brought the action against Vick on the grounds that his guilty plea to the dog fighting charge, and the resulting impact on his career, prevented him from repaying the loan. According to the suit brought before a US District Court, the terms of the loan stipulate that any change in employment which has a negative impact on the lender’s income constitutes a
3. Contracts

default on the loan. As a result of the 23-month prison sentence imposed on the renowned quarterback, the latter was suspended indefinitely without pay by his team, as well as losing all his major sponsors, which include Nike (Associated Press, www.findlaw.com of 9/5/2008).

The judge found for the bank, and ordered Mr. Vick to repay the $2.4 million, as well as $499 per day by way of interest charges, starting from September 2007. He was also ordered to pay the lawyer’s fees incurred by the bank and court costs amounting to $11,950 plus interest. Following the decision, the player’s team, the Atlanta Falcons, also attempted to recover approximately $20 million in bonuses which Vick had earned between 2004 and 2007. However, the federal judge ruled that Vick was entitled to retain all but $3.75 million of the cash paid to him for his footballing activities until the 2014 season (Ibid).

French court decisions on contractual obligation to ensure safety in motorised competitions

In the case under review, the participant in a quad race, organised in the context of a leisure centre, became stuck on the circuit where the race took place and was almost immediately hit by another quad, thus sustaining injuries. He brought an action against the operator of the leisure centre in question on the basis of Article 1147 of the French Civil Code, which stipulates that:

“a debtor shall be ordered to pay damages, either by reason of non-performance of the obligation, or by reason of a delay in performing, whenever he fails to prove that the non-performance emanates from an external cause which may not be ascribed to him, even though there has been no bad faith on his part” (translation by the author)

The court ruled that the operator of a leisure centre where quad cars can be hired is bound by an obligation to ensure safety which is an obligation de moyens (i.e. an obligation to provide the means without being bound to provide a result). Accordingly, it is for the victim of an accident which occurred in that leisure centre to prove that the operator in question was at fault if the latter’s liability under Article 1147 of the French Civil Code, which stipulates that:

However, the operator of the centre was at fault for failing to reveal the identity of the participants, which deprived the victim of the opportunity to bring an action against the driver of the car in question under Article 1384 of the civil Code (which regulates liability for dangerous things). Since the acceptance of risk theory was restricted to the quad competition itself, the operator was obliged to compensate the loss suffered by the victim. This loss was evaluated in terms of the loss of an opportunity to act against the third party who was responsible for the accident, and had to be evaluated at 90 per cent (Decision of the Court of Appeal at Caen of 22/11/2007, JCP-La Semaine Juridique of 16/4/2008 no. 1739).

The second case (Decision of the Court of Appeal at Lyon dated 14/6/2007 JCP-La Semaine Juridique of 7/4/2008, no. 1036) was that of a motorcyclist who had sustained serious injuries – to the point of becoming tetraplegic – as a result of an accident which occurred whilst he was taking part in a motor cross competition. He sought to obtain compensation from the competition organiser under the aforementioned Article 1147 of the Civil Code on the basis that the latter had failed to meet his contractual obligation to take all such safety measures as were necessary.

The Court found that the organiser had applied for all the necessary authorisations and that his circuit had been certified by UFOLEP, the relevant sporting federation. A decision by the local préfet had laid down the conditions under which the competition was to take place, and required the presence of a double barrier consisting of bails of hay disposed along the circuit up to the level of the first mound, as well as measures to protect the trees. The track of the circuit did not present any above-normal dangers. The circumstances of the accident were found to be such that the motorcyclist lost control over his motor cycle when negotiating the bump on the arrival space. It is at this point that he was ejected from the cycle, as a result of which his head hit the stone wall located to his left. There was no evidence that the mound contained rocks which represented obstacles requiring protection of a similar kind to that which was accorded to the trees. Nor was there any proof that the soil hit by the motorcyclist was harder than that which is normally expected on such circuits. It had not been established either that the motorcyclist had been exposed to a risk which exceeded that which was normal in this type of sport. As a result, the organiser’s contractual liability could not be engaged.
4. Torts and Insurance

Sporting injuries

**Australian court allows appeal in ski lift accident compensation claim**
The case in question had arisen when the original claimant had been injured riding a T-bar ski lift at a resort operated by the defendant. The injury had been caused as a result of the rope snapping. No rope frays had been established during the inspection of the lift on the day of the incident, but the trial judge had awarded the action to the claimant on the basis that the system of inspecting for rope frays had been inadequate. On appeal, the New South Wales Court of Appeal found that the trial judge’s decision was not supported by the facts, as a daily system of inspection was impracticable, and there was no evidence that the rope had snapped at the location indicated by the judge. The appeal was therefore allowed (Perisher Blue Pty Ltd v. Vidakovic Decision of 21/9/2006 (2006) Aust Torts Reports 81-858).

**Rugby international refuses to pay compensation ordered by French court**
In early April 2008, it was learned that the former Wasps and England hooker Phil Greening was ordered by a French civil court to pay compensation amounting to £32,500 on account of the injuries which he caused to French winger Aurélien Rougerie, who plays for top French side Clermont. Mr. Greening subsequently announced that he would not appeal against this decision, but that he would refuse to pay the amount imposed by way of damages. The injury concerned occurred during a friendly (!) fixture on August 2002, as a result of which Mr. Rougerie spent 12 weeks in hospital and required three operations on his windpipe. The Professional Rugby Players’ Association condemned the ruling (The Daily Telegraph of 16/4/2008, p. S19).

**Liability shared in French mountaineering accident litigation**
The case under review (Decision of the Court of Appeal at Besançon dated 8/2/2007, JCP-La Semaine Juridique of 16/1/2008, No. 1136) resulted from a fall sustained by a certified mountaineer, who on that occasion was accompanied by a beginner as a team-mate, and insisted on making one last descent. She chose to apply the descent technique known as la moulinette (the vegetable mill), and disposed the equipment required for such a manoeuvre. The descent had to be carried out on the basis of oral instructions without the possibility of any visibility, in view of the steepness of the rock in question. The victim then made the jump, which turned out to be fatal.

The court found that the team-mate had been at fault for failing to give the proper instruction to her partner. However, the victim was also at fault by choosing to make a new descent at a late stage, when her partner was tired and wanted to stop, and by selecting a descent technique which presented serious risks in the absence of any visibility. As a result, the liability of the team-mate should be reduced by 50 per cent. The latter was accordingly ordered to pay the following amounts: 50 per cent of the funeral expenses, i.e. €4,569, the sum of €7,500 to each of the victim’s parents by way of moral damages, €7,500 by way of material damages, €3,750 by way of moral damages for the victim’s brother, and €2,500 by way of moral damages for the grandfather.

**Horse riding operator found liable for accident involving small child falling from horse (Australia)**
In this case (Ohlstein v Ohlstein [2006] NSWCA 226, BC200610593), the defendant had owned and operated a horse riding business since the mid-1970s. The appellant, who was just under six years of age, was a beginner who was taking part in a trial ride, supervised by two experienced trial leaders. The appellant was given a preliminary lesson on a docile, relaxed and slow horse. At a certain point, however, the horse in question started to gallop away, causing the appellant to fall off the horse and be dragged along for over 100m.

The appellant claimed damages from the respondent, alleging that it had been negligent in permitting him to participate in the event and failing to lead participant individually during the ride. The court found that the risk of injury was clearly foreseeable in application of an undemanding test of foreseeability. The inadequacy of the operating system was illustrated by the accident and the failure to use a lead rope, which was a precaution requiring no expense or difficulty. The operator was also negligent in allowing the appellant on the trial ride without previous lessons. The failure to lead the horse constituted negligence as the operator could have reduced the danger and as a matter of probability avert injury.
4. Torts and Insurance

BMX injury award varied by Australian court of appeal
The claimant was injured in November 1995 when a 13-year-old. He had been cycling on a BMX bicycle track located within a sporting complex on community land and open to the public. He had cycled down the starting ramp at the highest point of the track and attempted to ride over a speed hump. The bicycle became airborne and the claimant fell to the ground, suffering brain damage as a result, and successfully brought proceedings against the local council and BMX club concerned. The trial judge awarded damages for the care of the claimant’s children. The council and BMX club appealed. The New South Wales Court of Appeal allowed the appeal (Shellharbour City Council v. Rigby, Supreme Court NSW [2006] NSWCA 308, BC200609658), in that it varied the amount of the damages, which had been awarded on the basis of a precedent (Sullivan v Gordon) which had already been overruled by the High Court of Australia.

Ski station operator held liable for injuries to skier. Italian court decision
In the case under review, the claimant, a skier, maintained that he had started a descent on the “Trametsch” piste when, suddenly, on encountering a left-to-right bend, he lost control over his skis, exited the piste and hit a number of trees located beside it. He conceded that wire fencing had been disposed along the piste, but this stopped precisely at the level where the skier had left the piste. The victim had sustained serious injuries as a result of the accident. He accordingly claimed damages from the operator of the skiing station in question. The Court ruled that the operator was liable, given that the latter had, in its defence, merely restricted itself to alleging that the skier had been using excessive speed. It had failed to provide any evidence that it was imprudent or inadequate conduct on the part of the skier which had caused the events leading to the fall (Decision of the Tribunale of Bolzano dated 21/5/2007 Il Foro Italiano (2007) p. 3320 et seq).

Libel and defamation issues

Pakistan cricket board initiates, then withdraws, action against Shoaib
The brilliant career of Shoaib Akhtar, the Pakistan fast bowler described as the “Rawalpindi Express” because of his ability to break the 100 mph barrier, has unfortunately been marred by a number of brushes with the game’s authorities – for such misdemeanours as attacking a team-mate with his bat and a positive test for steroids. He was in trouble again in early April of this year when he expressed criticism of the Pakistan Cricket Board (PCB) after missing out on a central contract. On this occasion, the Board issued him with a ban lasting five years, which was set to end his international career prematurely. Shoaib vowed to fight the ban, in the courts if necessary (The Guardian of 2/4/2008, p. S9).

However, the next day it was learned that Mr. Shoaib had expressed his reaction to the ban in even stronger terms, accusing PCB chairman Nasim Ashraf of attempting to extort money from him and from others in the national team in order to allow them to play in the lucrative Twenty20 league in India (Daily Mail of 4/4/2008, p. 97). This prompted the PCB to launch a £1.6 million action for defamation against the fast bowler (Ibid). However, the action was later withdrawn after an apology was issued by Shoaib (The Daily Telegraph of 6/5/2008, p. S18).

US judge overturns $5 million award to football fan for slander
In late April 2008, a judge in Birmingham, Alabama, dismissed a $5 million verdict obtained by an Alabama (American) football fan in an action brought against the NCAA sporting federation for slander. Circuit Judge William Gordon granted the NCAA’s request for a new trial, and ruled that the jurors acting in the court case held in Scottsboro the previous year, who had sided with timber dealer Ray Keller, had been swayed by “passion or prejudice” during the trial held the previous year. Mr. Keller had claimed that the NCAA had slandered and libelled him when it had announced penalties against the Alabama team in 2002 by referring to him and others as “rogue boosters”, “parasites” and “pariahs”. The NCAA claimed that it had never publicly identified Mr. Keller and portrayed him as a rabid fan who lost all perspective on the game (Associated Press, www.findlaw.com of 30/4/2008).

Insurance

[None]
4. Torts and Insurance

**US jockey settles suit against Miami Herald**

In mid-February 2008, it was learned that “Hall of Fame” jockey Jose Santoshad settled his libel action against the newspaper, the Miami Herald after an article which had raised questions over his actions aboard 2003 Kentucky Derby winner Funny Cide. He had sued the Herald for libel after the newspaper had published a story alleging that he may have carried an illegal object in his hand during the 2003 Derby. He was cleared of the allegations by racing officials (Associated Press, www.findlaw.com of 12/2/2008).

**Other issues**

**Organisers of soapbox race found liable for injuries to spectators Belgian court decision**

Every year, there takes place in the Flemish commune of Maaseyck a soap box race, for which the organisers had contracted insurance with the FA insurance company. RK, one of the competitors, was also insured, but with the AB company. In the final straight line leading up to the finishing line, following a 90 degree left-to-right bend, the organisers had erected a crush barrier on each side of the road, behind which the claimants in the case under review had placed their chairs behind the crush barrier in order to be able to have a good view of the final stages of the soap box race. At a certain point it is possible that one of the front wheels of RK’s soapbox broke down in the bend – at all events he lost control over his steering wheel and collided with a crush barrier. This resulted in the claimants being seriously injured and requiring hospital care, and bringing an action for damages.

At first instance, the court ruled that the organisers of the race were not to be held liable for the accident. It took the view that the organisers had an obligations as to means (inspanningsverbintenis) and not an obligation as to result (resultaatverbintenis) as regards ensuring safety of spectators, and that the claimants had taken a real risk by placing themselves immediately after a bend. In so doing, the court relied on previous case law relating to motor rallies. However, on appeal, the Civil Court (Burgerlijke Rechtbank) of Tongeren held that the circuit of a motor rally cannot be compared with the track of a folkloristic soap box race. The spectators were not taking any risks by placing their own chairs behind the crush barrier placed on either side of the track by the organisers. They were entitled to assume that the latter provided sufficient protection against a race involving a set of ramshackle soap boxes. It was the responsibility of the organisers to assess the likely impact which a collision involving the soap boxes could have, and to take the necessary protective measures to avoid any accidents of which spectators acting in a normal way could be the victims.

However, the Court also ruled that the driver of the soap box in question could not be held to have acted negligently for any fault of his vehicle, for any driving error or for any error on the part of the team-mate who was operating the brakes. Soap boxes built in an amateurish way for participation in folkloristic races were not required to meet the technical standards normally applied to four-wheel vehicles, and the actions of the drivers and their assistants need not comply with normal road traffic rules (Decision of the Civil Court at Tongeren dated 16/10/2006, Rechtskundig Weekblad of 15/12/2007, p. 658).
Run-up to Beijing Olympics continues to cause ructions

Background
As the preparations for the largest sporting jamboree in the world, to take place in Beijing later this year, work up to their natural, if over-hyped, conclusion, the problems associated with this year’s Olympic Games and their controversial venue have continued unabated. It has been reported ad nauseam in previous issues of this Journal that there appeared to be no difficulty with the purely technical aspects of the 2008 Games’ organisation, but massive problems continued to prevail as regards their political and legal context. These can be broken down into four main headings: (a) the exploitation of the event by the Chinese authorities for political propaganda purposes, (b) the human rights abuses which continue to besmirch Chinese society and which have also left their mark on the Games, (c) the various health and safety issues, prominent amongst these being (d) the pollution, both man-made and otherwise, which threatens to play havoc with the competitors’ health during the various events.

During the period under review, there have been significant developments under all these headings, as will be detailed below. One major element which has been added to the Some of these have even cast doubts on the question whether the games would go ahead at all. However, at the time of writing this seems an extremely unlikely contingency, and the present writer is confident that the next issue will report on developments as they arose both on and off the field of play.

The security net tightens – for the best and worst of reasons...
It is obvious that the organisers of a major sporting event such as the Olympics would be guilty of gross dereliction of duty if they failed to take adequate precautions with a view to ensuring the safety of participants and spectators alike. Certainly the Beijing organisers cannot be accused of any failings in this regard as part of their preparations for the four-yearly sportfest. However, in the case of this year’s proceedings the impartial observer is left with the distinct impression that the precautions in question sometimes tended to venture well beyond the call of duty for reasons which were not totally connected to concern for the participants well-being.

Concerns in this direction started in late January, when the Beijing Olympic Chief ordered a somewhat chillingly-named “cleansing operation” aimed at clearing the city of beggars, hawkers and prostitutes during the run-up to the Games. The relocation of “problem” residents was intended to present a salubrious image of the Chinese capital prior to the arrival of up to 500,000 tourists, athletes and journalists for the Olympics. Targets of this exercise included the homeless, unregistered taxi drivers, snack vendors and such fronts for prostitution as hairdressers and karaoke parlours (The Guardian of 24/1/2008, p. 12).

Naturally, this exercise, which had certain sinister Orwellian overtones, gave rise to certain fears of human rights abuses, particularly in view of the Chinese authorities’ less than perfect record in this regard. In order to quell such fears, Liu Qi, the head of the Olympic organising committee, advised that the police should use restraint. In palliation, it has to be admitted that Beijing is not the first city to adopt measures of this type. Prior to the 2004 Athens Games, 2,700 Roma were reportedly evicted, and last year, a study by the British Centre on Housing Rights claimed that over 2 million people had been driven from their homes since 1988 to make way for various Olympics. However, the concerns expressed were particularly appropriate in China, where in the past brutal tactics have often been employed to evict people (Ibid).

Nor was this the only concern to be voiced on the question of the various security measures adopted and/or planned. In fact, some commentators were, with only a hint of hyperbole, beginning to refer to the August 2008 event as the “Paramilitary Games”. This followed the discovery that the Chinese authorities were planning to deploy over 94,000 security staff for the event. As a measure of the sheer amplitude of the security operation, this meant that both uniformed and plain-clothed operatives would outnumber the 10,500 athletes by nearly nine to one. Another disquieting aspect of this proposed operation was that the organisation in question, the People’s Armed Police (PAP), was believed to have been involved in the crackdown on Tibetan demonstrators in Lhasa (of which more below) and to have provided the squads of blue-and-white tracksuited paramilitaries who formed the controversial guard for the Olympic torch as it made its chaotic way across London, Paris and San Francisco in early March 2008 (The Independent on Sunday of 13/4/2008, p. 36).

The following month saw a considerable intensification of this security campaign, when it was announced that new rules issued by the Beijing city government were to ban...
dangerous articles, including guns, explosives, knives and “other items which affect social order and public safety” in and around the highly-sensitive area of Tiananmen Square. More significantly, however, the rules in question also allowed random searches of people and vehicles in the area surrounding the vast plaza at the heart of the capital city. They also allowed the authorities to adopt unspecified emergency measures in order to disperse crowds. Tiananmen Square is China’s most politically-sensitive public space, particularly in view of the 1989 demonstrations which were crushed by the People’s Liberation Army amidst universal protests (Associated Press, www.findlaw.com of 5/5/2008).

As an added precaution, the Chinese authorities announced, in early May 2008, that it was tightening its visa policies ahead of the Games. Foreign Ministry spokesman Qin Gang justified these measures on grounds of national security and of ensuring that foreign visitors would be safe during the event. Earlier, travel agents in Hong Kong, a major gateway to mainland China, had reported that the Government’s visa office had informed them that multiple-entry business visas would not be available from mid-April until mid-October. In the past, such visas have been easily obtainable. Other additional rules including additional documentation for business visas, hotel bookings and aeroplane tickets for tourist visas has also been reported (Associated Press, www.findlaw.com of 6/5/2008).

Naturally, there were at least some observers who questioned the need for such heavy security – indeed some entertained the suspicion that at least some of these measures had the ulterior motive of acting as a deterrent to any protest action inspired by China’s difficulties in Tibet (not to mention some of its domestic controversies). This may have been the reason for the “terror attack that never was”. In mid-March, just before the Tibet controversy started in earnest, the Chinese authorities claimed to have foiled a planned terror attack on the Games as well as a plot to cash an airliner flying to Beijing. More particularly, it was announced that two alleged terrorists had been shot dead and 15 others arrested in January during a raid on a flat in Urumqi, capital of the Xinjiang “autonomous region”. Wang Lequan, the regional Communist Party secretary, stated that it was “obvious” that an attack on the Olympics was being planned (The Daily Telegraph of 10/3/2008, p. 16).

Meanwhile, the alleged plot involving the jet airliner was revealed by Nur Bekri, the governor of Xinjiang and Mr. Wang’s second-in-command, who claimed that inflammable liquid had been discovered the previous Friday aboard a China Southern flight. The aeroplane made an emergency landing in the city of Lanzhou and two passengers had been arrested (Ibid). The location of the alleged plot was significant, since it is an area which contains an appreciable rebellious element in the shape of militants of the Uighur minority, consisting of Muslims who are engaged in low-intensity insurgency to demand an independent state of East Turkestan in the province, and who had been blamed for sporadic incidents of violence, although no serious attacks had been reported in China for more than a decade (The Times of 10/3/2008, p. 20).

However, the very next day the Chinese authorities started to retreat discreetly from these claims – very probably because there was no substance to them. There was no mention of the “plots” even in the People’s Daily, the official mouthpiece of the Communist Party (The Daily Telegraph of 11/3/2008, p. 16). The suspicion was that this was merely a propaganda exercise aimed at diverting attention away from the criticism China had been subjected to over the actions of its regime – although naturally nothing to that effect could be proved.

**Tibet question threatens to impinge on Games**

Although it has never been entirely absent from the international political agenda, the policies of the Chinese authorities in Tibet, which it annexed after World War II, had not been expected to play an unduly prominent part in the political background to the run-up to the 2008 Games. All that changed in early March, when several Tibetan exiles sought to commence a six-month march from India to Tibet in order to protest against the organisation of the Olympics in the Chinese capital. This was timed to coincide with the anniversary of a failed uprising against Chinese rule in Tibet which forced the Dalai Lama, the Tibetan Buddhist spiritual leader, into exile in 1959. The Indian authorities prevented the march from taking place. Protesters then proceeded to demonstrate in Indian and Kathmandu, Nepal, where 10 activists had been detained after hundreds had clashed with police (The Guardian of 11/3/2008, p. 29).

The Dalai Lama himself marked the anniversary by warning that Tibet’s language, customs and traditions were gradually fading away as they became an “insignificant minority” in their own homeland. He added that his fellow-countrymen:

> “have had to live in a state of constant fear, intimidation and suspicion under Chinese repression. Repression continues to increase with numerous, unimaginable and gross violations of human rights, denial of religious freedom and the politicisation of religious issues” (Ibid)

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Beijing has always maintained that Tibet is historically part of China, whereas many Tibetans argue that the Himalayan region had been virtually independent for many centuries. A few days after these protests started, Chinese troops were deployed at important monasteries in Tibet to quell the increasingly virulent protests by Tibetan Buddhist monks. Witnesses reported trucks of troops were surrounding the Drepung monastery in the capital Lhasa, whilst the Sera monastery was ringed by hundreds of police officers. These two sites have strong symbolic significance, having been the training ground for the monks who led Tibet before the People’s Liberation Army ousted the Dalai Lama after World War II (The Independent of 14/3/2008, p. 37). The unrest also took the form of attacks on Han Chinese, who settled in the country after the annexation by China. It was unclear whether the violence was premeditated, but the timing, coordination and boldness of the initial demonstrations suggested that they were more clearly planned than previous protests (The Guardian of 15/3/2008, p. 25).

The Chinese authorities increased their pressure on Tibetan activities a few days later, releasing pictures of protesters wanted over the violent uprisings described above. They claimed that over 100 rioters had already surrendered after Beijing had issued an ultimatum urging them to give themselves up within the next few days, with those who did being promised more lenient treatment. Despite the attempts made by Beijing to suppress media coverage of the riots, spectacular video pictures emerged of an angry Tibetan mob attacking a building in an unnamed village in Gansu, a neighbouring province. Soldiers had used tear gas to repel the crowd, who included monks, women and children who then vented their anger on a nearby school, tearing down the Chinese flag and replacing it with a Tibetan one (The Daily Telegraph of 20/3/2008, p. 21).

There followed a series of international calls for the Chinese authorities to hold talks with the Dalai Lama on the future of Tibet. However, Beijing defied such calls and promised to crush “resolutely” what it described as a “conspiracy of sabotage” and smash the Tibet independentists. British Prime Minister Gordon Brown claimed that, the previous week, Wen Jiabao, his Chinese counterpart, had given him an assurance that China would talk to the Buddhist leader if the latter agreed to abandon support for independence and to renounce violence. In fact, the Dalai Lama had already stated that he favoured autonomy over independence, and had also condemned the violence which had already taken place. However, the Chinese authorities refused to relax their uncompromising stance. Thanks to a massive army presence, the protests had ended. In China itself, Tibet-related dissent was also relentlessly crushed. 100 students at the Central University for Nationalities in Beijing held a candle-lit prayer vigil on campus, which ended with 15 of the students being led away in handcuffs (The Sunday Telegraph of 23/3/2008, p. 36).

Not unexpectedly, these events led to pressure on the International Olympic Committee (IOC) to exert its influence on the Chinese regime in order to change its inflexible stance. In fact, such pressure soon turned to criticism that the IOC was doing too little in this respect, which stung IOC president Jacques Rogge into calling for an end to the violence as being “contrary to the Olympic spirit” and expressing his confidence that China would change be being exposed to the scrutiny of the world through the 25,000 representatives of the media who would attend the Games (The Daily Telegraph of 24/3/2008, p. S30). The following week, he expressed the hope that he could meet the Chinese Prime Minister in an attempt to ease political tensions surrounding the Beijing games. As the Olympic torch arrived in Tiananmen Square following its controversial and incident-ridden journey (see below), it emerged that the IOC president was to hold talks with the country’s political leadership to discuss the crisis (The Guardian of 1/4/2008, p. S8). In addition, the IOC issued a warning to the Beijing authorities to maintain a “free and open” internet service during the Games. It had been reported that the Internet had closed down during the Tibet protests, and the fear was that something similar might occur if there were any unusual news developments in China during the Games (The Guardian of 3/4/2008, p. S7).

It was becoming increasingly clear that the political impact of China’s intervention in Tibet could yet overshadow the Games, with world leaders, including the French President Nicolas Sarkozy, openly discussing absenting himself from the opening ceremony in protest. Amnesty International was also cranking up the pressure with a report detailing various human rights abuses in the country (The Guardian of 1/4/2008, p. S8). Earlier, the German Government had announced that Chancellor Angela Merkel and her Foreign Minister, Frank Walter Steinmeier, would not attend the opening ceremony. They stressed that there was no “Tibet connection” but failed to provide an alternative explanation (The Independent of 29/3/2008, p. 29).

Meanwhile, in Tibet itself the tension was mounting. The dissident movement made a spectacular gain when monks succeeded in disrupting China’s attempt to present an image of new-found harmony, bursting in on a state media trip to one of the areas which had
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The IOC, which had initially shown some signs of concern at the hosts’ actions in relation to Tibet, now seemed increasingly hesitant to adopt a radical, or even critical, stance. At the much-vaunted meeting between Dr. Rogge and the Chinese Prime Minister, Wen Jiabao, referred to above, it appeared that the former had watered down considerably the IOC’s calls for Beijing to find a negotiated solution to the conflict. This naturally prompted speculation in many quarters that the IOC had yielded, in deference to China’s sensitivities. Disquiet over the political consequences from the rising violence in Tibet had in fact dominated a meeting of the Olympic movement in the Chinese capital that week. Tensions emerged publicly as the Association of National Olympic Committees – the organ which controls the 205 competing nations – included a reference to Tibet in a draft resolution scheduled to be debated by its members and by the IOC executive board. However, in the final draft released the next day, the reference to Tibet had been removed, prompting speculation that the IOC had backed off following pressure from Beijing (The Guardian of 10/4/2008, p. S9). The IOC President seemed to confirm these suspicions when, in a statement issued later that day, he confirmed that it was not for the Olympic movement to become involved in the host state’s political affairs, adding that Tibet was “a sovereign matter for China to decide” (Associated Press, www.findlaw.com of 11/4/2008).

The Olympic torch run fiasco

It is now a firmly-established tradition that, prior to the official opening of the Games, the Olympic torch should be carried from the previous venue to the new. Even before the violence in Tibet, detailed above, started there were fears that, on this occasion, the torch run would not be the untroubled exercise in promoting human understanding which it was previously. Indeed, some of the controversy surrounding the event had started even before the famous torch was lit, and for reasons which had nothing to do with the siting of the 2008 Games. Thus when the London authorities decided that former Olympic athlete Linford Christie would be asked to carry the torch through the streets of the British capital sparked fury, given that the ex-champion had received a lifetime suspension from the Olympics because of a failed drugs test in 1999. Prominent amongst those protesting against this were the IOC themselves, who claimed that they had not been consulted about this move and that, if they had been, they would have “strongly recommended” that Mr. Christie be not invited to play this part in the ceremony (The Daily Telegraph of 22/2/2008, p. B20).

The Chinese authorities naturally were also aware of the potential which the torch run had as a vehicle for protest, and were taking precautions well before the procession was due to get under way. They even went so far as to deny mountaineers permission to climb on its side of the Everest in the spring for fear that Tibetan activists might disrupt that part of the run. These restrictions were contained in a letter which the government’s mountaineering association sent to various expedition companies (The Independent of 13/3/2008 p 35). The British authorities were also making extensive security preparations for the event when it reached these shores, with the planned deployment of thousands of police along the route of the British leg of the run (The Daily Telegraph of 21/3/2008, p. 18). The authorities of Greece, where the run was to commence were also fully on the alert for trouble, and deployed 1,000 police officers around the ancient ruins of the temple of Hera. The torch was scheduled to pass through 20 countries before the Olympics were due to open officially on 8 August (The Independent of 24/3/2008, p. 18).

Came the day when the torch run was to be launched. Amid a ceremony more reminiscent of a military operation than of a sporting festival – with helicopters hovering overhead and thousands of police standing by – the Olympic flame was handed over to Chinese officials as pro-Tibet demonstrators scuffled with security officials. Despite the unprecedented security measures, dozens of activists had emerged from behind a heavy police cordon to denounce Beijing’s human rights record as the last Greek torchbearer entered the ancient stadium where Chinese officials lined up to receive the flame. The protestors, who came from all over Europe, were bundled into a police van after unfurling a banner which proclaimed “Stop the Genocide in Tibet”. From London to Sydney, activists pledged to intensify the protests. Already Greek and
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Foreign demonstrators had sabotaged the flame’s lighting ceremony in ancient Olympia, birthplace of the Games and physically attempted to prevent the torchbearers as they carried the flame on the first leg of its relay round Greece. The protests compelled local Olympic committee organisers to change the relay route around Athens several times during that weekend (The Guardian of 31/3/2008, p. 18).

In the event, the torch relay proved as chaotic and bitter as had been predicted. The aura surrounding the procession was one of face-saving overbearing security, whose image was further marred by the presence of a phalanx of track-suited Chinese guards who accompanied the torchbearers for most of the journey. In London, protests against the relay were intense, with thousands of protestors lining the streets through which the torch progressed, and with one protestor attempting to grab the torch from a young runner just outside Wembley Stadium (The Daily Telegraph of 7/4/2008, p. 5/16). There were also fierce scenes in France, where officers sprayed tear gas to break up a sit-in by about 300 pro-Tibet demonstrators, and a police authority investigation was begun after a cameraman from France 2 TV was hit over the head by a policeman and briefly lost consciousness (The Guardian of 9/4/2008, p. 17). The image projected by the torch run was made even less salubrious when it was learned that the flame guards in question were in fact elite members of the paramilitary units which crushed dissent in Tibet. Officially described as “volunteers” by Beijing, the 30 blue track-suited guards had been recruited from specialist squads in the People’s Armed Police (PAP), a one-million strong force dedicated to maintaining public order (The Daily Telegraph of 9/4/2008, p. 17). Their heavy-handed tactics during the London leg had included pushing Lord Coe, the London Olympic Committee chairman, who later described them as thugs”, and shouting orders at Konnie Huq, the former Blue Peter host, as she carried the torch. (The Daily Telegraph of 9/4/2008, p. 1.) A spokesman for the Free Tibet Campaign later expressed disbelief that personnel from the PAP were allowed onto the streets of London at all, let alone policing them (Ibid).

Another major focal point for the protests was the US city of San Francisco. This was an obvious if problematic choice for the US leg, since it has the largest Chinese population of any US city with some 20 per cent of its residents being of Chinese descent. However, it also has a history of radical protest, dating back to the days of the Vietnam War. Before the day of the US leg, South African bishop Desmond Tutu as well as actor and Tibet activist Richard Gere attended a vigil in the city, whilst Burmese monks led a march across the famous Golden Gate bridge (The Guardian of 9/4/2008, p. 17). In the event, the relay passed off fairly uneventfully, but only thanks to a massive operation which involved not only heavy security presence, but also such diversionary tactics as continuously changing the route in order to stymie the protestors (The Daily Telegraph, loc cit).

The following week, the relay reached Asia – more particularly India. Here, it has to be said that the torch run went very peacefully – but only because the authorities had taken the step of effectively holding the entire event in private, given that virtually all members of the public were banned from the two-mile stretch in the Indian capital of Delhi where the run took place. The only people who succeeded in obtaining a glance of the torch were the 15,000 police, the politicians and a few hundred specially selected schoolchildren (The Independent of 18/4/2008 p. 30). Nevertheless, scores of Tibetan protesters were arrested as they attempted in vain to defy the security cordon (The Daily Telegraph of 18/4/2008, p. 17). When the torch reached Malaysia, three members of a Japanese family were arrested after they waved a Tibetan flag during the heavily policed leg of the relay which took place in the capital, Kuala Lumpur (The Times of 22/4/2008, p 33).

When the run reached Japan, however, a new element was added to the controversy surrounding the procession when it was learned that Olympic sponsors had abandoned promotions during the Japanese leg of the procession (The Daily Telegraph of 19/4/2008, p. 16). In the first sign of panic amongst the Games’ commercial supporters Coca-Cola, Samsung and Lenovo announced that they would not be fielding their logo-covered vehicles as the flame made its way through Nagano. The decision emerged hours after religious leaders at a Buddhist temple in the city, which had hosted the 1998 Winter Olympics, had caused major disruption to the route by refusing to act as starting point for the relay on 26 April. Priests at the Zenkoji temple, whose imposing bell was rung to open the 1998 Games, said this was a reaction to the “indiscriminate killing” in Tibet (The Times of 19/4/2008, p. 1). This new, financial aspect to the controversy could cause further disruption if others follow suit as the date of the actual Olympics approaches amid further allegations of brutality and human rights abuses in Tibet.

By now the entire affair had become somewhat farcical as the relay wound its weary way towards its final destination. Further attempts at disrupting the relay took place in Canberra, Australia, where pro-Tibet demonstrators threw themselves in front of the
torchbearer. Over 10,000 Chinese turned up to drown out the protestors. Australian police briefly scuffled with China’s torch guards, preventing them from surrounding the flame (The Daily Telegraph of 28/4/2008, p.20). In Korea, Chinese students clashed with anti-Beijing protestors during the leg which took place in the capital Seoul, throwing rocks and punches in yet another troupespot for the procession. Thousands of police guarded the torch from demonstrators – this time protesting not about Tibet, but about the treatment by the Chinese authorities of North Korean refugees (The Independent of 28/4/2008, p. 23).

Thus the relay was gradually approaching its destination, as the potential obstacles tended to take on the form of nature’s landmarks rather than human intervention, in the shape of the mighty Himalayas mountain range. It was at this stage that probably the most successful part of the entire exercise took place, since China’s ambitious plan to bear the Olympic flame to the top of the world’s highest mountain peak actually succeeded as the torch reached the summit of Everest. Five mountaineers escorted the flame to the 29,000 ft peak following a six-hour climb in strong winds and a temperature which dropped to below -30C. They unfurled the Chinese flag, the Olympic flag as well as a Beijing Olympic banner (The Guardian of 9/5/2008, p. 24). The team was composed of 22 Tibetans, eight ethnic Han Chinese and a man from the Tu jia minority. The group had been on the mountain for over a week preparing the route along the north-east ridge (The Independent of 9/5/2008, p. 56). However, the very attempt to take the torch up Everest and through Tibet was condemned as an ac of hubris and symbolic colonialism by free-Tibet campaigners, who interpreted it as an attempt to emphasise China’s control over the region (The Daily Telegraph of 9/5/2008, p. 19).

And what about protests at the Games themselves?

Naturally, even after That Flame had been safely transferred to its temporary home in Beijing, the authorities were aware that this did not mean the end for the potential for protest action – in fact, it could be said that the disruption caused to the Olympic Torch relay only served as an encouragement for other demonstrations to use the Olympics as a platform for dissent – and not only on the Tibetan question, given the other human rights abuses of which the Beijing authorities stand accused by such organs as Amnesty International. More particularly the fear was expressed that even the athletes could be motivated to make such a show of protest, as indeed had been the case at the 1968 Mexico Olympics, when to US athletes staged a “Black Power” demonstration on the occasion of the medals ceremony.

This was obviously an issue on which the IOC would once again be expected to take up a certain stance. The entire question acquired an early momentum, even before the Tibetan issue had erupted in earnest in the manner described above, when the British Olympic Association (BOA) decreed, in mid-February 2008, that they would prevent their competitors from commenting on “politically sensitive issues” during the Games. The controversy started with reports that the BOA had threatened that any athletes who refused to sign its “gagging order” would not be allowed to travel to China. Also, any British participant who signed the order and subsequently spoke out during the Games would be sent home. The order in question was based on Section 51 of the Olympic Charter, which states:

“No kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas”

These orders caused widespread dismay and anger, and not only in the British athletic community – particularly since it had been learned from other national Olympic associations that China had put no pressure on the participating countries’ authorities to silence their Olympians (The Daily Telegraph of 12/2/2008, p. S11). It is true that some countries were known to have instructed their athletes to respect the Charter, but none had gone as far as the BOA. The latter’s stance was also attacked by the pressure group Reporters Without Borders, although the group emphasised that the IOC also had to make its share of the blame for its refusal to speak out about the human rights situation in China. In response to the outcry, the BOA announced that it would “review” its position, although since then nothing further has been head about this issue.

However, it would seem that the British political authorities’ sympathies were very much with the potential dissenters. The following months, Lord Malloch Brown, the Minister for Africa, Asia and the UN commented that the situation in Tibet could damage the reputation of the Games as well as China’s own interests. On the British athletes’ demeanour on this matter during the Games, he stated during Question Time in the House of Lords:

“We will expect to see our athletes respect both the values of Britain – courtesy and respect for the country where the Games are – but also that supremely important value of speaking the truth as they see it and speaking openly of what they see” (The Daily Telegraph of 20/3/2008, p. 12)
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The following month, the Australian Olympic authorities added to the confusion by stating that their selected athletes would be required to sign a standard team agreement by which they undertook not to comment on their team mates or opponents, but which did not prohibit them from speaking out on China’s human rights record. In fact the media director of the Australian Olympic Committee (AOC), Mike Tancred, stated that the Australian athletes would “be entitled to speak out on any issue” including human rights. Michelle Engelsman, a swimming finalist for Australia at the 2004 Athens Olympics, who is likely to be included in the Beijing team, is a stern critic of China’s human rights record, and could well take advantage of this freedom (Associated Press, at www.findlaw.com of 18/3/2008).

In the meantime, it appeared that Reporters Without Frontiers were not the only critics of the role played by the IOC in this matter. Poignantly, further criticism came from Tommie Smith and John Carlos, the US athletes responsible for the Black Power salute mentioned above. In interviews with the British newspaper The Times, they accused the IOC of sidestepping the controversial issues in awarding the Games to Beijing, adding that, 40 years after their now-famous left-fist salute, “it doesn’t appear that we’ve learned anything” (The Times of 12/4/2008, p. 3). As if intent on confirming such criticisms, The supreme Olympic authority decreed that athletes’ external appearances, clothing and gestures would be scrutinised at Olympic venues. In order to make it quite clear that it had in mind potential protest action over the troubles in Tibet, the IOC specified that waving the Tibet flag or paying tribute to the Dalai Lama during the medals ceremony would be outlawed – even though the penalties against such misdemeanours were not made clear (Associated Press, www.findlaw.com of 6/5/2008). This naturally once again prompted the suspicion that the IOC was being too conciliatory towards the Chinese authorities.

Persecution of internal Olympic dissidents continues

Previous issues of this Journal have already highlighted the extent to which those who have criticised the Chinese regime from within have been subject to repressive measures on the part of the domestic authorities. Naturally, the powers-that-be in Beijing were fearful that these dissidents would use the media attention focused on the Olympics to advance their campaign, and were on the alert well before the run-up to the event entered its final stage. Thus with six months to go before 30,000 foreign journalists were to descend on the Chinese capital, the dissident who was most likely to reveal the darker side of the country’s development was arrested by security forces. Hu Jia who used weblogs, webcasts and video to expose various human rights abuses, was formally detained after he had been seized by police from a flat in east Beijing in later December. Since then, his wife and their two-month-old daughter have been under house arrest. Because the case was classified as a “state secret” the authorities ad the power to deny Hu’s right to legal representation and his trial, which had yet to take place at the time of writing, could be held behind closed doors (The Guardian of 2/2/2008, p. 19). His arrest was made public by Duihua, a US-based group specialising in dialogue with China over political prisoners (The Daily Telegraph of 2/2/2008, p. 20).

Several days later, it was learned that Yang Chunlin, an unemployed factory worker from Jiamusi City in the north-eastern province of Heilongjiang, was facing charges of subverting state power for his activism which had involved petitions denouncing government corruption and seeking democratic reform of the one-party state. Last year, he helped to organise a petition, signed by 10,000 villagers, over a land dispute. It included the line “We don’t want the Olympics, we want human rights” (The Independent of 19/2/2008, p. 22). He went on trial several days later, having been detained for eight months with little access to his lawyers or his family. Relatives even suggested that he had been tortured. The prosecution evidence included the petition itself and Mr. Yan’s internet articles allegedly inciting the trial itself and Mr. Yan’s internet articles allegedly attacking the socialist system and state leaders. At least on this occasion the trial was held in open court, although that was dismissed as mere window-dressing by human rights activists such as Nicholas Becque of the Human Rights Watch pressure group (The Guardian of 20/2/2008, p. 7). Ultimately, the court sentenced Mr. Wang to a five-year jail sentence, being the maximum penalty for the charge under which he had been brought to trial. Later, his lawyer, Li Fangping, alleged that his client was beaten with electric batons, as his family scuffled with police after the hearing. The outcome of the case was seen as a touchstone for the case which is to be brought against Hu Jia when he stands trial (The Daily Telegraph of 25/3/2008, p. 18).

The Spielberg/Darfur affair

It was not only the internal aspects of China’s political action which has come under scrutiny during the run-up to this year’s Games. The country’s authorities have also been severely criticised for their relations with regimes whose treatment of their citizens has been even worse than that of the Beijing authorities. This was particularly
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the case with Sudan which for some years now has been presiding over a human crisis in its Darfur region. Since the conflict in the area began in 2003, some 200,000 people are believed to have died and 2 million driven from their homes. The government of Khartoum and allied Arab militias have been widely blamed for massacres of Darfur’s black population. China buys approximately two-thirds of Sudan’s oil exports whilst selling weapons to the latter’s government. It has also been accused of providing cover for Khartoum at the United Nations Security Council.

This affair has been added to the list of issues over which criticism has been levelled, not only at the Beijing authorities, but also at those who have been directly and indirectly associated with the organisation of the 2008 Games. The list of those who have found themselves in the dock here included not only sporting federations and competitors, but also those who are involved in other aspects of the Olympics and who have cast a veneer of respectability over the entire event through their fame and reputation. Thus it was with the renowned film director Steven Spielberg, who accepted an invitation to act as an “artistic adviser” to the Beijing Games – for which he came in for a good deal of flak thereafter. These criticisms had prompted him to write to the Chinese President, Hu Jintao, adding his voice to those who objected to China’s involvement with Sudan. He even asked to meet Jintao on this matter, but received no response (The Independent of 13/2/2008, p. 55).

Since then, the Oscar-winning director had come under pressure from various human rights campaigners, as well as the actress Mia Farrow, whose campaigning had led Spielberg to write to the Chinese President in the first place. Finally, in mid-February, he decided to act and sever his relations with the entire enterprise. In the statement in which he announced his decision, Mr. Spielberg said:

“I find that my conscience will not allow me to continue business as usual. At this point, time and energy must be spent not on Olympic ceremonies but on doing all I can to help bring an end to the unspeakable crimes against humanity that continue to be committed in Darfur” (Ibid).

However, not everyone was ecstatically happy about Darfur-inspired boycotts – and we are not only referring to the Chinese authorities here. Athletes from the region who had hopes of achieving Olympic glory in the Chinese capital naturally entertained a different view. Nevertheless, it would be a mistake to view this reaction purely in terms of the selfish desire for sporting success. Many believe that if Sudan were to achieve some major triumph at Beijing, this could have a healing effect on their bitterly divided country. This is particularly the case because some of Sudan’s brightest prospects actually come from the Darfur region. One of these is Ahmed Ismail, who is one of the handful of runners from the region. His family emanates from Wadi Saleh in West Darfur and are members of the Fur tribe. However, he maintains that ethnicity does not matter when he pulls on his Sudanese team shirt. Success at the Olympics could show that Sudan is, after all, one nation and make a contribution towards the peace process (The Times of 14/4/2008, p. 10).

Beijing compelled to cool the flames of anti-Western sentiment

To most non-Chinese observers, the invective directed against the authorities in Beijing would seem perfectly justified – indeed, somewhat restrained and muted given the seriousness of the charges made against them. However, even the most rabid critic of Chinese policies could not claim to be surprised to learn that these various condemnations and protest actions had produced a nationalist reaction among the Chinese people themselves. Indeed, such was the scale of the counter-reaction that the Chinese authorities themselves became somewhat alarmed at its intensity, and at the fact that these passions could spill over into the real world, and even that anger directed towards foreigners could turn inwards. Critics claimed that Beijing had played a part in fanning the xenophobic sentiment to counter international condemnation of its hard-line policies, but at a certain point Chinese officials appeared intent on reducing the level of anti-western vitriol.

A great deal of the backlash directed against the outside world had taken the form of cyberspace warfare, which is why Chinese censors quietly warned the cyber-police and internet businesses to delete all information relating to protests against Western policies, nations or companies which had proliferated in the wake of demonstrations concerning the global Olympic torch relay and high-level calls to boycott the opening ceremony of the Games. A notice issued by China’s “Internet Inspection Sector” instructed recipients to reset the keywords used to block access to certain websites relay the instructions through all internet distribution channels and subsequently delete the notice in a timely manner. One development which the authorities were keen to avoid was a repeat of the incidents which took place in April 2005, when demonstrators attacked the Japanese embassy in Beijing and the country’s consulate in Shanghai, burned Japanese goods and beat Japanese citizens because of Tokyo’s bid to join the UN Security Council and over the
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Japanese textbooks which downplayed Tokyo’s wartime record (The Observer of 20/4/2008, p. 31).

The two Western companies which were specifically singled out for protest action seemed to be the French supermarket chain Carrefour and the US fast food group KFC. Angered by the disruption of the Olympic torch relay during its passage through Paris, and by widespread but unverified rumours that one of Carrefour’s major shareholders, the luxury goods company LVMH, had been making donations to the Dalai Lama, people across China were using the internet and text messages to incite a boycott of the company’s 122 stores on 1 May. Both Carrefour and LVMH denied funding pro-Tibet groups.

In spite of this, there were demonstrations outside the company’s stores across the country as people sang the Chinese national anthem, burned the French flag and held up banners calling for the French government to apologise to “all Chinese people”. In addition, internet chat rooms were dominated by talk about the alleged anti-China attitude by the West (The Sunday Telegraph of 20/4/2008, p. 34).

World leaders fail to agree on boycott proposals

From the very moment when China’s alleged human rights abuses came to be seen through the prism of its involvement in this year’s Games, it was clear that, stopping short of full-blown, UN organised sanctions, a boycott of the Olympics – or at least its opening ceremony – by the world community would be by far the most effective way of bringing pressure to bear for change. In fact, it was the controversial French foreign minister, Bernard Kouchner, who was the first amongst senior statesmen to broach this subject when he suggested that the European Union should consider boycotting the opening ceremony – preferably at the meeting of EU foreign ministers in March. However, he insisted that France had no intention of boycotting the entire Games, stating that this would be “unjust” (Associated Press, at www.findlaw.com of 18/3/2008). At an EU meeting of sports ministers held the very next day, however, the assembled dignitaries pronounced themselves against a boycott of the Games – although they studiously avoided the question of boycotting the opening ceremony (which would certainly not have endangered the Beijing Games themselves (Associated Press, at www.findlaw.com of 17/3/2008).

The British government also pronounced itself opposed to a comprehensive boycott, with Foreign Secretary David Miliband restricting himself to a general call for a “diplomatic solution” to the troubles. This news came as Tibetan activists started to target the IOC’s headquarters in Lausanne, Switzerland, with its President Jacques Rogge stating that he remained resolutely opposed to a boycott (The Guardian of 19/3/2008, p. S8). Even staying away from the opening ceremony was a bridge too far for the British Premier (The Guardian of 28/3/2008, p. S9). However, several days later French President Nicolas Sarkozy stated that he could not rule out the possibility that France might boycott the opening ceremony (Associated Press, at www.findlaw.com of 25/3/2008). It was Dr. Brown’s Polish counterpart, Donald Tusk, who was the first EU Head of Government to announce a boycott of the official opening, and he was promptly followed by Vaclav Klaus President of the Czech Republic. The next day, the German Chancellor, Angela Merkel, also announced that she would definitely not be attending the opening ceremony (The Guardian of 29/3/2008, p. 21).

Calls for some kind of international protest at the Games also came from beyond the EU with US Presidential candidate Barack Obama leading the calls for diplomatic action, although he stopped well short of a boycott. Richard Gere, the Hollywood actor and Tibet activist, went a good deal further and stated that a boycott would be a more forceful way of bringing the plight of the Tibetan people to world attention (The Sunday Telegraph of 16/3/2008, p. 29). Later, President Sarkozy announced that he would definitely seek an EU-wide agreement on boycotting the opening ceremony (The Independent of 25/4/2008, p. 30). South African Archbishop Desmond Tutu also called upon the “leaders of the free world” to stay away from the opening ceremony. He was speaking at a Cape Town event where calls were made for a “Tibetan Olympic torch which would cross the continents before arriving in Dharamsala, India, where the Tibetan Parliament-in-Exile is based (The Guardian of 29/5/2008, p. 18).

Environmental issues continue to fester

The environmental problems with which those participating in the Games will have to contend (and we are not only referring to the athletes here) may seem a little trivial compared with the human rights abuses and armed struggles which have formed the backdrop to the Beijing Olympics for the past few months, as described above. Nevertheless, they have also formed a controversial ingredient to the organisation of the 2008 Games, and need to be addressed – if only in order to draw lessons for the future.

The main environmental hazard to have bevedilled the Beijing Games has been, and continues to be, the air pollution which has become a marked feature of life in
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the Chinese capital – so much so that some competitors and their associations have feared the effects which this aspect may have on their health, and even their careers. A dramatic and early warning in this regard came in late January 2008, when Haile Gebrselassie, the world record holder over the marathon distance, announced that he would be withdrawing from the event at Beijing because he feared that the prevailing air pollution could put paid to his career. It is true that Mr. Gebrselassie is allergic to pollen, and that breathing problems were cited when he withdrew from last year’s London marathon (The Daily Telegraph of 13/2/2008, p. S7). Nevertheless, it was an announcement which prompted serious consideration about what could be done even at this late stage to remedy this situation. In fact, at a certain point the IOC had stated that some events may have to be postponed if the capital’s notorious smog is deemed to be serious (The Daily Telegraph of 13/2/2008, p. 16).

This case, as well as the dire predictions emanating from other quarters about the air pollution problem, may have been the reason why, the following month, the Chinese government unveiled ambitious plans to reduce air pollution this year, despite having fallen well short of previous targets. The State Environmental Protection Administration (SEPA) announced that the country intended to reduce emissions of sulphur dioxide, a key component of acid rain, by six per cent, as well as cutting levels of chemical oxygen demand, a measure of water pollution, by five per cent, both from 2005 figures (Ibid). However, it was extremely doubtful whether this plan could achieve sufficient relief in time for the opening of the Games in August. A more realistic plan emerged in April 2008 when the Chinese authorities unveiled plans to halt construction and heavy industry in order to improve air quality. Beijing’s Municipal Environmental Protection Bureau announced a set of tough measures aimed at reducing pollution, such as closing many petrol stations and even banning spray painting. The Deputy Director of the Bureau, Du Shaozhong, warned that even more “strident” measures would be taken if the weather was unfavourable by the time the Games began in August. As has been extensively revealed in previous issues of this Journal, this particular month is regarded as one of the worst in terms of pollution in the capital because the air is humid and often stagnant. Also, as from March 2008, some types of construction work had been banned on windy days, and from July, all digging and pouring of concrete on sites was suspended for two months. In addition, production was stopped at cement, concrete mixing and cement grinding plants in South-East Beijing. Nearby quarries have also been temporarily ordered to cease operations (The Guardian of 15/4/2008, p. 20).

Another measure which is likely to ease the atmospheric conditions somewhat is the ban on smoking introduced by the Beijing authorities in all public areas. This may seem a straightforward and natural step in Western Europe, but one has to remember that China constitutes the world’s most enthusiastic smoking nation, being the home to one in three of the globe’s smokers. The authorities, however, have decreed that this practice should be completely banned in all schools, hospitals or government offices, as well as – naturally – all 37 Olympic sites, including indoor and outdoor stadiums, training facilities and the Olympic village. Hotels, restaurants and bars face a partial ban, and have been forced to introduce smoking and non-smoking areas. Then again, it has to be remembered that the first smoke-free Games were those held in Barcelona in 1992 (The Independent of 2/5/2008, p. 30).

The medical evidence as to atmospheric conditions in Beijing, in the meantime, was mixed. In mid-March 2008, the IOC’s top medical officer stated that Beijing’s air quality was better than expected, even though a study showed that there were risks to athletes in outdoor endurance events, and that conditions could be less than ideal at the Games. Arne Ljungqvist, the Chairman of the IOC’s Medical Commission, announced that an analysis by four independent experts of data supplied by Beijing organisers had found that heat and humidity might be a greater threat to athletes than the city’s noxious air. The data in question were, according to Dr. Ljungqvist, gathered in August 2007 at a time which roughly matched that at which this year’s Olympics would take place, and that they were supplied after the IOC requested the study. He added that athletes would have to compete in face masks, which at least one international federation had already suggested. He added that athletes having asthma would not need to take any particular precaution, and that the main risk was that they might not perform at their best level (Associated Press, www.findlaw.com of 17/3/2008).

The notion of athletes competing in masks had already been the subject of considerable controversy. This was certainly the case in Britain, where, in mid-February, it was decreed by the British Olympic Association (BOA) that its athletes would be allowed to compete in masks in order to counter the air pollution. Simon Clegg, the BOA Chief Executive, expressed the hope that this would not be necessary and that the Chinese would have solved the problem by the time the Games opened (which was always going to be a somewhat
forlorn hope) \((The\ Guardian of 14/2/2008, p. S2)\). However, exactly one month later, the BOA recanted and gave assurances that such contraptions would “not be necessary”. In fact, it transpired (if that is the right expression to use) that a mask had already been developed by the BOA in association with the University of Exeter. The following week, the US Olympic authorities also backtracked on their plans to allow athletes to wear anti-pollution masks \((The\ Mail\ on\ Sunday\ of 23/3/2008,\ p.\ 101)\).

These two volte-face came in the wake of the backing given by the IOC to China’s plans to cut pollution as outlined above \((The\ Daily\ Telegraph\ of 14/3/2008,\ p.\ S22)\). However, the IOC’s blithe optimism in this regard could be interpreted by the less charitably-minded as yet another example of IOC “appeasement”… Indeed, it was soon revealed how well-founded were the fears that the prevailing pollution would affect sporting performance, when certain athletes competed in Beijing by way of training for the Big Event. One such event was in fact the test run for the marathon in the Chinese capital. After finishing fifth in the event, Britain’s Mara Yamauchi complained of dryness on the throat and itchy eyes, and announced that she would be training in a smog mask. And this development had to be seen against the fact that conditions for the test event proved infinitely more benign than anything the world’s best distance runners can expect in August, when temperatures are usually well above 30 degrees \((The\ Daily\ Telegraph\ of 21/4/2008,\ p.\ B19)\).

Worker fatalities continue on Olympic sites

Yet another concern which has arisen from the Beijing Games has been the conditions in which those employed in preparation for its organisation – a fact to which, once again, previous issues of this Journal have borne eloquent testimony. More evidence of this disturbing development came in late February with the unveiling of the first of Beijing’s Olympic venue showpieces, to wit a giant swimming pool known as the “Water Cube”. The latter has turned out to be pyramid-like constructions covered with a blue bubble-effect translucent membrane, which stands at the heart of the Olympic Green next to the National Stadium, nicknamed the “Bird’s Nest”. These two buildings are intended by the organisers to represent the Games’ most potent symbols in terms of their striking designs (although in both cases this was the work of foreign firms).

However, there is a darker side to these monuments to Olympic grandeur, which emerged when the Chinese authorities used the occasion to acknowledge for the first time that a number of deaths had occurred during their construction. They admitted that six workers have been killed in unreported accidents. Yet here again, this seemingly frank admission may not tell the entire story. According to a newspaper report, 10 migrant workers had died on the construction of the Bird’s Nest alone, and these deaths had been covered up through “hush money”. It was also a fact that Ding Zhenkuan, the Deputy Head of the Beijing Board of Work Safety, had initially stated that two people had died during the building of the National Stadium. It is only when he was cornered later that he was forced to concede that four others had been killed on other sports venues over the five-year construction period \((The\ Daily\ Telegraph\ of 29/2/2008,\ p.\ 18)\).

Exactly how ready is Beijing?

Thus far, the focus on the negative aspects of this year’s Olympics has touched upon virtually all areas surrounding its organisation, save for one – i.e. the efficiency of the organisation and its ability to “deliver the goods”. Yet even this aspect was called into question when spectators at a key test event for the Games cast doubts on the host city’s readiness to host the massive sporting jamboree. Visitors from the Netherlands, Britain and elsewhere who attended the event commented that the ticket allocation system broke down, officials excluded them from events arbitrarily and few allowances were made for people with disabilities \((The\ Daily\ Telegraph\ of 22/2/2008,\ p.\ 17)\).

In addition, there appears to have been a good deal of chaos at the entrance to the world diving championships held in the aforementioned Water Cube. Long queues formed as scores of “touts” offered tickets at prices up to five times their face value under the very noses of police officers and officials. The problems at this event – which was not only the world championship, but also decided qualification places for the Olympics – started two weeks before it actually took place. Advance tickets could be bought in China, but visitors could apply online only two weeks in advance. Several spectators from various countries complained that they were unable to book any tickets at all. There were also reports of long walks from one end of the stadium to the other to gain entrance, and volunteers revealed that they were not allowed to make exceptions for the disabled \((Ibid)\).

However, difficulties in gaining entrance to the sites may seem a trivial complaint when viewed alongside a more serious concern, i.e. that of food safety. This fear was raised after reports, which surfaced in late January,
proved an unmitigated disaster on this occasion. The bullfighting correspondent for leading newspaper El Pais lamented that the animals in question were “not bulls but kittens”. Even the staunchly taurine ABC newspaper described the bulls as “absolutely leaden”. This year’s fiasco in Seville coincided with a crescendo of voices calling for the spectacle to be cancelled as a cruel waste of money. Hundreds protested outside the La Maestranza bullring in the city chanting “Torture is not culture” and “Not with my taxes”. Opposition to this “sport” is also growing throughout the country (notably in Catalonia), and television coverage of these events is now restricted to the pay channels (The Independent of 8/4/2008, p. 21).

Professor Fernando Alvarez, a specialist in biology, has challenged the myths which glorify bullfighting in the following terms:

“Bulls suffer and die during the bullfight, but have no way of escape; the bull doesn’t enjoy a happy life or a dignified death. If we stopped breeding bulls to kill, there is no evidence that wild bulls or their habitat would become extinct. The artistic and traditional aspects of bullfighting cannot justify its sadistic component” (Ibid).

There are other factors which are playing a part in the decline of this activity. Rising costs of foodstuffs and stiffer competition among the bull breeders have meant that making a profit from it is currently much harder. According to figures from Spain’s Ministry of Industry, only half of the country’s 1,268 bull breeders made a profit in 2007. Of the 351 members of the Union of Bullfighting Breeders, the second largest industry association in Spain, only 50 eluded going into the red last year. Eduardo Miura, the president of the Union, said that of the 700 bulls which he breeds, only 70 may be of sufficient quality for bullfighting purposes. There is also the circumstance that the cost of breeding a bull has also risen sharply in recent years, with figures reaching the €100,000 mark for the top attractions. Many breeders depend on European Union subsidies of €220 per bull per year, as well as indirect farming aid emanating from the Spanish government (The Guardian of 12/5/2008, p. 23).

And finally...
There may be a happier legal side effect to the Beijing Games than is apparent from the various tales of woe cited above – particularly in terms of family law. In early January, it was learned that superstitious Chinese couples would be able to marry on the opening day of the Games, after officials dismissed rumours that the registry office would be closed for that day. Eight is a lucky number in China, and the games will start at 8.08 pm on 8/8/2008.... Thousands are expected to tie the knot on that day (The Daily Telegraph of 8(!)/1/2008, p. 16).

Bullfighting crisis continues (Spain)
The regular reader needs no reminding that the only context in which this column will acknowledge the cruel pastime of bullfighting is formed by developments which will or could hasten its timely demise. During the period under review, there have once again been some heartening signs that such a trend is gathering momentum.

The first came during the annual Feria de Abril, an annual Spring Fair held in Seville, which traditionally features bullfighting displays that, by all accounts, have
tranquilisers and cortico-steroids. The latter apparently give the bull greater levels of resistance and can disguise a limp or injury which allows the animal to pass the initial tests. In 2002, an investigation was opened after bulls appearing in fights in Bilbao appeared to behave strangely, but the inquiry proved inconclusive (The Guardian of 22/4/2008, p. 16).

This is why it was no surprise to learn, in mid-April 2008, that doping tests are to be introduced for the first time at the nation’s most prestigious bullfighting festival. Breeders at the Feria de San Isidro, held in May, faced fines of up to €60,000 if they were proved to have administered drugs to their animals. Blood and urine samples will be taken from bulls which veterinary surgeons consider to be behaving strangely. Currently bulls undergo other tests prior to entering the ring, but this will be the first occasion on which they are subjected to specific anti-doping tests. They were ordered by Francisco Granados, who heads the bullfighting authority of the Madrid regional government. Initially they will merely apply to this major event, but they could be carried out at other fights within the Madrid region (Ibid).

Public health and safety issues

Boxer’s death once again raises safety concerns (South Korea)

After having successfully defended his WBO intercontinental flyweight title in late December 2007, Choi Yo Sam, of South Korea, lapsed into a coma from which he never emerged. He was declared brain-dead and taken off the life support system at a Seoul hospital (The Times of 3/1/2008, p. 56). A spokesman for the hospital in question stated that the switch-off was at the express request of his family (The Guardian of 3/1/2008, p. S2). This case has once again raised concerns about the wisdom of continuing with this sport in view of its obvious health and safety implications.

Rodeo hats fall foul of health and safety officials (US)

Although less riddled with fatalities, rodeo is also a sport where health and safety considerations are rarely in evidence, so much so that its exponents like to think of themselves as the last surviving champions of the American Wild West spirit. It is therefore highly probable that they were distinctly underwhelmed when informed that health and safety experts are attempting to make them exchange their Stetsons for protective helmets. To date, the governing bodies have been reluctant to comply with these exhortations. Under association rules, helmets remain optional for children as young as five (The Daily Telegraph of 31/1/2008, p. 7).

At present, just under 40 per cent of adult riders wear helmets, which is a considerable increase from 10 per cent five years ago. However, the experts are claiming that this is not enough, and are pushing the sport to encourage all bull and steer riders to wear hard hats and to make this compulsory for those under 18. Luke Haught, a 23-year-old bull rider from Texas, summed up the feelings of many when he commented that, although it may prompt a saving on dental bills, it simply would not “feel right”. Other refuseniks have claimed that the helmets are heavy, block their vision and prevent only superficial injuries (Ibid).

Winter sports casualties cast shadow over ski resorts

Winter sports are another athletic pastime for which concern at its safety aspects has been growing in recent years. Naturally, broken limbs and crutches at airport arrival lounges have long been the stuff of bar-room jokes, but the entire aspect loses its jocular aspect when we are talking in terms of fatalities – as has been related in earlier issues of this Journal and as is once again – tragically – related below.

One day in early February 2008, Robert Bruce, a 40-year-old doctor from Winchester, left his medical conference in Val d’Isère, French Alps, strapped on his snowboard and embarked onto an almost impossible route. He was in full view of the main Olympique cable car but fell 30 metres over bare rocks and died. Whatever caused Mr. Bruce’s death, the tragic accident that killed him is not unique. Twenty-nine other skiers and snowboarders have perished in the Alps this year – a number ski professionals believe is disconcertingly high. Monica Davis, 35, from Derbyshire, went off-piste in Germany the previous month and fell into a canyon. Her frozen body was found the next morning. A third Briton, David Monk, 46, from Hertfordshire, died after using a piece of ski barrier to sledge down a mountain in the Italian Alps. In France, at current rates, the death toll will exceed that of last year. In the past three months, there were eight deaths and countless near misses. In spite of all this, attempts to educate mountain users in the dangers of “hors piste” seem to be falling on deaf ears (The Guardian of 9/2/2008, p. 21).

It transpired that the 400 delegates at Dr. Bruce’s conference had been offered a short training session in off-piste safety. Only 13 attended, and Dr. Bruce was...
not among them to hear advice which could have saved his life. The head of the sécurité de piste service shrugged in exasperation at the attitude of some off-pisteurs. He related that in most cases, attempts to warn such amateur skiers not to go down dangerous routes merely result in a one-finger salute. He added there was a particular problem with young men, but research conducted by Henry Schniewind, an off-piste safety expert in Val d’Isère, shows that over the past decade, the average age of victims of avalanches has risen from 27 to 37. The day Bruce died, the local mayor’s office had posted a category four avalanche warning, the second most serious. It is unclear what happened, but there were reports that an avalanche pushed him off the edge. The warnings are posted daily in shop windows, on the radio and displayed on flags, but most visitors never see them or ignore them (ibid).

Mr. Schniewind – “Henry Avalanche”, as he is known – has plenty of evidence of the apocalyptic power of an avalanche which looks not unlike the clouds of smoke on 9/11. Death tolls from these snow slides vary. There were 57 in France in the 2005-06 season and less than half the year after. “If this were happening in a holiday resort in Spain or Portugal there would be outrage” said James Fisher, 27, an instructor. Along with Roddy Clarke, a Scot, he has joined Schniewind to spread the word about safety. Mr. Clarke’s epiphany came when he went off-piste with two colleagues and triggered an avalanche which swept one person away. They found him, but none of them was wearing transceivers to indicate their location, so it took longer than 15 minutes, the typical survival time. The snow was compacted around him and he was dead. Unlike its counterpart in the US, off-piste skiing in Europe is not policed. Nicola Glize, the resort’s only dedicated snowboard instructor, commented:

“The trouble is it is too easy technically. It takes 15 days on a snowboard to be able to ride off-piste, but takes 10 years on skis. That means kids full of hormones can go charging into areas that could easily kill them ... I have lost many friends, close ones too.” (ibid)

However, every time there is fresh snow, there appears to arise a “powder frenzy” with snowboarders competing to reach the virgin snow first. Only a quarter of these carry the survival kit of transceiver, collapsible shovel and probe. For Schniewind, his safety evangelism is a means to keep people following a pursuit which he thinks borders on the sublime.

Concern at winter sports deaths is also mounting on the other side of the Atlantic. In mid-January 2008, an avalanche killed a college student on a backcountry ski trip, officials reported. The avalanche apparently swept Tyler Stetson into trees, and he was dead when searchers found him within 10 minutes, according to the Gallatin County Sheriff’s Department. Mr. Stetson was a student at Montana State University in Bozeman. The avalanche came a week after one that killed two skiers near the Whitefish Mountain Resort in north-western Montana. Two witnesses reported that the avalanche buried at least two more skiers. Authorities cited bad weather, unstable snow and lack of a missing-person report in suspending a search three days later. With the latest death, avalanches have killed at least 22 people across the West since early December 2007. The national average for avalanche deaths is about 25 a year, according to the Colorado Avalanche Information Center (Associated Press, www.findlaw.com of 21/1/2008).

Big sporting occasions could be health hazard – for the spectator

To rabid fans of our more popular sports, the latter is not just a game – it may also be a health hazard. It has emerged that heart attacks and other cardiac emergencies doubled in Munich, Germany during the latter football team’s progress in World Cup matches, according to a recent study. Whilst history suggests that European football fans can get a trifle more worked up than the average American football fan, doctors have opined that there are some valid warnings to be shared. According to Dr. Gerhard Steinbeck, of Ludwog Maximils University in Munich:

“I know a little bit about the Super Bowl It’s reasonable to think that something quite similar might happen.”


He and his colleagues have presented their results in a recent issue of the New England Journal of Medicine. They blamed emotional stress for the heart problems, but they note that lack of sleep, overeating, eating too much junk food, drink and smoking might also have played a role. Previous studies suggest that events like earthquakes and war can boost the risk of heart problems. Findings in relation to football have been inconsistent. The new work confirmed “something people have been highly sceptical about ... that football would produce that kind of emotional investment that might trigger a heart attack” said psychologist Douglas Carroll of the University of Birmingham in England.

“People who are not interested in sport find it very difficult to comprehend this,” said Dr Carroll, who in 2002 reported a link between World Cup soccer and heart attacks in England.
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The new paper included heart attacks, cardiac arrests, episodes of irregular heartbeat and activations of automatic implanted defibrillators. The researchers noted the number of cases reported in the greater Munich area during World Cup competition in Germany in the summer of 2006. They compared that to the totals for similar periods in 2003 and 2005, and for several weeks before and after the tournament. In all, the study included 4,279 patients. Analysis showed that on the seven days when the German team played, the overall number of cardiac emergencies was more than double the norm. As regards men, this figure tripled. The effect was strongest in people with known heart disease. So in the US, on Super Bowl Sunday, such people and others with known risks for heart disease — like high blood pressure or diabetes — should take extra care of themselves, according to Dr. Lori Mosca, director of preventive cardiology at New York-Presbyterian Hospital (ibid).

She said that means:

- Taking medications as prescribed
- Avoiding tobacco smoke and fatty meals
- Getting plenty of sleep the night before
- Not over-exerting yourself physically
- If you drink alcohol, limit yourself to one drink for a woman and two for a man, and even
- Trying “not to get too angry with the match officials.

People with known heart conditions should also keep their nitroglycerin and aspirin handy. And if heart symptoms appear, she said, call emergency services right away. In fact, research by Dr. David Jerrard, an associate professor of emergency medicine at the University of Maryland, indicates that some men do put off seeking emergency treatment if they’re watching a game. On a typical Super Bowl Sunday, the number of patients waiting to be seen dries up dramatically, said Dr. Jerrard. But delaying that visit to stick with a sporting broadcast is a bad idea, especially for people with a history of heart trouble, he added.

Nationality, visas, immigration and related issues

Manchester United v Chelsea final gives rise to visa problems (Russia)

The news that two English sides had reached the final of the European Champions’ League, to be played in Moscow, raised concerns not only about the possibility of hooliganism, but also regarding the more fundamental question whether the supporters of both clubs would actually be able to gain access to the country in order to attend the match. The main reason for these worries was the state reached in Anglo-Russian relations, which has plumbed new depths in recent months because of the Litvinenko affair. This is the case of a Russian businessman who was murdered in London last year, and for which the British authorities are seeking the extradition of a prime suspect – attempts which hitherto have fallen on stony ground in Moscow. It was therefore feared that the extraction of gore from the proverbial rock-like material would be much smoother than the timely obtention of visas for the clubs’ travelling support.

The problems became immediately apparent when it was learned that, in the wake of the diplomatic difficulties related earlier, three-week waits for visa applications to be processed had become the norm rather than the exception. Given that only 21 days elapsed between the second, decisive semi-final and the Moscow fixture itself, the potential difficulties were obvious. There were also accusations that the Russian consulate in London had issued stricter guidelines for British visitors generally. These included having the names of people on the compulsory invitations form Russia written in Cyrillic script, and denying a visa to anyone having a “worn or faded passport” (The Sunday Telegraph of 20/4/2008, p. S6).

Added to this were the sheer logistic problems associated with processing over 40,000 applications from English football fans for the event. Confusion over the arrangements intensified when Yuri Luzhkov, the mayor of the Russian capital, announced that the visa requirement would be waived – only for this to be denied by the host nation’s foreign ministry. Russian diplomats in London were nevertheless insistent that they would be equal to the visa challenge, with extra staff being employed in order to process these myriad applications. The Russian authorities, however, did not hide their disenchantment with accusations that they had placed red tape before the needs of English supporters. A spokesman for the Russian consulate in
London stated:

“We would like to point out that the arrangements that we will put in place will be substantially more favourable than those for Russian supporters who are planning to the UK (for the UEFA Cup Final in Manchester). Zenit St. Petersburg supporters have already been instructed to undergo a cumbersome personal application process, including a biometric test, online only visa applications and possible interviews with British consulate officials” (The Daily Telegraph of 1/5/2008, p. S7).

In reply to these accusations, a British Foreign office spokesman said that visa requirements had been tightened only for Russian officials rather than for ordinary citizens (Ibid). It seemed, then, that this game of diplomatic “tit-for-tat” would put paid to the hopes of English fans. However, negotiations started between the European governing body for football, UEFA, and the Moscow authorities on a scheme which could, after all, enable the English support to attend the final. This would involve a waiver of visa requirements, but confined to those supporters who would be travelling either with official package tours or on trips which had been sanctioned by the competing clubs. There were also a number of additional strings attached to the proposal, with the “sanctioned trips” in question being required to include provision for security arrangements and for escorting fans to the Luzhniki Stadium, where the final was due to be played (The Daily Telegraph of 2/5/2008, p. S11). However, adherence to these additional requirements would still have meant the exclusion of thousands of hapless supporters who were unable to join such schemes.

Finally, a deal was struck following communications between UEFA President Michel Platini and the Russian President, Vladimir Putin. Instead of a visa, tickets for the match could be used as an alternative means of gaining access to the country for a limited period of 72 hours from 19-23 May (the final being scheduled for 21 May). However, as well as a match ticket, supporters would require a valid passport and a completed immigration form on arrival. Fans were urged not to dispose of their match ticket until they had left Russia, whilst anyone overstaying the 72-hour entry period would be charged the fee for a regular visa when they left. There was even some joy for those intending to travel without a ticket, since the latter would be able to have their visa processed within five days through the British Foreign Office. (naturally, UEFA issued the now-standard advice to supporters “not to travel without a ticket”…) (The Daily Telegraph of 6/5/2008, p. S4).

Chelsea’s Israeli visa difficulties resolved by Malaysian government

As part of their preparations for the 2008-9 English premiership season, Chelsea FC had provisionally planned mini-Asian tour which would feature a match against the Malaysian national side. However, this presented something of an politico-administrative problem, in view the potential presence among the London team party of manager Avram Grant and defender Tal Ben haim, both being Israeli citizens (The Independent of 1/4/2008, p. 52). Malaysia does not have diplomatic relations with Israel, and citizens need special permission to travel to the country. However, the Malaysian government announced, in late April 2008, that there would be no restrictions on the club’s two Israelis. Chelsea had already made it clear that they would not travel without Messrs. Grant and Ben-Haim. Rais Yatim, the foreign minister, said there would be no problems with the Chelsea pair. He added:

“In this case, although we don’t have diplomatic relations with Israel or direct trade with the country, we don’t have objections over their visit. They are a sports team with two Israeli members. We don’t see it as something wrong. We have to look at this on a case-by-case basis. We don’t want to mix politics with sports.”


Chelsea were due to play the Malaysia national team in Kuala Lumpur on 29 July.

Visa issue causes ICC to move conference from Lord’s

In April 2008, the ICC, cricket’s world governing body, made the decision to relocate its annual conference away from Lord’s for the first time in 99 years. This decision was prompted by doubts on the question whether Peter Chingoka, the chairman of Zimbabwe Cricket (the national governing body for the sport in that country), would be admitted to the UK to attend the conference (for the wider context of this issue, see Section 1 above, p. 000). It has highlighted tensions between the ECB and Zimbabwe Cricket, with one senior source suggesting yesterday that Mr. Chingoka had misled the ICC.

England’s hosting of the World Twenty20 tournament in 2009 has been threatened by the British government’s hardline attitude to Zimbabwe and those with links to Robert Mugabe’s Zanu-PF regime, which has insisted on retaining power after the controversial election referred to above. Sporting links between the UK and
Zimbabwe are officially under review, prompting concerns that the Zimbabwe cricket team would not be admitted to the UK for the tournament, or for a one-day series against England earlier in the summer (The Guardian of 25/4/2008, p. S9).

Those fears appeared to be justified with government sources indicating that there was little chance of Mr. Chingoka being granted a visa. The Zimbabwean cricket chief subsequently claimed that his application for a visa had been blocked, whereas he had not in fact formally applied, having requested that his passport be returned by the British consulate to allow him travel to India for the Indian Premier League. His version of events prompted an angry response from the ECB. A senior source said:

"Once again Peter Chingoka has demonstrated his ability to misrepresent the facts. It is fundamentally untrue that he was refused a visa. Our understanding is that he asked for his passport to be returned to him so that he could join several other members of Zimbabwe Cricket enjoying the hospitality of the Indian board." (Ibid)

ECB executives subsequently met government officials to discuss the Zimbabwe issue and were reassured that, while it is unlikely that the one-day series between England and Zimbabwe would be allowed to go ahead, the World Twenty20 was not under threat. The ICC also expressed its confidence that the tournament will be held in England, believing that any ban on Zimbabwe’s players or officials would be a breach of the staging agreement struck when England was awarded the tournament.

The ICC argues that the World Twenty20 is analogous with the Olympics, for which the government is obligated to grant access and freedom of movement to all athletes, officials and media accredited by the International Olympic Committee (IOC). The move away from Lord’s also threatens ICC plans for its centenary celebrations next year, which were expected to centre on HQ. It also means that David Morgan, the incoming president of the organisation, will be the first leader of the world governing body not to be formally appointed in the famous Lord’s Long Room (Ibid).

Sporting figures in politics

**Maradona joins Peronists (Argentina)**

Even if they have heard of this political entity at all, most people will associate the Peronist party with the musical Evita. However, the ruling Argentinian party, known for its populist and nationalist brand of politics, may acquire a new access of media fame with the news that one of the country’s all-time footballing greats, Diego Maradona, has joined its ranks. In so doing, inevitably, he was given the same registration number, i.e. 10, as the one which he wore for many years on his jersey. The former footballer, who led Argentina to victory in the 1986 World Cup, but whose life has been a chequered one ever since, has over the years expressed his sympathy for the Peronist cause and courted with several presidents from the Party (The Guardian of 26/4/2008, p. 20).

**Background checks upset baseball umpires (US)**

For sporting figures to show an active interest in politics is nothing new, but seldom have they been associated with violently racist groupings. It was therefore somewhat unsurprising to learn, in late January 2008, that Major League Baseball, the sport’s governing body, had sent investigators to their home towns, asking neighbours a series of questions which include whether the umpire in question belonged to the Ku Klux Klan. According to World Umpires Association president John Hirschbeck:

"The questions that we found out are being asked are about beating wives, marijuana use and extravagant parties. And then finally with this whole thing about the Ku Klux Klan. You get someone from security, shows his credentials and starts asking these kind of questions, and right away what’s the neighbour going to think other than the umpire is in trouble, he’s done something wrong and he’s going to lose his job.” (Associated Press, www.findlaw.com of 30/1/2008)

Hirschbeck and union spokesman Lamell McMorris said that in the Milwaukee-based supervisor of security and investigations in the commissioner’s office, had asked questions about Klan membership to neighbours of umpires Greg Gibson and Sam Holbrook, who reside in Kentucky. In addition, Hirschbeck said similar questions had been asked to neighbours of umpire Ron Kulpa, who lives in suburban St. Louis. US Baseball intensified its background checks last August, after it became public that the FBI was investigating...
5. Public Law

NBA referee Tim Donaghy for betting on games. Mr. Donaghy pleaded guilty to felony charges of conspiracy to engage in wire fraud and transmitting betting information through interstate commerce, and he awaits sentencing.

MLB asked umpires to sign authorizations allowing the sport to conduct financial backgrounds checks, but the match officials concerned balked at this idea. Mr. Morris said that they did not anticipate that the officials in question would approach neighbours posing as a close colleague and friend of the umpire’s and asking them questions such as: “Do you know if umpire ‘X’ is a member of the Ku Klux Klan? Does he grow marijuana plants? Does he beat his wife? Have you seen the police at his home? Does he throw wild parties?” He went on to describe such attempts to link umpires to the Ku Klux Klan as “highly offensive”, and that it was essentially defaming the umpires in their communities by conducting a very strange and poorly executed investigation (Ibid).

Other issues

Moscow’s secret football stadium tragedy exposed (Russia)
The Olympic Stadium in Moscow, where this year’s Champions League Final (football) was held, has had a colourful history which has experienced Tsarist rule, the Communist regime and, currently, post-1989 capitalism. However, its darkest hour in the course of its existence was undoubtedly the stadium tragedy which occurred during a UEFA Cup fixture played in 1982. On the evening of 20 October Spartak Moscow were meeting Dutch club Haarlem for a place in the last 16 of the tournament. They eventually won the match to secure a 5-1 aggregate victory, but it was also the night on which the greatest disaster in the history of Russian football took place. Officially, 66 fans lost their lives having been crushed to death. However, several subsequent investigations and eyewitnesses put the death toll closer to 350. That would make it the worst disaster in the history of world football, worse even than the 318 people who were killed in rioting at Peru’s National Stadium in Lima in 1964 and the tragedies that have scarred football at the Heysel Stadium as well as in Glasgow, Bradford and Hillsborough (The Observer of 4/5/2008, p. S4).

The Russian winter set in early in 1982, making the stone steps of the East Sector of the Lenin Stadium extremely icy. Since no more than 15,000 Spartak fans and a hundred or so hardy Dutch spectators had braved the elements in order to attend the fixture, the stadium authorities crammed them into a single section of the ground, leaving terraces of the remaining three-quarters of the stadium empty and pristinely snow-white. It was to prove a fatal decision. In a tragic echo of the Ibrox Park disaster in 1971, several hundred fans had decided to leave and take an early underground train home from the Lenin Hills station. However, Spartak scored a second goal in injury time, through Sergei Shvetsov. “I wish I hadn’t scored” he was reported to have said later.

Many of the departing fans descending the icy steps of the gangway and, hurrying inside the dark tunnel, did what many others would have done. Hearing the roar that greeted the second goal, they rushed back to join in the celebrations. As they did so, they ran into a wall of Spartak fans on their way out. Some witnesses say the militia would not let the returning spectators back into the stadium, so they were stuck in the tunnel, unable to move back or forward. Panic ensued, and because the stadium authorities had closed other tunnel exits, hundreds were caught on icy steps, stumbling and slipping in the darkness. As a result, many of them were trampled to death.

The next day Moscow’s evening paper Vechernaya Moskva contained a short cryptic note following its match report to the effect that “an incident” had occurred at the Luzhniki stadium, and that after the football match, some spectators had been injured. Under an ailing President Leonid Brezhnev – he was to die 21 days later – the communist leadership dithered and could not bring itself to admit to bad news. The tragedy was quietly covered up. According to the testimony of some of the victims’ relatives, the bodies were removed as rapidly as possible, and the families given no more than 40 minutes to pay their last respects before the dead were buried in a mass funeral. Some relatives claimed that the police had warned them not to speak of the tragedy – especially to foreigners – on pain of imprisonment.

Four months later, on 8/2/1983, a trial took place to apportion blame or, according to some insiders, to find a scapegoat. The unfortunate accused was the stadium chief, Panchikhin, who had only been appointed two-and-a-half months previously, and who eventually was given 18 months corrective labour. Despite testimonies by eyewitnesses about fatal mistakes made by the militia, no investigation was made of their activities. The trial was not reported in the press for several years. Not until 1989 did the truth – or smatterings of the truth – come out. Not all the pieces were easy to fit together (Ibid).
5. Public Law

This was towards the end of Mikhail Gorbachev’s period of glasnost. Already the regime had made a fatal mistake in trying to conceal from the public, and the world, the nuclear reactor explosion at Chernobyl on 24 April 1986. By 1989, communism was crumbling in eastern and central Europe, and the Baltic states were struggling for their independence from the Soviet Union. Gorbachev was rapidly losing control and unable to stop all Soviet dirty linen from being washed in public, even if he had wanted to. That was the background to the first public revelations, seven years late, about the 1982 stadium disaster.

In 1992, when communism had fallen in the Soviet Union and it had splintered into 15 independent nations, Spartak fans clubbed together to pay for a modest monument that was erected outside the tunnel in which so many had died. Football fans visiting Moscow, on learning of the story, often left red carnations at the foot of the obelisk. It certainly attracts far more floral tributes than the giant statue to Vladimir Ilyich Lenin, founder of the Soviet state, which welcomes spectators to the once-Lenin, now Olympic, Stadium (Ibid).

Bradman keeps his place in Aussie citizenship test….

For refugees fleeing conflict-torn Sudan or Afghanistan, the identity of Australia’s greatest-ever cricketer is probably not uppermost in their minds. Yet unless they know the name of Donald Bradman they may be disqualified from becoming Australian citizens. In January 2008, the Labor government announced yesterday that a controversial – some say ludicrous – citizenship test introduced by its conservative predecessor is to be reviewed, following revelations that significant numbers of migrants, particularly refugees, are failing it (The Independent of 30/1/2008, p. 1).

However, suggestions by the Immigration Minister, Chris Evans, that the Bradman question might be scrapped were quickly squashed by the Prime Minister, Kevin Rudd. Fearful, perhaps, of alienating Middle Australia, which voted him into power two months ago, Mr Rudd insisted that “the Don” was safe. The written text, comprising 20 multiple choice questions from a bank of 200, was introduced by John Howard’s conservative government the previous October. It is deemed to tax would-be citizens’ knowledge of Australian history, culture and values. Anyone with fewer than 12 correct responses fails the test and will be required to resit it.

Mr Evans said he was ordering the review in an effort to make the test more relevant to migrants from all backgrounds. He suggested that there had been “political interference” in the questions, which were weighted towards Mr Howard’s obsession with sporting heroes of his youth. Mr Howard, a cricket fanatic, is said to have personally written a question asking prospective citizens to name Australia’s greatest cricketer of the 1930s, offering a choice of Bradman, Hubert Opperman (a cyclist) or Walter Lindrum (a billiards player). Mr Evans said the government had no plans to abandon the test itself. He said:

“Labor is committed to the test, we think it’s a positive thing, it will remain part of the path to citizenship. It’s a question about whether people ought to be failing the test on the basis of sports trivia answers. It is important for migrants to know about Australia’s democratic values and legal system. Whether or not they need to understand the history of Walter Lindrum’s contribution to billiards in the 1930s and 40s, I’m not so sure” (Ibid)

Questions demanding historical dates, such as when the Australian flag was first flown, were also of dubious value, Mr Evans suggested.

Figures released by the government show that while 93 per cent of applicants passed the test in its first three months, up to one in four people from Afghanistan and Sudan failed. Mr Evans said he was concerned that the test might be deterring people from applying for citizenship. Numbers have declined since it was introduced. But after Mr Rudd declared on national television that he was “not lining up in that camp” (of those wishing to dump Bradman), Mr Evans dutifully paid homage to the late cricketer. “We all love The Don” he added (Ibid).

… but Boris Becker loses out in Germany’s Hall of Fame

Several months after the Bradman “controversy” detailed above, it was learned that Germany also had its problems with the place occupied by its sporting greats in the nation’s annals. The country’s sporting lobby has sparked a furious controversy by founding a Hall of Fame to honour the nation’s top athletes which includes five former Nazi Party members but fails to mention the likes of the racing driver Michael Schumacher or the tennis player Boris Becker. The pantheon of 40 heroes of sport has been set up by Deutsche Sporthilfe, the German sports foundation, with the help of big business, and was inaugurated by Germany’s President Horst Köhler, earlier this week. Its aim is to encourage young people to take up sport (The Independent of 8/5/2008, p. 24).
However, the project has already earned the nickname “Hall of Shame” in the German media because of the organisers’ decision to include five former Nazi party members, including the Third Reich’s football trainer Sepp Herberger, in its line-up of outstanding German sportsmen and women. Thomas Mergel, professor of modern history at Berlin’s Humboldt University, said that although the Hall of Fame “reflected the chasms and contradictions of German history” its choice of athletes also showed “the desire not to remember one thing and forget another.” The other ex-Nazi Party members in the list include Josef Neckermann, the Olympic riding champion who made millions from a mail-order empire he started during the Third Reich, Willi Daume, the former German International Olympic Committee member, and the cyclist Gustav Kilian.

Hans Wilhelm Gäb, chairman of Sporthilfe’s board, has replied to his critics with barely concealed anger and described his journalist critics as people whom he did not actually consider to be journalists and who were not “sticking to the facts”. Hans Joachim Eltz, Sporthilfe’s spokesman, insisted that sport was no better than society, adding that “these people led a life after the Nazi era and in some cases they went on to receive awards of merit for the contributions to society.” The Hall of Fame manages to include the football World Cup-winner Franz Beckenbauer and seven other living German sporting heroes, but fails to mention the nation’s other international greats such as Boris Becker, who won Wimbledon three times, Steffi Graf, who captured seven Wimbledon titles, or the seven-time Formula One world champion Michael Schumacher.

Mr Gäb insisted that the idea was to focus initially on sporting heroes who were now dead. However, he had no apparent explanation for Beckenbauer and the six other living sportsmen and women on the list of sporting heroes. The jury, headed by Wolfgang Schäuble, the German Interior Minister, which included sports officials and journalists, has also been attacked for putting only one sporting personality from the former East Germany and only three women on its list. However, the Hall of Fame does include two victims of the Nazi regime, to wit Albert Richter, the cycling champion who infuriated Hitler by refusing to wear a swastika on his jersey, and Werner Seelenbinder, the Olympic wrestler who was executed by the Nazis in 1944 for his links to the communist anti-Nazi resistance movement (Ibid).
Planning law

Legal battle over sports fields in New York City (US)

In late January 2008, it was learned that dozens of sports fields on a tiny island off Manhattan have prompted a debate over fair play. The legal battle over public parkland on Randall’s Island has pitted some of the city’s most exclusive private schools against mostly poor, minority communities.

Last year, the city forged a deal with a consortium of 20 private schools in Manhattan under which the schools agreed to pay about $52 million over 20 years to build new athletic fields and renovate 36 existing ones on the island. In exchange, the schools, which include such high-profile institutions as Dalton, Trinity and Spence, will receive exclusive use of two-thirds of the fields between 3 and 6 p.m. on weekdays (the hours of peak demand) for the duration of the deal. Public schools, sports leagues, after-school programs and private schools not included in the consortium would compete for permits for the remainder of the fields.

The deal was not well received by the residents of East Harlem, who sued, claiming officials have effectively turned over public land to a group of private schools. They fear the city may be setting a dangerous precedent. According to Marina Ortiz, a member of the East Harlem Community Board, these officials “don’t care about children from poor and working families”, adding that whoever could afford to pay will play. She did not think that this should be the case with public parkland (Associated Press, www.findlaw.com of 29/1/2008).

The claimants also aver that the project was approved without sufficient environmental or community review, and without competitive bidding. The island in question is a 480-acre speck in the East River between upper Manhattan, Queens and the Bronx. It is connected to the city boroughs by the Triborough Bridge as well as a pedestrian bridge to East Harlem. Besides the athletic fields, the mostly uninhabited island is home to a psychiatric centre, homeless shelter, the city’s Fire Department training academy and a stadium which has been the site of big concerts such as the previous autumn’s Farm Aid.

A ruling against the city could halt construction of the new fields, which is already under way. On a recent winter morning, bulldozers rumbled over large tracts of dirt enclosed by wire fencing. City officials defend the project, saying they needed the private schools to pay for such amenities as new restrooms, benches, water fountains, bleachers, dugouts and information booths. According to Aimee Boden, executive director of the Randall’s Island Sports Foundation, which is overseeing the project, these new fields will provide public schools priority access to four times more fields during prime after-school hours than previously available.

Mark Skrapits, a senior at Regis High School in Manhattan, commented that it had been a struggle for his Roman Catholic school to obtain official permission to play on the island. His school is not part of the consortium. He said:

“It’s a three-part battle to baseball practice. The first part is finding an open field. Then you have to make sure the field is playable, clean it up a little bit... and not get kicked off by another team. We struggle.” (Ibid)

His baseball coach, Dan Dougherty, fears the deal between the city and the private schools could shut his team out for good. The worst-case scenario, in his view, would be required to terminate its baseball and soccer programmes. However, the deal has many supporters, including Ogden Lewis, a former trustee at the private Buckley School. “The total availability of the fields for all children in the city is actually going up” he said. Some public school officials also are in favour of the plan. Gregory Hodge, the principal of Frederick Douglas Academy, a West Harlem public school whose students are bussed to the island twice a week by the foundation, said that he did not care who provided the money. He added: “The reality is, public schools benefit. Some fields are better than no fields” (Ibid)

Judicial review

Lifetime ban for judoka deemed to be disproportionate. French court decision

In the case under review, a judo club had banned the claimant for life from practising judo with a club which was a member of the national judo federation and from participating in any competitions organised by the federation, because of actions which had constituted an infringement of the moral code governing the sport. The penalty did not, however, extend to banning the claimant from becoming a judo instructor. The Administrative Court of Appeal (Cour administrative d’appel) had overturned this decision, on the basis that this decision represented an obviously disproportionate measure, taking into account the claimant’s young age at the time when he committed the actions in question, as well as...
6. Administrative Law

the definitive nature of the penalty, given that the
disciplinary rules of the federation provided alternative
penalties which were equally capable of protecting the
interests of the federation and of its members. The
Federation applied to the Supreme Administrative Court
(Conseil d’Etat) for review of this decision.

The Supreme Court upheld the decision. It conceded
that, taking into account the objectives imposed by the
relevant legislation on the various sporting federations,
the latter have at their disposal disciplinary powers
which they are to use in order to impose penalties for
infringements of those technical and ethical rules which
are laid down in their constitutions, ensure the
protection of other licensed practitioners, and guarantee
the honourable manner in which the sport which they
govern is practised. In discharging this duty, the
federations had a duty to take account of the effects
which their penalties might have on the education and
integration into society of the party affected. Therefore,
the Court of Appeal, where it judged that the actions
committed by the claimant infringed the behavioural
rules laid down in the moral code governing judo were
such as to justify a disciplinary penalty, had committed
no error of law where it took account, when assessing
the proportionality of the penalty imposed, of the
effects which that penalty might have on the person
affected, and of the possibility that the practice of judo,
more particularly in a competitive context, could
contribute towards his social reintegration.

In so doing, the Court of Appeal had made an
assessment of the facts, on which the Supreme Court
could not make a judgment in the absence of any
manifest misinterpretation of the facts (dénaturation
des faits) on the part of the Court of Appeal. The latter’s
decision was therefore confirmed (Decision of the
Conseil d’Etat of 28/11/2007, case No. 294916, JCP-La

French administrative court lays down
criteria for size of rent payable by football
club to municipal authorities for use of
stadium

In France, as is the case in many countries, the local
authorities like to entertain narrow relations with the
professional football clubs which come within their
jurisdiction. This is particularly the case where the latter
have acquired an international reputation, given that this
contributes in no small measure to the fame enjoyed by
the town or city concerned. It is therefore entirely
normal for these local authorities to give financial
assistance to such clubs, given that they stand to profit
from the economic, social and touristic side effects
which the club’s reputation can bring to the municipality
in question. This practice has, however, led to some
excesses which French legislation has sought to curb.
Thus such municipal subsidies may not exceed €2.3
million per year, and must be spent on specific
objectives; in addition, the provision of services by the
club to the municipality, such as the buying of match
tickets and the placing of advertisements, is also
subject to certain limits.

Almost inevitably, the local authorities in question have
sought to circumvent these provisions by devising ways
of providing the clubs with additional financial benefits,
such as the allocation of public contracts for virtually
fictitious services. Such practices have been censured
by the courts. Another method can consist in making
available to the club sporting facilities, such as
stadiums, on highly favourable terms. This is what the
case under review related to. It originated from a clause
in a contract made between what is currently the best
football team in France, to wit Olympique Lyonnais, and
the Mayor of Lyon regarding the amount charged by the
latter for the use of the Stade de Gerland, which is the
Lyonnais ground. This clause was challenged before the
local administrative court, which ruled that the clause in
question was unlawful under the legislation cited above.
The Lyon local authority challenged this decision before
the Administrative Court of Appeal (Cour administrative
d’appel).

The Court upheld the challenged ruling. It held that the
amount charged by the City for the use of the stadium,
to wit €31,579, was not proportionate to the level of the
benefits which the club derived from the use of this
ground. These benefits had to be measured in terms
not only of the income which derived from this use,
such as sales of tickets, the club’s merchandising
activity and its advertising revenue, but also of the
expenses borne by the local authority in question, such
as the maintenance of the stadium and the depreciation
costs. In addition, the city had made allowed the club to
use the Tola Vologe training centre without charge. In
so ruling, the court dismissed the arguments put
forward by the Lyon city authorities that the club bore
the cost of actually organising its fixtures, that the
income from each match was extremely variable, and
that the club had to pay various fees to the sporting
federations organising the competitions in which it took
part (Decision of the Cour administrative d’appel of Lyon
Disciplinary decision to disqualify football stadium is not capable of judicial review.

Italian court decision

The reader will doubtless recall ([2007]1 Sport and the Law Journal p. 56) the tragic case of the policeman killed during a confrontation with the violent football ultras of Catania, Italy. As a result, the Italian football federation (FIGC) had banned the Catania stadium from hosting any more League fixtures for the remainder of the season. This decision was challenged before the Regional Administrative Court (Tar) of Sicily by a number of season-ticket holders, who demanded not only the setting aside of this decision, but also compensation for the loss they had suffered. The Court in question ultimately made no decision in the matter, for the simple reason that it disclaimed jurisdiction in such matters (Decision of 8/11/2007, [2008] Il Foro Italiano p. 134 et seq.).

This decision has caused some raised eyebrows in Italian legal circles. In an annotation to the decision, the commentator A. Palmieri (ibid) points out that in other cases involving sporting controversies, the administrative courts had fully assumed jurisdiction. This was notably the case during the so-called calciope match-fixing scandal of that same year (also extensively covered in these columns), more particularly by reference to the side-effects which were potentially produced by such decisions, which brought such matters firmly within the jurisdiction of the courts. He goes on to cite numerous other examples of such decisions.
Land law

[None]

Intellectual property law

[None]

Other issues

Barry Bonds ball sold (this time without court litigation) (US)

It will be recalled from previous issues of this Journal ([2002] 1 Sport and the Law Journal p. 70, [2005] 1 Sport and the Law Journal p. 79) that the balls which baseball star Barry Bonds (who is no stranger to other, more controversial, parts of these columns) despatches to the outer reaches of the field when reaching various landmarks of his career have a habit of causing legal controversy, in terms of the disputes over their ownership to which they have given rise. In March of this year, it looked as if the same scenario might be repeated for an incredible third time – on this occasion as a result of Bonds’s career-best 762nd home run. This time, however, there is no prospect of the matter ending before the judiciary.

After snaring the baseball Barry Bonds hit for his record-breaking home run, Jameson Sutton stored it in the safest location he could imagine, to wit deep inside his closet. The 24-year-old from Boulder quickly moved the baseball into a safety deposit box after the season was finished, realizing its potential worth. With Mr. Bonds still looking for a place to play this season, Sutton decided to come forward with the ball. He has hired SCP Auctions to organise an online auction that started at the end of March and could fetch as much as $1 million.

Mr. Sutton grabbed Bonds’s final homer of last season on Sept. 5 at Coors Field when he extended his arm over the fence. He thought he had it cleanly and then was “crunched” by two other fans.

“I did what was a weird splits, and saw the ball rolling in front of me,” he said. Mr. Sutton already had a batting-practice baseball in his hand that he was given by a member of the Rockies’ maintenance crew before the game. He let go of that one and snatched the home run ball. Robert Harmon, who was taking pictures at the time and was close to Sutton, saw a ball rolling and quickly scooped it up. It later turned out that he had grabbed the batting practice ball.

Mr. Harmon isn’t bitter about losing the expensive baseball to Mr. Sutton. Being a partial season ticket holder, Harmon became acquainted with his rival’s parents, David and Debbie, who have been ticket holders since the team’s inception. Harmon knows how much the ball can help the family, since David Sutton is back in the hospital as he battles cancer. Jameson Sutton has already pledged at least half of the ball’s proceeds to his parents. The auction house in question had already handled the sale of Bonds’s record-breaking home run ball No. 756, which went for $752,467.

David Kohler, the president of SCP Auctions, said he had already gathered that some people would be prepared to pay up to $1 million for Sutton’s baseball. Earlier in the week, local businessman Gregory Anderson made an offer of $15,000 for the ball. He said he would be taking part in the forthcoming auction, but was unsure whether he would bid over $100,000.

SCP said it authenticated Sutton’s ball by studying game films and interviewing fans, including Harmon who will sign an affidavit saying he doesn’t have the ball. But Harmon has no doubt that Sutton possesses the ball. “There were two balls in play, and I got the practice ball,” Harmon said. Nevertheless, SCP required Mr. Sutton to take a polygraph test, and he passed. Asked if he would consider returning the ball to the record-holding batter, Mr. Sutton, who considers himself a big Bonds fan, just smiled. “If he wants to come bid on it, that would be great,” he said (Associated Press at www.findlaw.com of 23/4/2008).

David Beckham jersey ignites legal feud between two boys in Hawai

It started with a generous gesture by England footballer David Beckham, who handed over his game-used soccer jersey to two young boys after a match at Aloha Stadium. Now a squabble over the sweaty souvenir has devolved into a nasty fight with threats of legal action that has left the general manager of the Los Angeles Galaxy soccer team in “utter disbelief.” The youngsters from Honolulu used to be close friends and teammates on a soccer team. Then a shirtless Beckham approached the boys Feb. 20, after the Galaxy’s exhibition loss to Japan’s Gamba Osaka in the Pan-Pacific Championship, and reached over a sign with his right hand and gave away his white jersey.
7. Property Law

Eric and Yoshika Kerr said it was their 10-year-old son who had succeeded in luring Mr. Beckham over to the boys’ side. The jersey, they say, was intended for their son because the soccer star pointed to him. Wilfred and Yoshika Ho said their 9-year-old son had possession first and that a police officer stepped in during a scrum for the jersey and resolved the issue by handing it to their son.

“My son got the shirt, their kid started trying to pry it away,” said Wilfred Ho, who obviously considered a front-page photograph in Thursday’s edition of The Honolulu Advertiser as conclusive evidence. The picture in question shows Ho’s son in an emotional tug-of-war with two other youngsters. The Kerr boy is standing behind Ho’s son, holding a sign, not involved in the tussle.

The Kerrs told the Advertiser they never wanted sole possession of the jersey but wanted to share. They even suggested a joint-custody deal where they would rotate possession. Said Eric Kerr:

“(Beckham) pointed out that he wanted our son to have it. How do you explain this to a 10-year-old? It’s been really hard on him. Why not let the kids share? He’s such a big star and it’s one heck of an experience for the boys. We just want the Hos to keep their end of the bargain.”


Wilfred Ho said he and his wife attempted to clarify that they were the owners, but that they proceeded to get upset – which was why they never let them borrow it.

On 10/4/2008, the Hos received a letter from the Kerrs’ attorney, demanding the return of the Beckham jersey or possible legal action. The Hos’ attorney responded in a letter the previous week, claiming that the Hos were the rightful owners. Alexi Lalas, the Galaxy’s general manager, told the Advertiser that Beckham and the team never intended this situation to happen. “My suggestion is that the judge get a pair of scissors, cut the thing in half and give half to each” he added (ibid).
8. Competition Law

National competition law

**NFL, Cable Execs Spar at Congressional hearing (US)**

Cable television operators discriminate against the NFL even though professional (American) football is the most popular spectator sport in the US, the league’s commissioner told members of the country’s federal legislature during a hearing in March of this year. The league-owned NFL Network broadcasts eight regular-season games each year. However, they are not widely available to viewers because of a dispute between the league and the country’s two largest cable companies, Comcast Corp. and Time Warner Cable. NFL Commissioner Roger Goodell said the companies in question “enjoy a high level of bottleneck power” and that they treat the NFL Network in a “sharply different and clearly less favorable” way when compared with networks they own a stake in.

Mr. Goodell asked members on the House Energy and Commerce’s telecommunications sub-committee to pressurize the Federal Communications Commission (FCC) into enforcing legislation which bars discrimination against unaffiliated networks. However, Democrat representative Anna Eshoo said Goodell’s claims of discrimination were a trifle hard to believe considering the league’s own antitrust exemption. She said the dispute is really about money. Glenn Britt, president and chief executive of Time Warner Cable, said the NFL’s position was especially disingenuous considering the League’s exclusive arrangement with DirecTV Inc. to air the “NFL Sunday Ticket” package of out-of-market games.

The trend of exclusivity has grown recently, said another Democrat, Ed Markey, of Massachusetts, the chairman of the sub-committee (and a fan of the Boston Red Sox). He noted that baseball’s “Extra Innings” package was scheduled at first to air exclusively on DirecTV but ultimately was made available on cable systems. The FCC has a process for resolving disputes between cable operators and programmers. However, owners of independent networks have claimed that the process is not used frequently enough and is ineffective. At the heart of the NFL Network dispute is the league’s preference that the network be carried on basic cable levels. Time Warner has refused to carry the NFL Network channel unless the channel is part of a higher-priced package. Comcast carries the channel on a premium level.

As a result, fans are caught in the middle, said Consumer Federation of America research director Mark Cooper. He said:

> “The current system, where the cable operators and dominant sport programmers force consumers to pay ever-increasing prices for a restricted set of choices, is the worst possible for the consumers” (Associated Press, www.findlaw.com of 6/3/2008)

Mr. Cooper said a simple solution would give people the option of paying only for the channels they want. Such an “à la carte” concept was strongly opposed by programmers and system operators. He added that the solution was to allow consumers to buy programming on a stand-alone basis, a proposal opposed by both programmers and system operators. Britt warned against government intervention. He said that negotiations “may be messy at times” but are best resolved in the marketplace.

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

**Anti-trust action brought against NASCAR dismissed (US)**

The National Association for Stock Car Auto Racing (NASCAR) is the largest sanctioning body of stock cars in the United States. The three largest racing series sanctioned by NASCAR are the Sprint Cup, the Nationwide Series and the Craftsman Truck Series. It also oversees NASCAR Local Racing, the Whelen Modified Tour, and the Whelen All-American Series. NASCAR sanctions over 1,500 races at over 100 tracks in 39 states, Canada, and Mexico. With roots as regional entertainment in the South-eastern U.S., NASCAR has grown to become the second-most popular professional sport in terms of television ratings inside the U.S., ranking behind only the National Football League (NFL). Internationally, NASCAR races are broadcast in over 150 countries. It is accordingly a major operator in the sports market, and has sometimes been accused of unfair commercial practices.

In early January 2008, it was learned that federal judge has dismissed an anti-trust actuion brought against NASCAR by a Kentucky track that was left off the lucrative Nextel Cup schedule.Kentucky Speedway alleged that NASCAR conspired to leave the Sparta track and others out of the Nextel Cup series despite their superior amenities. Judge William Bertelsman rejected the speedway body’s action in a ruling Monday from the U.S. District Court in Covington. The track is located about halfway between Louisville and Cincinnati. It has drawn huge crowds to some of its other races, especially the NASCAR Busch race, which last year drew more than 70,000 people (Associated Press, www.findlaw.com of 7/1/2008).
8. Competition Law

EU competition law

Belgian cycle race organisers judged to have abused dominant position. Belgian court decision

In the case under review, the claimant, being a Swedish professional cycling team (G), participated in professional cycling races in Europe. It had been awarded a pro-tour licence by the International Cyclists Union (UCI). Two events were scheduled for 25 and 29 April 2007 in Belgium. These races, as well as other major European events, were organised by ASO, which held a dominant position in that market. In early April 2007, ASO sent a letter to G in which it informed the latter of its decision not to allow G’s cyclists to take part in the races concerned on the grounds that one of the team’s sponsors was an online sports betting company which undertook an activity that was unlawful under Belgian law. Although the latter failed to specify in what way the activity in question was illegal, it stated that ASO would be held liable as the organiser of the events. G sought an urgent meeting in order to resolve the matter, but received no response from ASO. Concerned that it would be refused access to the races – as had been the case on previous occasions – G brought an ex-parte application to the Commercial Court of Liège seeking an order that ASO be required to allow its cyclists to compete, and ordering other entities involved in the race not to prevent their participation. G, for its part, offered inter alia to remove any reference to its betting sponsor.

The Court awarded the action to the applicants. It ruled that ASO, being in a dominant position in the organisation of cycling races, had failed to adopt the objective, transparent, fair and non-discriminatory manner which was required of it in relation to its competitors. In addition, there was no evidence that ASO would be held liable under Belgian law for any illegal activity conducted by the sponsor. For the latter’s activity to be declared illegal under Belgian law, it had to be proved that the Belgian law in question complied with EU law – more specifically Article 49 of the EC Treaty laying down the principle of the free movement of services and embodying the supremacy of EC law over domestic law.

Prima facie the Belgian legislation relied upon by ASO constituted a restriction on the freedom to supply services, and the mere reliance upon that legislation could not be accepted as a justification of ASO’s position, since the latter had, in its letters, failed to explain in a specific and justified manner the conditions under which the restrictions under Belgian law should be applied in the light of the overriding grounds of public interest. Nothing more could be concluded from the mere reference to the Belgian regulation with respect to the lawfulness of the services proffered by the sponsor (Case No. 2007/2874 [2008] 1 ECC p. 1 et seq.).

French racing under threat from EC law

In mid-March 2008, it was learned that the testing ground which produced the celebrity horse Kauto Star, was under threat from an attack by the European Commission on state betting monopolies. The horse in question was foaled in the Lion d’Angers stable in North-West France, and was four years old before he was brought to Britain by Clive Smith, having cut his teeth – so to speak – in his homeland. However, the courses which showcase France’s best horses depend for the bulk of their income on the state betting operation, and a court ruling there which was issued in July 2007 has placed its future viability in jeopardy.

The court in question is the French Supreme Court (Cour de cassation), and it has ruled that the Pari-Mutuel state monopoly is unlawful under Article 49 of the EC Treaty on the freedom to provide services. The French Government is challenging the ruling in an effort to protect its thriving bloodstock industry – which has also produced Mastermind, who is another Smith-owned mount. Such is the cross-channel flow of horses that it could produce a severe effect on National Hunt racing in Britain (The Guardian of 14/3/2008, p. S2).
EU law (excluding competition law)

“Dangerous tennis racquets” row hits European court

In mid-April 2008, it was learned that an Austrian man had requested the European Court of Justice (ECJ) to rule on the lawfulness of his ejection from an aeroplane for carrying tennis racquets, even though he had not been informed that they were banned as hand luggage under EU law. Gottfried Heinrich’s flight was about to depart from an airport near Vienna when he was instructed to leave the aircraft. It has transpired that racquets are featured on a secret list drawn up by the EU of items deemed to be potential weapons. An adviser to the Court stated that the Commission had displayed “fundamental absurdity” when it justified not publishing the list on the grounds of preventing crime (The Guardian of 11/4/2008, p. 7).

The Commission’s White Paper on Sport

Member States had detailed discussions with the Commission on the implications of the White Paper on Sport (COM(2007) 391, 11.07.2007). 2007 had been a “vintage year” for sport at EU level: in addition to the adoption of the White Paper in July, Article 149 EC as amended by the Lisbon Treaty, signed in December, opened new opportunities (although the fate of the Lisbon Treaty is, pace the Irish referendum result, very much in doubt). In particular, after ratification of the Treaty, sport would be integrated into the work of the Council of Ministers, and the creation of an EU Sport Programme would become likely. In relation to these objectives, the Working Group should play a role in helping the Commission to define priorities. There was a clear intention to use the Working Group as a source of inspiration and expertise.

Text of direct relevance to the Working Group was section 2.1 in the White Paper and section 2.1 in the accompanying Staff Working Document entitled “Background and Context”. The Commission thanked the Working Group once again for its input for these sections of the White Paper. Attention was drawn to the actions which are numbered and listed in the “Pierre de Coubertin” Action Plan annexed to the White Paper. Of direct relevance to the Working Group were the topics PA Guidelines (Action 1), EU HEPA Network (Action 2) and mobilisation of EU programmes to finance projects with a HEPA aim (Action 3).

Expert Group “Physical Activity Guidelines”

The decision to appoint this Expert Group had been taken by the Working Group at its fourth meeting (3/5/2007). A list with 21 experts representing all major geographical regions of the EU had been drawn up since the last meeting and the Expert Group had held its first meeting in Brussels on 7/12/2007. The Working Group confirmed the composition of the Expert Group.

The Commission explained that all experts had accepted the role of the Working Group and were aware that they would report solely to the Working Group, which would maintain control of the process and its product. At the Expert Group meeting, the Commission also stressed that the most central concern was to have guidelines defining priorities for
policies that would induce people to move more. The Guidelines should therefore be addressed to policy makers in the Member States and not to the population. The document should neither contain a comprehensive academic discussion of the subject, nor a redefinition of WHO recommendations and targets. EU added value should be provided by focusing on implementing the WHO targets, by being action-oriented and by being solely directed toward physical activity (not nutrition or other related topics).

The Expert Group had discussed existing national guidelines and had defined topics on which the experts were now writing drafts. In their file, Working Group members would find the meeting report, including a detailed draft Table of Contents which had been agreed at the Expert Group meeting.

At the sixth Working Group meeting (planned for 25/9/2008), the Working Group would take over responsibility for the draft, finalise it and submit it to Sport Directors. The plan was for the draft PA Guidelines to be presented to Members States’ Sport Directors in Versailles on 30-31 October 2008 and possibly to Members States’ Sport Ministers in Biarritz on 27-28 November 2008, in accordance with the objective defined in the White Paper on Sport. However, the question whether this timetable could be kept depended on respect for the agreed deadlines by the members of the Expert Group, and could therefore not be guaranteed.

Cooperation with the World Health Organisation (WHO)

There was a general discussion and it was decided that the Commission should visit the WHO Rome Office which hosts the secretariat of the WHO Europe HEPA (Health Enhancing Physical Activity) Network, in order to identify possibilities for future cooperation in line with commitments of the Commission as published in the White Paper on Sport.

EU law scuppers FIFA “6+5” plan

That three English teams reached this year’s semi-finals of the European Champions’ League final may have gladdened the hearts of Manchester United, Liverpool and Chelsea fans, but to many dispassionate observers it was indicative of a tendency whereby the richest sides will win every club trophy in sight – even if they have hardly any home-grown players in the team. FIFA, the world governing body in football, have been concerned at this development for some time now, and have hinted that they may introduce rules aimed at countering this trend. Accordingly, in early February 2008, its President, the controversial Sepp Blatter, indicated that he was about to table a proposal under which clubs would be required to field a minimum of six players eligible for the national team of the country in which they play. He also indicated that he wanted a vote on these proposals to take place in the course of May 2008 (The Independent of 6/5/2008, p. 55).

The springboard for the proposal was a meeting of the FIFA Football Committee, a group of prominent players, former players, managers and officials, including a representative of the players’ international trade union, FIFPRO. Those present included such prominent figures as Franz Beckenbauer, Pele and Sven-Göran Eriksson (Ibid). However, no-one could be in any doubt as to the many potential obstacles that would need to be overcome if this plan were to be translated into reality. Even as Mr. Blatter announced his proposal, it was already known that, amongst others, UEFA president Michel Platini was opposed to the scheme (The Guardian of 8/2/2008, p. S2). The English Premier League – unsurprisingly – firmly opposed the scheme. Its Chief Executive, Richard Scudamore, argued that, far from benefiting the England team, this proposal would actually be detrimental to it (The Daily Telegraph of 15/1/2008, p. S3). Some national associations were also known to oppose it, prominent amongst them being the English Football Association (FA), which had already gone on record as saying that they “prefer meritocracy to quotas” (The Independent, loc. cit.). Two weeks after the proposal was announced, however, Lord Triesman, the FA Chairman, seemed to indicate that the English governing body was ready to support the plan (The Guardian of 20/2/2008, p. 38).

The main objection to the scheme, however, was always going to be the fact that it ran directly in the face of EU law on the free movement of persons. Obviously Mr. Blatter was not unaware of this potential obstacle, but believed that the EU authorities might be sensitive to please for such change because of the “specificity of sport in the new European Treaty” (The Independent loc. cit). In early May, just before the FIFA Congress in Sydney, Australia, the European Parliament approved a motion rejecting the Blatter plan by a crushing majority of 518 to 49. Ivo Belet, the Belgian MEP and author of the Parliament’s report on the future of professional football, told the assembly:

“Unfortunately the 6+5 rule is not compatible with the free movement of persons in the EU. The European Treaty is very clear on this point: discrimination on the basis of nationality is not allowed and this also counts for football” (The Guardian of 9/5/2008, p. S5).
9. EU Law

Obviously the world governing body was not bound by this resolution; however, they must have realised that, if it were to be introduced, it would rapidly be challenged before the national and European courts by those whose interests would be prejudiced by it. This is not to say that the European authorities were entirely impervious to the dangers which the current position carries, and which prompted the 6+5 plan in the first instance. In fact, the second part of the resolution referred to above called upon the European Commission to:

"recognise the legality of measures favouring the promotion of players who have come through training schemes, such as a minimum number of locally trained players, irrespective of their nationality" (Ibid)

This tied in with the UEFA President’s pledge, made two months previously, to ban clubs from signing youth imports, and to do so with the support of the European Commission (The Sunday Telegraph of 30/3/2008, p. S3). Mr. Platini had, in fact, already been scathing in his criticism of English clubs which encourage boys to join them from abroad at the age of 16 or 17, a practice which was pioneered by Arsène Wenger at Arsenal, most famously in the recruitment of Spanish star Cesc Fabregas from Barcelona. This policy was later copied by others, more specifically by Liverpool and Chelsea. Mr. Platini added that the first contract which a player should sign should be for the clubs which trains him – a player was trained to play, not to be sold. Minors should not be seen as a machine that could be transferred for the benefit of agents or clubs. Mr. Platini intends to work with French president Nicolas Sarkozy and his sports minister, Roselyne Bachelot, to persuade the European Commission to introduce special rules along those lines based on the “specific nature” of sport in EU law (The Mail on Sunday of 30/3/2008, p. 103).

This is obviously an issue which will continue to evolve in the near future – the present writer pledges, as ever, to follow developments in this regard with the keenest of interest.
10. Company Law

Bankruptcy (actual or threatened) of sporting clubs & bodies

**US Jockeys’ Guild applies to emerge from bankruptcy**

The Jockeys’ Guild Inc. is an American trade association based in Lexington, Kentucky, representing thoroughbred horse racing and American quarter horse professional jockeys. In October 2007, the organization applied for “Chapter 11” protection from creditors in bankruptcy court in Louisville, Kentucky. However, in mid-April 2008, it was learned that the Guild had submitted a plan to emerge from bankruptcy, under which it claimed that it could expect an income of around $213,000 per month. This revenue would come from dues paid by jockeys and various payments from racing tracks. Under the plan, the association says that it could pay $780,095 to non-secured creditors whilst continuing to meet all its financial obligations.

The Guild had originally applied for bankruptcy after financial problems caused by its health insurance plan, litigation and reduced payments from racing track associations left it with few assets (Associated Press, www.findlaw.com of 22/4/2008).

**Champ Car owners apply for bankruptcy (US)**

In early March 2008, the owners of the Champ Car World Series applied for “Chapter 11” bankruptcy only two weeks after agreeing to an open-wheel unification plan with the Indy Racing League (IRL). The application, lodged with the US District Court in Indianapolis, stated that Champ Cars had expended tens of millions of dollars since 2004 in order to maintain the series, and that its takeover by the IRL was in the best interests of the sport (Associated Press, www.findlaw.com of 7/3/2008).

Champ Car was formed in 2004 after team owners Kevin Kalkhoven, Paul Gentilozzi and Gerald Forsythe bought the assets of Championship Auto Racing Teams after the latter had applied for bankruptcy (Ibid).

**Other issues**

[None]
International private law

Use of mediation in Australian sport. Article in leading journal
In the article in question (Humphrey, T., “Dust in the balance: the use of mediation to resolve disputes in Australian sport” in [2008] ISLR 23), the author examines the current state of dispute resolution in sport, and tracks the trend towards Alternative Dispute Resolution (ADR) in sport. However, he notes that ADR remains heavily dependent on the arbitration mechanism, and points out some of the defects inherent in this type of remedy. He shows a marked preference for mediation — or at least encourages sport to move in that direction to a much greater extent than has been the case hitherto. He explains that mediation provides a forum for open communication, ensures confidentiality, helps to maintain relationships, creates a neutral environment in which the parties can infuse their true interests and can be flexibly tailored procedurally to suit specific circumstances. He concludes by saying that these factors, combined with its high success rate in the past, prove that mediation is the perfect remedy for many — if not most — of the various disputes which are capable of arising in sport.

Swiss supreme court upholds transfer of documents decision
In the case under review IX v. Public Prosecutor of the Canton of Thurgau, Decision of 17/7/2007, [2008] ISLR 76, the claimant was a professional cyclist resident in Switzerland. In July 2006, both his contract of employment and sponsoring agreement were suspended because of a doping investigation which had been opened against him. Criminal proceedings were subsequently initiated in Germany not only against the claimant, for fraudulent behaviour, but also against his coach for aiding and abetting the claimant to commit fraud, as well as for an infringement of the laws governing medicinal products by acquiring doping substances and administering them to the cyclist. In the course of the inquiry, the German prosecutor (Staatsanwalt) sought legal assistance in Switzerland requesting in particular details of one of the claimant’s bank accounts. More particularly it was alleged that payments to four physicians had been made from this account in order to cover the cost of the claimant’s doping treatments.

The relevant Swiss court ruled in favour of the German prosecutor’s request in January 2007. Four months later, its decision was confirmed by the Swiss Federal Criminal Court. The claimant appealed against this decision, on the grounds that his alleged actions did not constitute fraud under the Swiss Criminal Code and, consequently, there could be no question of double criminality (beidseitige Strafbarkeit) in these circumstances. The claimant therefore requested that the German prosecutor be denied the legal assistance applied for, and that no relevant documents be disclosed or handed over.

The Swiss Federal Supreme Court dismissed the application. It ruled that the fundamental principle of relevance was that of double criminality, and referred to the existing case law on its application in Switzerland with regard to (a) extradition and (b) “minor legal assistance”, i.e. assistance which included in particular the service of documents, the obtaining of evidence (including the searching of persons and premises, seizure, hearing, etc.), production of documents and papers, or the handing over of objects or assets. The Court confirmed that the Swiss authorities would need to examine thoroughly the facts underlying a requested extradition of an accused person to a foreign jurisdiction in order to establish whether each alleged offence under the foreign law in question also constituted an offence under Swiss law. The foreign authority may prosecute the extradited person only for those offences which the Swiss authorities have stated that they are covered by the “double criminality” criterion. However, as regards the so-called “minor legal assistance” involving compulsory measures such as those in the case under review, the Swiss authorities merely had to examine whether the given facts were consistent with the elements of any offence under Swiss law, which would allow the initiation of criminal proceedings in Switzerland.

Article 11(f) of the Federal Law on the Promotion of Gymnastics and Sports makes provision for the imprisonment for up to three years, or a fine, of those persons who produce, import, distribute, prescribe, dispense or act as brokers for illegal substances or apply procedures to third parties for doping purposes. The Court upheld the view taken by the Swiss Federal Criminal Court that the behaviour engaged in by the coach was covered by this provision. The Court concluded that the double criminality criterion applied, and that the conditions for granting legal assistance had been met without needing to assess further whether the claimant’s alleged behaviour would qualify as fraud under the Swiss Criminal Code. The Court therefore upheld the decision to hand over the requested details to the German prosecutor.
12. International Private Law

Conflict of laws

[None]

13. Fiscal Law

Fiscal law

Golf club not liable for in put tax. German court decision

In the case under review, the German Federal Taxation Court (Bundesfinanzgericht) ruled that a golf club which placed its sporting facilities at the disposal of its members was not thereby organising a “sporting event”. Members’ contributions and enrolment fees were capable of constituting consideration for the services provided by a sporting association to its members (Decision of 11/10/2007, [2008] 5 Neue Juristische Wochenschrift p. XIV).

Trials and tribulations of Italian sporting (and other) stars with the taxman

As is the case in most countries, the citizens of Italy enjoy but a lukewarm relationship with the fiscal authorities. This is particularly the case with their celebrities, who have sometimes been accused of being less than totally loyal to the nation’s fiscal regime – and who from time to time are pulled up short by the authorities in this account. This was certainly the case with the seventimes world motorcycling champion Valentino Rossi, who in mid-February 2008 became £26m poorer as a result of his settlement with the income tax authorities in his native province of Pesaro, on the Adriatic.

However, it now has transpired that it could have been much worse for the expert Yamaha rider, who had originally been threatened with a bill for £83m. Wearing a severe new haircut but with the same cherubic smile on his unaging face, the champion met the press after signing the agreement with the tax authorities and explained that he had cut the deal for the sake of his peace of mind. Mr. Rossi had apparently failed to pay tax in Italy since 2000, having changed his domicile to London. However, the Italian authorities claimed that he was only resident in Britain in name, and in fact maintained a secret home in the town of Tavullia, where his family lives. He told reporters:

“I already had the intention of returning to Italy, and this affair has only speeded things up. In a few more months the thing would have happened of its own accord. I feel I have cleaned my conscience, and in all these months I have never felt alone, people have stood beside me right through it.”

(The Independent of 13/2/2008, p. 50)

Mr. Rossi’s problems exploded last year when he was notified of what he supposedly owed the tax authority, i.e. the sum of £83 million. Days later the news was released to the media and the darling of Italy, rival with Francesco Totti for the greatest number of sponsorship deals, was suddenly in the fiscal doghouse where other stars including Luciano Pavarotti had been before him. During the following months his smiling, puckish image had all but vanished from view. He later said that he never had any doubt about whether to choose a long and vicious court battle – which his tax specialist, Victor Uckmar, who was not present yesterday, has said that he would have won – or the end of the stress which he had incurred.

It was in March 2000 that Mr. Rossi “moved” to London and recorded his name in the register of Italians living abroad. Subsequently he closed his VAT account with the Italian revenue authorities – who promptly began to check on the place where he was actually spending his time. The secret investigation proceeded, and in 2003 the Italians obtained the cooperation of their counterparts in Britain, Japan, Spain and Ireland. The point of the investigation was to establish that, despite his claims, Italy remained the centre of his interests and his businesses. Rossi told reporters that he took sole responsibility for his problems. “I said yes (to the idea of living in Britain) from the first moment I went to London,” he said, “but when you are young sometimes you let yourself be guided by the people who are working for you”.

He proceeded to describe London as “a beautiful experience”, but added that he had an ever greater need to come home. He denied, however, that he planned to move back to live with his mother, saying
that he was “no longer a big kid”. The director of the Pesaro tax authorities, Massimo Romano, beaming slightly more broadly than the champion, praised Rossi as “an example of straightforwardness and correctness” capable of disbursing himself of £26m without allowing his jovial smile to slip.

The press conference was disrupted by the chanting of employees of the tax authority demonstrating outside the room about the authority’s failure to come to terms with them on a new contract. Cries of “Shame!” and “Contract” drifted into the hall. A leaflet handed out by the demonstrators complained that “the champion has been given a 90 per cent discount.” (Ibid).

Another citizen of Italy who has recently moved to London, and is experiencing difficulties with the tax authorities, is new England manager Fabio Capello, whose tribulations in this regard have been dealt with earlier (see above, p. 000). It is this case which is believed to have prompted an outbreak of glasnost on the part of the authorities. Thus it was that, in early May 2008, Italian citizens who were curious to establish how much their neighbour, boss or favourite footballer was paid saw their dreams come true when a government website briefly published the income of every Italian taxpayer. However, the posting of 38 million tax returns from 2005 was no bureaucratic bungle or the result of a hacking attack but a deliberate last push for fiscal transparency by the outgoing government of Romano Prodi. Unfortunately, a stampede by curious Italians to the site caused it to crash, before Italy’s privacy watchdog demanded it be shutdown a few hours later after howls of protests from celebrities, including many prominent sporting figures (The Guardian of 2/5/2008, p. 29).

The finance minister, Vincenzo Visco described this as a victory for “transparency and democracy. However, the data protection commissioner, Francesco Pizzetti, was not convinced. “It is one thing to make data available in response to precise requests, another to publish it in this way” he said, adding that the idea of the data appearing on Google for eternity was “extremely dangerous”. Italian newspapers were quick to download the pay packets of reams of celebrities to fill entire pages yesterday, from Giorgio Armani, on €45m, and Umberto Eco, on €2.1m, to incoming prime minister Silvio Berlusconi on €28m.

Mr. Visco’s campaign for transparency follows investigations into possible tax evasion by high-profile Italians such as England coach Fabio Capello (referred to above) and motorbike champion Valentino Rossi (also, see above). In a nation that loses up to €100bn to tax evasion a year, and where a quarter of Italians claim to earn just £4,000, many saw the numbers released not as an indication of earnings, but of how little people think they can get away with declaring. Mario Ferrara, a member of Berlusconi’s People of Freedom party, described this development as “Visco’s vendetta against those who have just voted him out of office” (Ibid).

Baseball star settles tax dispute (US)

In early February 2008, it was learned that the captain of the New York Yankees, Derek Jeter, had settled his dispute with tax officials who had asserted that he should have paid taxes stretching over three years as a New York State resident. The actual terms of the settlement were not disclosed. The tax officials concerned had claimed that Mr. Jeter should have been taxed as a state resident between 2001 and 2003. Mr. Jeter, who has an apartment in Manhattan, had claimed that he was a Florida resident and did not owe New York any taxes. Florida charges no state income tax, whereas New York State does. He was given notice of the tax allegations last year. The case became public after Administrative Law judge Timothy Alston had issued an order in November 2008 instructing tax officials to provide Jeter with more detail concerning their claim that Tampa, Florida, was no longer his home. Mr. Alston had also said that the burden of proof rested on the State authorities (Associated Press, www.findlaw.com of 5/2/2008).

13. Fiscal Law
14. Human Rights/Civil liberties

Racism in sport

The Harbhajan/Symonds affair
(Australia/India)

Background
For a sport which for centuries has been held up as a model of sportsmanship and gentlemanly conduct, cricket has, over the years, been dogged with a fair amount of controversy on the field of play. Nor is this something which has suddenly appeared out of nowhere. The practice of “sledging” may have made the media headlines in recent decades only, but that is mainly because improvements in communications technology have enabled observers to see and hear what is said and done on the pitch in a manner which was impossible when, for example, the Grace brothers (19th century!) were frequently reported to have intimidated opposition players and umpires in word and deed. The frequent and blatant cheating that occurred during top matches was frequently commented upon by commentators and novelists even during the early 19th century. And if we go back even further, we will read hair-raising accounts of rank hooliganism during matches between rival villages, with crowds frequently encroaching onto the pitch in order to shorten the boundary when the home side was chasing a target.

However, as cricket has grown, both in international appeal and in the money which now stands to be made from it, the range for unsavoury incidents has also increased – the more so because, with the topsides now coming from various continents, the scope for clashes between cultures and for inter-ethnic acrimony has also grown. This has found expression in accusations, both real and unsubstantiated, of racialism which have been made at various levels in recent years. The cases of Herschelle Gibbs, the South African opening batsman who was banned for several fixtures for racist comments during a game against Pakistan, and Darren Lehmann, the first Australian to be suspended for a racist outburst, have been well documented both in previous issues of this organ and elsewhere. Even the Darrell Hair affair, the fall-out from which continues to produce effects to this day (see below, p. 000) was not entirely free from such accusations.

These cases are bound to increase as a result of greater media intrusiveness, as well as a marked increase in sensitivity – and, some would argue, over-sensitivity – to pronouncements inspired by prejudice against certain ethnic or religious groups. They are also bound to increase the tension between the cricketing nations, particularly where the response by the game’s authorities is seen to be less than satisfactory. The case which is described below, which involved exchanges between, essentially, an Indian bowler and an Australian player of mixed racial origin, represents perhaps a perfect microcosm of all these developments, and seems to bode ill for the future unless all parties involved adopt a more rational and dispassionate approach towards the problem.

The incident itself and its immediate consequences
The entire affair started just after the New Year had been rung in, when the Indian spinner Harbhajan Singh was summoned to a hearing by match referee Mike Proctor, the former South African all-rounder, following an incident which occurred on the third day of the Second Test between Australia and India in Sydney. The charge had been laid by the umpires after the captain of the home side, Ricky Ponting, had complained about a comment which Mr. Harbhajan had allegedly directed against all-rounder Andrew Symonds. The alleged offence fell within section 3.3 of the Code of Conduct adopted by the world governing body, the International Cricket Council (ICC), regarding language or gestures which offend on the basis of race, religion, gender, colour, descent or national or ethnic origin (The Guardian of 5/1/2008, p. S13). The following day, it was learned that the Indian spinner was to be banned for three Tests after being found guilty of racial abuse (The Daily Telegraph of 7/1/2008, p. S31).

Gradually, details of the incident started to emerge. It appeared that the charge had been laid by umpires Mark Benson and Steve Bucknor after Ponting had accused Harbhajan of making a “monkey” comment against Symonds, the only black player in the Australian team. Following a four-hour hearing held at the Sydney Cricket ground, Mr. Proctor had found the case against Harbhajan proved. It was reported that Mr. Harbhajan had an argument with Symonds during which he used the word “monkey”, according to an ICC statement. Proctor said that he was “satisfied beyond a reasonable doubt that Harbhajan Singh directed that word at Andrew Symonds and that he meant to offend on the basis of Symonds’ race or ethnic origin” (Ibid).

The Indian team immediately announced that they would appeal against the decision. In addition, they called upon the ICC to ban the umpires in question from officiating during the remainder of the series over their handling of the fixture. They also lambasted the home side, accusing them of infringing the spirit of the game.
14. Human Rights/Civil liberties

However, the Indian management dismissed rumours that the team was considering pulling out of the remainder of the tour. The incident had fractured the relationship between the two teams, which had already been soured during an acrimonious one-day series in India three months earlier, when players from both teams were involved in heated exchanges; in addition, Mr. Symonds himself had been racially abused by spectators (The Guardian of 7/1/2008, p. S16). The temperature of the match had already been stoked up by a number of umpiring errors, mainly by Steve Bucknor (The Daily Telegraph, loc. cit).

*India protest... and the ICC partially backs down*

The protests lodged by India at the initial outcome of the case was but a taste of the furor that was to follow. Indeed, at first it seemed as of the visiting team were, after all, threatening to withdraw from the series, as they remained encamped in their Sydney hotel when they were supposed to have moved on to Canberra for a tour match in preparation for the Third Test. They refused to accept that Harbhajan had used the offending term, whilst administrators battled to thrash out a solution to the impasse (Daily Mail of 8/1/2008, p. 80). Their anxiety seemed all the more justified because India “had form” in such matters. Thus it will be recalled from a previous issue of this Journal (2002) 2 Sport and the Law Journal p. 68 that match referee Mike Denness had disciplined six Indian players, including star batsman Sachin Tendulkar, after a test against South Africa in Port Elizabeth and banned Virender Sehwag for one Test. India refused to accept the verdict, South Africa backed them, and the hapless Denness was refused entry to the ground for the next Test. The ICC had to reclassify the match as a “five-day friendly” instead of a test.

The affair had naturally reached the millions of cricket fans in India, who took to the streets to protest against the decision. It was particularly the fact that Mr. Harbhajan had been found guilty without any supporting video or audio evidence which had aroused such virulent opposition. Prominent personalities in the world of sport also added their voice to the protests. Sharad Pawar, the President of the Board of Control for Cricket in India (BCCI), and a senior Minister in the country’s government, described the ban as unfair and a slur on India itself (The Daily Telegraph of 8/1/2008, p. S8). The sense of unfairness was accentuated by the undeniable fact that the majority of umpiring errors referred to above had undoubtedly gone Australia’s way, and that India were far from being the first nation to feel that so many dubious decisions going to the home side could not entirely be ascribed to coincidence (The Guardian of 8/1/2008, p. S8).

Nor were the home team spared criticism, in the sense that their well-known abrasiveness on the field contributed towards an atmosphere in which certain players may be “pushed over the edge”. They have been notorious for the practice of “sledging” for a number of years now, with very little by way of retribution by the authorities, least of all the umpires themselves. As the perceptive commentator David Hopps, writing in The Guardian (8/1, p. S9) put it:

*“The problem is that Australia’s dividing line is not a reliable division between the morally upstanding and the indefensible. Australia’s dividing line is repugnant, enabling the condemnation of the likes of Harbhajan whilst legitimising obnoxious behaviour that cricket should have had the bravery to root out a generation ago. Racism cannot be countenanced. But it is a rum old world that bans a man for three Tests for calling someone a monkey, yet allows the sort of boorish behaviour that allows first slip to drone to a batsman that he is shagging his wife, or that convinces any fast bowler with half a brain that personal insults every time a batsman plays and misses are essential for any cricketer of spirit. As long as you are careful not to refer to the colour of his skin.”*

Interestingly, Australia’s cricket writers also appeared to have reserved the bulk of their condemnation of the scenes which took place during the Test in question for their own national team. One prominent home commentator was even sufficiently incensed to call for the captain Ricky Ponting to be dismissed, accusing his side of the “ugliest performance” which an Australian side had displayed for 20 years. To penalise Mr. Harbhajan for his over-reaction would, he suggested, merely impress the “barrack-room lawyers” (Ibid).

Two days later, in an attempt to relieve the ever-growing unease between the two sides, and to ensure that the four-Test series between the two sides is completed with the minimum of incident, the ICC stood down the umpire Steve Bucknor from the following week’s third Test in Perth. The ICC also permitted the Board of Control for Cricket in India the right to appeal against the three-match ban imposed on their spinner. In response, the BCCI confirmed that India would complete the tour. Nor did the Australians escape the fallout, with their all-rounder Brad Hogg being charged with making an offensive remark to the India captain, Anil Kumble, and wicketkeeper, Mahendra Singh Dhoni, during the Test. The Australian media also continued to turn on the Australia captain, Ricky Ponting, with The Sydney Morning Herald calling for his head, saying that Cricket Australia, the national governing body should not tolerate the “captain’s arrogant and abrasive conduct”.

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Also, in an online poll in the Australian newspaper The Daily Telegraph, 79 per cent of respondents said the team did not play in the true spirit of the game while 83 per cent said Ponting was not a good ambassador for cricket. The ICC’s decision, which meant New Zealander Billy Bowden would officiate at Perth Test and allowed Harbhajan to play in the final two Tests, held merit in that they all but guaranteed the continuation fo the tour. However, there was the criticism that the ICC had set a dangerous precedent, adopting a stance that many will see as weak.

Malcolm Speed, the chief executive of the ICC, insisted that the board’s decision was not made as a direct result of the BCCI’s complaint about Bucknor, but reflected dissatisfaction with the umpire’s performance omn the field. He said:

“It is accepted that Steve, and his on-field colleague Mark Benson, did not have good games by their own high standards. We feel that, given the added pressure and attention Steve’s presence would have at the Test, it is better for the match and Steve if he does not take part” (The Independent of 9/1/2008, p. 46)

In spite of these decisions, which were criticised by many for yielding too easily to the pressure of the authorities representing the greatest financial clout in the game, the BCCI issued a combative statement in which they continued to insist on the complete reinstatement of Harbhajan, and that the continuation of the tour was merely an “interim arrangement” which depended on the accusations in question being “set aside or withdrawn”. It was also learned that a second match referee, in the shape of former Sri Lanka batsman Ranjan Madugalle, would be flown into Perth in order to act as a mediator between the opposing captains (The Guardian of 9/1/2008, p. S8). ICC Chief Executive Malcolm Speed reacted decisively to the BCCI statement, saying that the game could not have one set of rules for the India team and another for everyone else, and urged the Indians to accept the Harbhajan ban. He dismissed suggestions that the appeal might be postponed so as not to jeopardise the Australian tour, and suggested that there were logistical problems in assembling all those involved, especially as the two teams were about to start the following Test within days (The Guardian of 11/1/2008, p. S6).

Harbhajan ban lifted as case is held “not proven” – Symonds himself blamed

In the meantime, the date of the appeal hearing was fast approaching – the ICC having commendably decided not to take the easy option and wait until the entire tour was over. As a result of the appeal, held in Adelaide, the Indian off-spinner was cleared of making the racist comment complained of. But the 27-year-old’s three-Test ban was overturned after he pleaded guilty to a lesser charge of abusive language. He was instead fined 50 per cent of his match fee. The New Zealand High Court judge John Hansen ruled there was not sufficient evidence to prove an offence under section 3.3 of the ICC Code of Conduct, which relates to racially insulting behaviour, but decided Harbhajan should be charged with a section 2.8 offence.
14. Human Rights/Civil liberties

The maximum penalty for a level two offence is a one-Test ban or a suspension of two one-day internationals, but the India bowler’s punishment is at the lowest end of the scale. Cricket Australia and the Board of Control for Cricket in India released a joint statement endorsing the appeal decision, which read:

“Controversy surrounding Harbhajan Singh and Andrew Symonds on day three of the Sydney Test has come to a constructive conclusion. Singh and Symonds said they had resolved the issue between them in Sydney and now intend to move on. They said they intended to make no further comment on the issue and intended to get on with the game of cricket which is most important to them. Both captains also said they were satisfied with the outcome between their players and they looked forward to the cricket ahead.” (The Independent of 30/1/2008, p. 54).

Interestingly, Hansen J went to great lengths to emphasise that, even if harbhajan Singh’s accusers had succeeded in proving that he had called Mr. Symonds a “monkey”, the ban imposed on the Indian spinner would not have been upheld. Not only was there insufficient proof that Harbhajan had racially abused Symonds – the latter agreeing under cross-examination that the Indian player might also have used the Hindi term of abuse ter maki – but the new Zealand judge also held that the abuse levelled by the Asutralian against the Indian spinner had effectively removed his right to be offended by the response, thus dismissing the Australian’s contention that Harbhajan had “crossed the line” between acceptable “sledging” and reprehensible racism. Thus most of the blame for the incident was placed on Symonds’s shoulders, and as such it represented an indictment of the “sledging” tactics which Asutralia insist are part and parcel of the modern game (The Guardian of 31/1/2008, p. S8).

Not unexpectedly, the Australian captain, Ricky Ponting, expressed his disappointment at the verdict. He claimed that decision reached by Hansen J might have been different if he had known of the Indian player’s previous offences (The Guardian of 1/2/2008, p. S2). However, regardless of the merits or demerits of Mr. Hansen’s ultimate decision, it was generally agreed – and in particular in the host country – that behaviour on the cricket pitch had reached an unacceptable point. The day after the verdict was known, the Australian Governor-General, Sir Michael Jeffrey, who rarely comments on public matters, delivered an impassioned speech in which he deplored the “reduction in the grace and courtesies” on display on the cricket fields. Those sentiments were echoed by Prime Minister Kevin Rudd, who called for a return to civility in the game (The Independent of 1/2/2008, p. 39). The Indian cricket authorities, for their part, announced that they would request a total ban on sledging at a forthcoming meeting of the ICC Chief Executive Committee (The Daily Telegraph of 15/2/2008, p. S12).

Lewis Hamilton victim of racist abuse (Spain)

That Spanish sport has for some time now experienced a problem with racism in its football grounds is a fact which has been extensively reported on in this organ and elsewhere. However, it now seems that this cancer had spread to other sports. In early February 2008, British champion racing driver Lewis Hamilton became the victim of racist abuse during a testing programme at the Spanish Grand Prix circuit in Barcelona. Insults from large sections of the crowd rained down on Hamilton as he made his way from the McLaren motorhome to the team garage. Chants of puto negro (f****** black) and negro de mierda (black shit) were reported. The 23-year-old, Formula One’s first black driver, had become the focal point of attacks by sympathisers of Fernando Alonso, the Spanish former world champion who was given a testing time by Hamilton at McLaren last year (The Daily Telegraph of 4/2/2008, p. S29).

Essentially, the Spanish blamed Hamilton for Mr. Alonso’s failure to record a hat-trick of world titles in 2007 and his split from McLaren. He finished third, two points adrift of champion Kimi Raikkonen, and one behind Hamilton. The circuit director, Ramon Pradera, ordered barriers to be erected around the McLaren end of the paddock for Mr. Hamilton’s safety and cleared the area above the garage to protect the car from debris that might be thrown on it. Banners with reference to Hamilton and McLaren team principal Ron Dennis were removed.

In an official response, McLaren played down the incident, issuing the following statement:

“McLaren has raced on Spanish circuits for many years and the team regards Spain and the Spanish people with great affection, Lewis included.” (Ibid)

However, cynics may point out that McLaren have no interest in deepening a rift with the Spanish public. One of their major sponsors, Bank of Santander, is Spanish and Spain remains a hugely important market for title sponsor Vodafone. The conciliatory tone also acknowledged that the team’s hugely popular test driver, Pedro de la Rosa, is Spanish and was passed over for promotion to the race team after Mr. Alonso’s departure in favour of Finnish rider Heikki Kovalainen, despite McLaren being petitioned by thousands of Spanish fans who wanted de la Rosa to acquire the position (The Guardian of 4/2/2008, p. S7).
14. Human Rights/Civil liberties

The following day, the Spanish motor sport federation (RFEA) roundly condemned the racist taunts directed at Mr. Hamilton – no doubt in response to the world governing body, the FIA, demanding a full explanation from the Spanish Federation as to how these unpalatable events unfolded in the grandstand opposite the pits during the test drive. Max Mosley, the President of the FIA, insisted that the Spanish authority deliver a prompt and detailed plan of action to ensure that there would be no repeat of the verbal abuse in question (The Guardian of 5/2/2008, p. S8).

It also transpired that some fans had added insult to injury by “blacking up” to hurl insults at the British driver. However, one of these individuals, Toni Calderon, later made the extraordinary claim that he was not a racist. He was one of four fans who wore dark curly wigs, black make-up and T-shirts with the words “Hamilton’s family” at the Montmelo circuit where the incident occurred. Mr Calderon told the Spanish daily Publico:

“We went last Sunday and we dressed up to celebrate Carnival. We wanted to give a touch of humour to Montmelo and have a laugh at the father of [Lewis] Hamilton. We didn’t have the slightest intention to laugh at anyone, nor to laugh at the British driver for the colour of his skin. I am not a racist and it has made me ashamed to appear like that in the British press. Also, as I am in the middle of the photo [of four blacked up fans], I seem like the protagonist. This has angered me.” (The Independent of 8/2/2008, p. 33).

Mr Calderon added that no one on security said a word when the group arrived at the circuit dressed as “Hamilton’s family”. On the contrary, he claimed that the security agents at the gate started laughing and let them pass. He also claimed that half the people who saw them thought they were fans of Hamilton (Ibid). In the meantime, the FIA had followed up their requests for preventative action with dire warnings as to what the consequences would be of any repetition of the scenes in question, hinting that these could take the form of penalties which could include the loss of the Spanish Grand Prix at the Circuit de Catalunya later that year (The Independent of 13/2/2008, p. 51).

At all events, it can be reported that there was no repeat of these disorderly scenes when Hamilton returned the following week for a further series of test drives. At the Jerez circuit, in the South of the country, the McLaren driver found a distinctly more relaxed atmosphere in the paddock, whilst the stands were barely filled. He showed no effects of the taunts he had faced in Barcelone as he finished the day fastest of the 16 drivers taking part (The Guardian of 13/2/2008, p. S10). It was also learned that the FIA was to launch a “racing against racism” campaign which was aimed at nipping the habit in the bud. According to the website autosport.com, teams, drivers and circuits will all be expected to drive home the message that racism is unacceptable and will not be tolerated. It was to be launched at the Spanish Grand Prix event in May (The Independent of 14/2/2008, p. 59).

It was therefore particularly unfortunate that, just a few days after this announcement was made, F1 supremo Bernie Ecclestone chose to dismiss the racism aimed at Lewis Hamilton as a “one-off” and to assert that the decision by motor racing’s governing body to launch an anti-racism initiative, was unnecessary. Mr. Ecclestone, Formula One’s commercial rights holder, brushed aside the behaviour of the abusers as nothing to worry about, stating “I don’t think they’re anything. I think they like to abuse people. It was a one-off, nothing to worry about”. However, Weyman Bennett, of the campaign Unite Against Fascism, commented:

“I think these comments are totally unacceptable. There should be a clear message that bigotry and racism are not tolerated in Formula One. I think the idea that when people are racist you ignore them is just not acceptable.” (The Guardian of 18/2/2008, p. S1).

Ecclestone had also shown scant regard for the “Racing against racism” campaign, describing it as unnecessary and stating that all it did was to give attention to people who want attention. Thereupon an FIA spokesman defended its stance, stating that it would not tolerate racism of any kind in its sport and that it would “take whatever steps necessary to ensure that such scenes of racial abuse are never witnessed again.” (Ibid).

Two months later, however, the FIA’s much anticipated anti-racism initiative was given a distinctly low-key launch in the paddock at the Circuit de Catalunya. In the absence of the FIA president, Max Mosley, who was displaying a rare interest in rallying matters – deciding to visit the inaugural world rally championship round to be staged in Jordan instead of visiting the Spanish grand prix as he chases a vote of confidence following recent revelations about his personal life – the launch of the EveryRace campaign – henceforth bearing the name EveryRace – was confined to a press release including support for the initiative (The Guardian of 25/4/2008, p. S6).

In a statement released the previous day, the FIA also said it had received a wide-ranging report on the Barcelona incidents by the Spanish federation, and that no further action would be taken (Ibid).
14. Human Rights/Civil liberties

St Petersburg team success taint by charges of racism (Russia)

Russian club teams have not enjoyed a great deal of the footballing limelight on the European stage in recent decades, so it must have gladdened many a heart in that vast country when, in May 2008, Zenit St Petersburg made it to the final of the UEFA Cup, played at the City of Manchester Stadium. Unfortunately, there is a less salubrious side to the club’s success, in that it has frequently been accused of racism, of both the overt and the covert variety. Black players representing visiting the Russian city have regularly complained of the racism with which they have been met on the part of the home support. When French team Marseille appeared there in the last 16 of the Cup, three of the club’s squad were greeted with monkey chants and bananas were thrown. Marseille filed a formal complaint, UEFA, the European governign body, promised action and made reference to a “zero-tolerance” policy. However, it would appear that these have amounted to words devoid of action, and to date not meaningful penalty has been imposed on the club (Daily Mail of 13/5/2008, p. S11).

This unfortunate image which the club has acquired has hardly been remedied by the observations and attitudes of some of its leading figures. It is a fact that no black player has graced the team in its entire 83-year history. This in itself is obviously no ground for criticism; however, when confronted with this fact, club manager Dick Advocaat made no secret of the fact that this was a deliberate policy aimed at appeasing a large and very vocal set of extremist supporters, saying that he would be “happy to sign anyone, but the fans don’t like black players”. He added that he did not wish to buy a player who would not be accepted by the fans. Blaming the fans certainly seemed like moral cowardice on the part of the Dutchman, especially since their close rivals, CSKA Moscow, seem to have no problem in fielding six black Brazilians and a Nigerian (Ibid).

When it emerged that the Russian club would be matched against Glasgow Rangers, there were fears that racism might once again manifest itself amongst the St Petersburg travelling support. British sports minister Gerry Sutcliffe was determined that the Glaswegians’ two black players, jean-Claude Darcheville and DaMarcus Beasley, should not have to endure taunts of a racist nature during the Manchester fixture. He insisted that any supporters who engaged in such behaviour should be jailed under the Football (Offences) Act 1991, which makes racist chanting a criminal offence capable of attracting a six-month jail sentence (The Daily Telegraph of 13/5/2008, p. S11). Mr. Advocaat attempted to downplay the entire issue, and when asked to comment on Mr. Sutcliffe’s admonitions, stated: “I think he must have other concerns. This is a football match and it isn’t about colour. Neither Rangers nor Zenit expected to be in this final. We beat great clubs to reach here and that is a great achievement, so we deserve a little more respect than to be asked about these non-football issues” (The Daily Telegraph of 14/5/2008, p. S7).

In the event, it was not the 10,000 fans from Russia, but the Rangers supporters who provided the negative headlines after the final (of which the present writer, a resident of the fair Mancunian city, was one of the victims). Nevertheless, it is expected that St. Petersburg and its supporters will remain under close observation from the football authorities in their future forays into European club football.

Hopkins in trouble over “white boy” jibe at Calzaghe (US)

Incidents of racism where the accused party is black and the alleged victim white are rare in all walks of life, including sport. However, they occasionally do surface, and so did so with a vengeance when Bernard Hopkins, the US light-heavyweight boxer who was scheduled to meet Joe Calzaghe in Las Vegas for the world title in April 2008. With two months to go before the big fight, he delivered himself of the remark that he would “never lose to a white boy”. Asked to justify these remarks, Mr. Hopkins explained that he was the product of his harsh and racially segregated background, and that racial division was embedded in American society – in particular American sport. He claimed that nothing much had changed since the days when prominent US sporting figures were openly barracked as “nigger” and that boxer Muhammad Ali, when in his prime, was unable to eat and drink in a New York City coffee shop. He added: “You might say that times have changed since then, but have they? Only the camouflage has changed. There are taboos now and it’s not the done thing to talk about race, but it is still there underneath. People just don’t have the courage to talk about it” (The Sunday Telegraph of 10/2/2008, p. S7).

Mr. Hopkins appeared to stir up racial tensions again during the immediate run-up to the contest, when he contended that “it’s always a race issue when it’s black versus white”. He once again proceeded to justify his observations by reference to his disadvantaged background, stating that young black fighters from his part of the world were obliged to view sport through the lens of race. He accused those who had upbraided
14. Human Rights/Civil liberties

him about the racial nature of his remark of being out of touch – like “the black guy who lives (in the suburbs) when his father’s a lawyer”. However, it was gently pointed out to Mr. Hopkins that the target of his observations was somewhat different – Mr. Calzaghe being a Welshman of Italian stock, who inhabited the valleys around Newbridge in Wales rather than Wall Street or the leafy suburbs of Mr. Hopkins’s native Philadelphia. It was therefore hard to see how Britain’s undisputed super-middleweight world champion could be regarded as complicit in the American inequalities (Daily Mail of 18/4/2008, p. 96).

Tiger Woods “lynch” remark has far-reaching repercussions (US)

When, in mid-January 2008, an American television presenter made an allegedly joking reference to “lynching” leading golfer Tiger Woods, this incident set off a chain of reactions which ended in the dismissal of an editor who highlighted his magazine’s coverage of the story by putting a noose on the front cover. A week after Kelly Tilghman was suspended from her position as host of PGA tour coverage on the Golf Channel, after joking with her co-host Nick Faldo that Woods’s young rivals might want to take him “down a back alley and lynch him”, David Seanor, the editor of Golfweek magazine, was dismissed after the magazine’s cover attracted criticism as well as threats from advertisers to withdraw their business.

Tim Finchem, the Professional Golfers’ Association tour commissioner, took the unusual step of issuing a statement condemning the cover, which carried the (somewhat tasteless) headline “Caught in a Noose?”, and read as follows:

“We consider Golfweek’s imagery of a swinging noose on its cover to be outrageous and irresponsible. It smacks of tabloid journalism. It was a naked attempt to inflame and keep alive an incident that was heading to an appropriate conclusion” (The Guardian of 19/1/2008, p. S12)

The decision to dismiss Mr. Seanor was announced by the magazine’s chairman, William Kupper Jr, who said the cover received extreme negative reaction. He issued an apology for creating this graphic cover, and explained that the magazine was trying to convey the controversial issues with a strong and provocative graphic image. He accepted that the overall reaction to this cover deeply offended many people. For this, he issued a sincere apology. It is not known, however, whether Mr. Kupper had seen the offending cover before it went to print.

Mr. Woods himself seemed to put an end to the entire controversy when he asserted that Ms. Tilghman had meant no harm when she used the “lynch” word during her ill-judged quip. He claimed that the entire episode had been “media-driven” and considered the matter as closed (The Daily Telegraph of 23/1/2008, p. S18).

Racial issues continue to fester in South African Sport

Rugby Union

The racial faultlines running through South African rugby – which have been highlighted extensively in previous issues of this organ – were forced open again in early January 2008 when a black man was chosen to coach the national team for the first time. Peter De Villiers was, in fact, unexpectedly put in charge of the Springboks, the world champions, with the rugby executive responsible for his appointment conceding that the colour of his skin was a deciding factor. The decision to appoint De Villiers in preference to the highly rated, and white, Heyneke Meyer reigned the explosive debate over the inclusion of more blacks in the country’s white-dominated national sport. Mr. De Villiers commented that he did not want people to dwell on his colour, saying that the fact that he was the first black rugby coach should not matter. He added that if they players were “good enough, talented enough and work hard enough” they would be part of the squad (The Times of 10/1/2008, p. 40).

However, his plea to fans to look beyond the colour of his skin was undermined by Oregan Hoskins, president of the South African Rugby Union (SARU), who said that race had been a determining factor when he admitted that the appointment was “not entirely made for rugby reasons”. Mr. De Villiers’s appointment split the SARU board down the middle and was eventually endorsed by ten votes to nine. Many members supported Meyer, an Afrikaner, who last season coached the Pretoria Blue Bulls to victory in the southern hemisphere Super 14 tournament, featuring teams from South Africa, Australia and New Zealand. De Villiers had previously coached South Africa’s Under-21 and Under-19 teams. Ultimately, the issue of transformation — bringing non-white players into a game that was restricted to whites in the apartheid era — tilted the decision in favour of De Villiers.

SARU has come under heavy pressure from the African National Congress Government over its failure to pick more players of colour. Whites accounted for 13 of the 15 players to start in October’s World Cup final against England in Paris. The quest to give greater opportunities
to black players is expected to lead to a further exodus of top white players to higher-paid professional careers in France and Britain. Victor Matfield, man of the match when the South Africans won last year’s rugby World Cup, has already joined Toulon in France and has said that he would be prepared to continue playing for the national team only under Meyer.

Mr. De Villiers succeeds Jake White, who resigned only weeks after leading the Springboks to World Cup victory after a succession of bitter arguments with SARU, mainly over the inclusion of black players. As soon as he was appointed, there was speculation that De Villiers will name Luke Watson as captain of the Springboks. Watson was at the centre of controversy last year when White was told to include the 23-year-old white player on the ground that he was an “honorary black”. Watson’s father, Dan “Cheeky” Watson, turned down the chance of a Springbok cap in the 1970s — when sport was racially segregated — to play instead for a black township team called Kwaru, outside Port Elizabeth. White insisted that Watson was not good enough for the national team but eventually agreed to select him for a friendly match against Samoa (Ibid).

It gradually emerged that, in fact, the appointment of Mr. De Villiers had been part of an orchestrated scheme to rid the white-dominated sport of its institutional racism. It turned out to be the key to a sweeping revolution, devised at a series of meetings 12 months previously, designed to “flush away institutional racism” in South African rugby. This was seen, to quote one rugby official, as important an event as the moment when Nelson Mandela walked free from prison. It was revealed that Dan Watson had been the architect of this change. However, this revolution in the manner in which the sport was being used to effect this transformation did not go completely unchallenged.

Sources close to the players claimed that four unnamed white internationals had privately indicated that they would not be prepared to play under a black coach. Others apparently indicated that they would move abroad, claiming that they were being penalised for being white (The Observer of 13/1/2008, p. 44).

It is currently the policy of Cricket South Africa, the national governing body, that the selectors, a multiracial committee of five, should attempt to include a minimum of seven players of colour in a squad of 15. However, the squad which was submitted to Norman Arendse, the CSA President, for the said Bangla Desh tour contained only four such players. During a subsequent teleconference between the selectors and the CSA president aimed at finalising the team, the atmosphere became distinctly heated, with reports of captain Graeme Smith and coach Mickey Arthur threatening to resign if changes were made. There were even whispers of the possibility of a players’ strike if any such changes were made (The Guardian of 7/2/2008, p. S8).

Ultimately, Mr Arendse appeared to be wary of allowing the issue to smoulder and catch fire and said that, at the end of the day, he deferred to the captain and the coach, sicne it was the latter who would be accountable for the team’s results. He insisted that his objections to the squad were not based on race but geared towards ensuring South Africa was at full strength for the tough away series against India and England which would follow the Bangla Desh tour. He apparently favoured blooding new players in Bangla Desh and allow the players to recover fully from injuries sustained during the home series against the West Indies (Ibid).

Human rights issues

[None]
14. Human Rights/Civil liberties

Gender issues

**Indian tennis star boycotts home tournaments**
The position of Muslim women in sport has always been a precarious one, and the case of Sania Mirza, India’s top tennis player, is no exception. It appears that the many controversies which have surrounded her career are mainly gender related, and have reached a point where she feels she can no longer compete in her native land. In early February 2008, she announced her intention to boycott all home tournaments, including the very lucrative Bangalore Open (The Daily Telegraph of 5/2/2008, p. S17).

The player has been criticised by Islamist groups for wearing short skirts while playing, and in December last year had to apologise for filming an advertisement near a historic mosque in her home city of Hyderabad. She also faces prison if a court rules that she showed disrespect for the Indian flag during a tournament in Australia the previous month. Media photographs showed her bare feet resting close to the Indian tricolour (The Guardian of 6/2/2008, p. S6).

**Tyson boycotted by ANC President (US/South Africa)**
In late January 2008, it was learned that Jacob Zuma, the new president of South Africa’s ruling ANC party, withdrew from a banquet given in honour of the former world heavyweight champion Mike Tyson, where he was due to speak. The event had outraged women’s rights activists in South Africa, on account of Tyson’s previous conviction for rape, and the fact that the country has one of the highest figures for rape in the world (The Independent of 31/1/2008, p. 29).

There was an immediate outpouring of anger and questioning after Saturday’s race, an event of barely two minutes known as the Run for the Roses. The Washington Post said thoroughbred racing was in a “moral crisis, and everyone now knows it”. The paper said that horses were being over-bred and over-raced, “until their bodies cannot support their own ambitions”. Attention has focused in the past on the hard dirt track, and there were also doubts on this occasion that a filly should be pitted against colts (Ibid).

**Professional golfer prosecuted for killing hawk (US)**
This case has already been referred to in the section devoted to the criminal law (see above, p. 000). To recapitulate: in early March 2008, an animal rights group called on golf officials to take action against a player who fired balls at a hawk because it was making a noise while he tried to make a television show. Tripp Isenhour was charged on Wednesday with cruelty to animals and killing a migratory bird after the hawk was felled by one of the balls. The charges carry a maximum penalty of 14 months in jail and $1,500 (£745) in fines. Said dale Bartlett of the Humane Society of the United States:

> “Because of the high-profile nature of this case, the PGA [Professional Golfers’ Association] needs to take steps to address its interest and to make it clear that they don’t condone animal cruelty,”


Mr. Bartlett added that the organisation would contact the PGA Tour today to discuss the issue. M. Isenhour, playing on the Nationwide tour this season after losing his PGA Tour card last year, apologised in a statement released yesterday and said he had been trying to scare the hawk away. The golfer whose real name is John Henry Isenhour III, became angry when a squawking red-shouldered hawk interrupted filming of “Shoot Like A Pro” on 12/12/2007 at the Grand Cypress golf club in Orlando, Florida. He drove closer to the bird in his golf cart and starting hitting balls at it, but the bird didn’t move and Isenhour gave up and drove away.

Animal rights issues

**Racing ethics concerns rise as Kentucky Derby horse dies (US)**
The greatest event in the American horse racing calendar, the Kentucky Derby, has given rise to a renewed exercise in soul searching after the horse who finished second had to be put down. Eight Belles was the first filly to run the derby since 1999 and excelled to come in behind the winner, the colt Big Brown. However, after she had crossed the finishing line, while cooling down, she suddenly collapsed on to her knees with her ankles fractured and the on-call veterinarian surgeon declared there was no way to save her. It transpired that this was the second time in two years that an animal died from injuries sustained at one of America’s Triple Crown races. In 2006 Barbaro broke a back leg in the Preakness and died eight months later. Last October another horse, George Washington, was put down on the track after the Breeders’ Cup Classic in New Jersey with a broken bone in a front leg (The Guardian of 5/5/2008, p. 13).

The greatest event in the American horse racing calendar, the Kentucky Derby, has given rise to a renewed exercise in soul searching after the horse who finished second had to be put down. Eight Belles was the first filly to run the derby since 1999 and excelled to come in behind the winner, the colt Big Brown. However, after she had crossed the finishing line, while cooling down, she suddenly collapsed on to her knees with her ankles fractured and the on-call veterinarian surgeon declared there was no way to save her. It transpired that this was the second time in two years that an animal died from injuries sustained at one of America’s Triple Crown races. In 2006 Barbaro broke a back leg in the Preakness and died eight months later. Last October another horse, George Washington, was put down on the track after the Breeders’ Cup Classic in New Jersey with a broken bone in a front leg (The Guardian of 5/5/2008, p. 13).

There was an immediate outpouring of anger and questioning after Saturday’s race, an event of barely two minutes known as the Run for the Roses. The Washington Post said thoroughbred racing was in a “moral crisis, and everyone now knows it”. The paper said that horses were being over-bred and over-raced, “until their bodies cannot support their own ambitions”. Attention has focused in the past on the hard dirt track, and there were also doubts on this occasion that a filly should be pitted against colts (Ibid).

Mr. Bartlett added that the organisation would contact the PGA Tour today to discuss the issue. M. Isenhour, playing on the Nationwide tour this season after losing his PGA Tour card last year, apologised in a statement released yesterday and said he had been trying to scare the hawk away. The golfer whose real name is John Henry Isenhour III, became angry when a squawking red-shouldered hawk interrupted filming of “Shoot Like A Pro” on 12/12/2007 at the Grand Cypress golf club in Orlando, Florida. He drove closer to the bird in his golf cart and starting hitting balls at it, but the bird didn’t move and Isenhour gave up and drove away.
Isenhour started again when the hawk moved within about 75 metres of him, according to a Florida fish and wildlife conservation commission officer, Brian Baine. Isenhour allegedly said “I’ll get him now” and aimed for the hawk. “About the sixth ball came very near the bird’s head, and [Isenhour] was very excited that it was so close,” Baine said in a report. A few shots later, witnesses said, he hit the hawk. The bird, protected as a migratory species, fell to the ground bleeding from both nostrils. Mr. Isenhour claimed to have been “mortified and extremely upset” at this outcome, and wanted the world to know that there was no malice nor deliberate intent to kill involved. However, Jethro Senger, a sound engineer at the shoot, said hitting the bird was “basically like a joke” to Isenhour (Ibid).

Mr. Senger said no one in the roughly 15-person crew intervened, and many later regretted it. He said the killing was not captured on video. The bird was buried at the golf course and later dug up by Florida investigators.

Other issues

[None]
15. Drugs legislation & related issues

General, scientific and technological developments

New artificial growth hormone test devised and applied... but remains big business

It has sometimes been asserted that the anti-doping campaign in sport amounts to the "pursuit of the uncatchable", in that those who peddle and use the substances remain invariably one step ahead of the sporting authorities. The truth or otherwise of this claim is not easy to assess; however, the science behind the "war on doping" is undeniably becoming increasingly sophisticated. In early February 2008 it seemed that a major breakthrough had been made in relation to the control of artificial human growth hormone (HGH), being a technique which had been extremely difficult to detect hitherto. Peter Sonksen, Emeritus Professor of endocrinology at St. Thomas’s Hospital, London, claims to have invented a test to detect the presence of this substance in athletes – nine years after completing his research on the subject (The Sunday Telegraph of 3/2/2008, p.S14).

Previously; prof. Sonksen had perfected his test for HGH in time for the 2000 Sydney Olympics, only to have his efforts sidelined by the World Anti-Doping Agency (WADA) in favour of an alternative test. Now WADA have revived their interest. The test in use at present is capable of detecting HGH in an athlete’s bloodstream for just 24 hours after it has been injected, whereas Prof. Sonksen’s test can detect it for up to two weeks (Ibid). The test was put into action in early April and produced immediate results, in that almost the entire Greek weightlifting team tested positive for HGH. Eleven out of 14 of the team revealed evidence of the substance after WADA swooped in a surprise test (The Mail on Sunday of 6/4/2008, p. 79).

This news may well have caused some more sporting performers to twitch uncomfortably, since the world governing body in athletics, the International Association of Athletics Federations have been storing the blood samples of athletes collected over the past few years for just this opportunity and are currently said to be keen to perform this test on them (Ibid). Nevertheless, however effective these tests may be, the fight against these drugs will always be heavily handicapped as long as they remain as easily available as they appear to be. Thus the US Drug Enforcement Agency (DEA) remains extremely concerned at what it describes as the "open pipeline" from Chinese pharmaceutical companies to North America. Where European pharmaceutical companies trade through the normal medical channels such as doctors and hospitals, the Chinese apparently have no such compunction. Internet sites are teeming with offers to ship HGH as well as steroids to the customer’s door. The DEA estimates that HGH is being used by some people in every school and sports club across the country. When the agency started going after the big importers of the drug it seized box after box of Chinese HGH (The Times of 20/2/2008, p. 55).

The Chinese dimension is important at least in the short term, because of the location of this year’s Olympics. Despite an attempt by the Chinese Government to crack down (no pun intended) on the unlicensed manufacturing of the drug, as well as a recent total ban on its export, China is and remains the world’s leading producer and supplier of steroids and HGH. The ban on exports will not affect domestic sales, which remain legal, and there must be a fear that at least some of them ill find their way to the Beijing Games (The Sunday Telegraph of 2/3/2008, p. 35). The other problem is that the substance is a “controlled drug” in most other countries, including Britain, which makes it even more difficult to wage an all-out campaign against them.

An interesting development in this regard occurred in late January, when the National Football League (NFL), the body governing American football, announced that it was ready to adopt HGH testing – but on the basis of urine, rather than blood, samples. According to Gene Upshaw, executive director of the NFL Players Association:

“We all know there is no reliable test for HGH. Until a test is developed for HGH, there’s really not an awful lot to talk about. And when that test is developed, we really believe it should be a urine test. No one is interested in a blood test. We got a lot of big tough guys, but they don’t even like to be pricked on the finger to give blood.”


NFL Commissioner Roger Goodell has said repeatedly since taking office just before the 2006 season that the League would implement a test for HGH as soon as one was found. Mr. Upshaw’s stance is similar to the one taken by baseball, which has pledged to adopt any validated urine test but does not want to test blood.

Baseball officials have claimed that there is no commercially available validated test for HGH. John Fahey, head of the World Anti-Doping Agency, disputes that, saying two weeks ago that the storing of blood is practical has in fact been “effectively in practice for some time in World Anti-Doping Code-compliant testing.” (Ibid).
15. Drugs legislation & related issues

Doping issues and measures – international bodies

International body of managers refuse to recognise doped athletes as clients
The hardening stance taken recently against doping by meeting promoters is being mirrored by a similar resolve among agents, according to a leading athletes’ representative. In mid-February 2008, Mark Wetmore confirmed that 30 leading agents have agreed not to represent athletes who have served serious doping bans. According to the US-based spokesman, whose clients include several world champion and world record-holding champions:

“We are all members of the Association of Athletics Managers, and we have unanimously decided that we will no longer represent athletes who have served bans for two years or more. You hear such sweeping statements being made about the sport – that doping is all the fault of the coaches, or of the agents – and we wanted to make it clear to people that we didn’t have anything to do with it. We take this issue very seriously and we feel we have to make a stand. I think you are seeing groups independently coming to the same conclusions right now. The meeting promoters and the agents are now shoulder-to-shoulder against doping.” (The Independent of 16/2/2008, p. 70).

Wetmore confirmed that he would no longer be representing the Ghanain sprinter Aziz Zakari, who is currently serving a two-year ban. Other leading agents who have signed up to this agreement include Ricky Simms, Emmanuel Hudson, Paul Doyle, Renaldo Nehemiah – who guided the career of the banned Olympic 100m champion Justin Gatlin – Daniel Wessfeldt, Pavel Voronkov, Mostaza Martinez and John Regis. Simms, whose clients include British athlete Mark Lewis-Francis, described this move as an “extra deterrent” for those people who think they can get away with doping (ibid).

New WADA chief: Beijing anti-doping campaign will be successful (but opiates that war on drugs can never be won)
It is possible that there are tougher assignments than catching and prosecuting drug cheats, but few spring to mind. John Fahey, the new president of the World Anti-Doping Agency, acknowledged the scale of his task when he admitted that, in common with the other war on drugs, victory is improbable. “The fight is more than likely never going to be won,” he said. Fahey’s candid admission, made in his first major interview since succeeding Dick Pound as sport’s drug-buster-in-chief, should not be mistaken for fatalism. The Australian incumbent, a former government minister, is not about to abandon ship. On the contrary, speaking at the Olympic Museum in Lausanne in late February 2008, Mr. Fahey pledged to continue the struggle that the Canadian QC began, starting at this summer’s Beijing Olympics. He predicted the Games there would be the most effective yet in tackling cheats, thanks in part to the first effective test for human growth hormone, and is optimistic that the tide may be about to turn.

It is a bold claim indeed, given the apparently endless flow of evidence to the contrary. In the past six month athletics has witnessed the damaging fallout of Marion Jones’s serial offences, and in the UK Dwain Chambers’s involvement with the same BALCO offenders’ collective (see below!) continues to overshadow the sport. In the public reaction to these depressing scandals Fahey sees grounds for optimism, in the following terms:

“The public are sick and tired of cheats. I think the opportunity we have right now is second to none. People are sick of the Marion Joneses. They want to pay their money to see a contest that is a true contest. There is enormous public support for us to succeed and that leads to more assistance coming from various sources. We have to inculcate young people with the belief that if they want to play sport they have to play it within the rules embodied in sport, and that includes fair play.”

Mr. Fahey takes over the organisation at a crucial time in its history, its strengths as apparent as its weaknesses. Founded nine years ago, WADA represents the global standard for anti-doping. His predecessor, Mr. Pound, may have been abrasive and, at times, an embarrassment to his own organisation, but at least he established the organisation as the scourge of cheats, winning the argument for funding, random testing and mandatory sentences for offenders. Admittedly, it is a transformed landscape from that in which drug-abusers ran rampant, literally, through the 1980s and 1990s. As the BALCO scandal proves, however, there is only so much one can do with a sample bottle. Mr. Fahey’s task is to develop the fight and he intends to do so largely with the assistance of governments. He intends to use his influence as a former minister to secure the assistance of national law enforcement agencies. It is a message he took to London shortly after his installation, when he met the British sports minister, Gerry Sutcliffe. The UK is in the process of establishing an independent national anti-doping agency, and recently, 100 stakeholders from various sports met to discuss the consequences. In addition, the British Home Office has included a commitment to boost anti-doping methods in its 10-year drugs strategy also published recently (The Guardian of 28/2/2008, p. S9).
The new WADA chief’s optimism about Beijing comes from a conviction that pre-Games testing will root out the worst offenders. He encourages all nations to “weed out the cheats and leave them at home”. If they make it to Beijing he believes that there is every reason to have greater confidence in the detection of those cheats than has been the case at any previous Games. The HGH test, referred to in the previous item (see above) could also represent a major breakthrough, says Mr. Fahey. Previously undetectable 24 hours after it was taken, human growth hormone is thought to be the drug of choice, but WADA said the test which will be employed has an effective window of more than two days (on the technical details of the new test see above, p. 000). Fahey, guided perhaps by a desire to differentiate himself from the larger-than-life Pound, whose ability to churn out incendiary soundbites made him a journalists’ dream but some of his fellow-administrators’ nightmare (as previous issues of this Journal can testify) declines to intrude on parochial issues such as Dwain Chambers’s inclusion in the British team for the World Indoor Championships. However, the sprinter’s insistence that a clean athlete could only win if the cheat was having an off day did draw a response (ibid).

FIFA adopts World Anti-Doping Code

Even though the vast majority of sports have given their backing to the anti-doping code adopted by the World Anti-Doping Agency (WADA), one major sport which has been particularly hesitant so to do has been football, whose world governing body, FIFA, has never shown itself keen on rectifying this position. However, this approach seems to have changed, since, in late February 2008, the FIFA President, Sepp Blatter, met the new WADA President, John Fahey in Zurich and signed a letter of intent to adopt the Code. The latter takes effect on 1/1/2009, and is expected to be ratified at the forthcoming FIFA Congress in Sydney, Australia. One of the reasons for FIFA’s new approach is the inclusion of more flexibility on doping penalties in the revised edition of the Code (Associated Press, www.findlaw.com of 29/2/2008).

Doping issues and measures – national bodies

BALCO aftermath rumbles on... with further disturbing revelations

How to cheat the testers – Mr. Conte writes a letter

From the may reports in previous issues of this Journal on developments in the scandal which showed the role played in the world of sports doping by the Bay Area Laboratory Co-operative (BALCO) in the world of sports doping, one major item will surely be recalled by every reader, i.e. the fact that its founder and director, Victor Conte, served a four-month jail sentence for his role in this affair. Since then, he has claimed to have repented and to be willing to co-operate in freeing sport of this cancer. On of his clients, has turned out to be none other than British runner Dwain Chambers, who tested positive for THG in 2003 and has also since then vowed to making his contribution towards cleaning up his sport.

As a result, Messrs. Conte and Chambers have joined forces, in that the former has sent to British governing body UK Sport a letter detailing not only the full extent of Mr: Chambers’s drug-taking, but also the various techniques which athletes have developed to evade various tests set by the invigilating authorities. Because of their disquieting contents, we publish below substantial extracts from this letter.

“Your performance enhancing drug program included the following seven prohibited substances: THG, testosterone/epitestosterone cream, EPO (Procrit), HGH (Serostim), insulin (Humalog), modafinil (Provigil) and liothyronine, which is a synthetic form of the T3 thyroid hormone (Cytomel). THG... was primarily used in the off season and was taken two days per week, typically on Mondays and Wednesdays. The purpose was to accelerate healing and tissue repair.

“Testosterone/epitestosterone cream was also primarily used during the off season... The purpose was to offset the suppression of endogenous testosterone caused by the use of the THG and to accelerate recovery. The testosterone/epitestosterone cream was also used in cycles of three weeks on and one week off.”

“EPO was used three days per week during the ‘corrective phase’, which is the first two weeks of a cycle... The purpose was to increase the red blood cell count and enhance oxygen uptake and utilization... EPO becomes undetectable about 72 hours after subcutaneous injection (stomach) and only 24 hours after intravenous injection.”

15. Drugs legislation & related issues
15. Drugs legislation & related issues

“HGH was used three nights per week ... this substance was used primarily during the off season to help with recovery from very strenuous weight training.”

“Insulin was used after strenuous weight training sessions during the off season ... The purpose was to quickly replenish glycogen, resynthesize ATP and promote protein synthesis and muscle growth ... There is no test available for insulin at this time.”

“Modafinil was used as a ‘wakefulness promoting’ agent before competitions. The purpose was to decrease fatigue and enhance mental alertness and reaction time. A 200mg tablet was consumed one hour before competition.”

“Liothyronine was used to help accelerate the basic metabolic rate before competitions. The purpose was to reduce sluggishness and increase quickness. Two 25mg tablets were taken one hour before competition. There is no test available for liothyronine ...”

“In general terms, explosive strength athletes, such as sprinters, use anabolic steroids, growth hormone, insulin and EPO during the off season. They use these drugs in conjunction with an intense weight training program, which helps to develop a strength base ...”

“It is not really necessary for athletes to have access to designer anabolic steroids such as THG. They can simply use fast-acting testosterone (oral as well as creams and gels) and still easily avoid the testers. For example, oral testosterone will clear the system in less than a week and testosterone creams and gels will clear even faster.”

Mr. Conte also outlines how athletes still try to cheat the testers. He says that athletes have a formula to ensure they have their excuses ready when the testers claim they could not reach them.

“First, the athlete repeatedly calls their own cell phone until the message capacity is full. This way the athlete can claim to the testers that they didn’t get a message ... Secondly, they provide incorrect information on their whereabouts form. They say they are going to one place and then go to another. Thereafter, they start using drugs for a short cycle of two to three weeks. After the athlete discontinues using the drugs for a few days and they know that they will test clean, they become available and resume training at their regular facility. Most athletes are tested approximately two times each year on a random out-of-competition basis. If a tester shows up and the athlete is not where they are supposed to be, then the athlete will receive a ‘missed test’. The disadvantage for an athlete having a missed test is that they have one strike against them. The advantage of that missed test is the athlete has now received the benefit of a cycle of steroids. Long story short, an athlete can continue to duck and dive until they have two missed tests, which basically means that they can continue to use drugs until that time.”

Prominent American footballer charged
It has already been revealed in previous issues of this Journal that athletics has been far from the only sport which has become enmeshed in the BALCO scandal. Thus in mid-January 2008, former NFL (American football) defensive lineman Dana Stubblefield was recently charged with perjury, becoming the first football player accused in the BALCO federal steroids probe. Mr. Stubblefield, a three-time Pro Bowler who testified before the BALCO grand jury in November 2003, is charged with lying to federal agents about his alleged use of performance enhancing drugs (Associated Press at www.findlaw.com of 18/1/2008).

The charges unsealed in federal court in San Francisco claim that Stubblefield made false statements to an Internal Revenue Service agent when he allegedly said he had not used steroids linked to the Bay Area Laboratory Co-Operative (BALCO) and denied receiving performance enhancing drugs from BALCO founder Victor Conte. In a brief morning court appearance, the 37-year-old Stubblefield pleaded not guilty and was released on bail (Ibid). Mr. Stubblefield played on the defensive line for various teams from 1993 to 2003. He was one of the three players fined by the NFL for testing positive for the drug THG, but was not suspended because THG was not added to the NFL prohibited substances list until after the tests were conducted.

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

Marion Jones fails in attempt to avoid prison (US)
It will be recalled from the previous issue of this organ (2007) 3 Sport and the Law Journal, p. 34) that, following her guilty plea on a charge of lying to federal investigators examining the Balco scandal – as well as a cheque fraud involving her former partner Tim Montgomery – the former Olympic campion Marion Jones was found guilty as charged by a US court. The only question to be settled now was whether she would be actually go to jail or not. Her lawyers made a determined effort to ensure that any punishment should be restricted to probation, on the grounds that she had suffered enough by the penalties imposed upon her by
the sporting authorities, which included being deprived of all the medals she won at the Sydney Olympics (The Daily Telegraph of 4/1/2008, p. S1).

However, these pleas ultimately failed in their objective, and the court in White Plains sentenced her to a 6-month term of imprisonment, as well as two years’ probation and 400 hours of community service. After the sentence had been read out to her, Ms. Jones made a tearful and apologetic speech to reporters, and hoped that “people will learn from my mistakes” (The Guardian of 12/1/2008, p. S10). However, the world governing body in the sport, the IAAF, will continue to be concerned at the fact that she was able to evade detection for so long. This is particularly the case since it has emerged that she had been under suspicion of using performance-enhancing drugs from 2000 onwards – as a senior athletics official admitted following the issuing of the verdict (The Observer of 13/1/2008, p. 18).

Jones’s former team-mates pay the price

The fall-out from the Jones case has also had consequences for some athletes who have teamed up with her in the past. In mid-April 2008, it was learned that relayed team-mates of the jailed former sprinter paid the price for her use of banned substances by being stripped of the medals which they won with her at the 2000 Games. The International Olympic Committee (IOC) ruled that Jearl Miles-Clark, Monique Hennagan and LaTasha Colander, who won gold in the 4x400 metres event, as well as Chryste Gains, Torri Edwards and Naneeen Perry, who came third in the 4x100 event, would lose their medals as a result of Ms. Jones’s confession (The Guardian of 11/4/2008, p. 38).

Maurice Greene accused

The number of athletes who have had to face allegations of drug-taking as a result of the BALCO scandal seems to be never-ending. In mid-April 2008, the ever-thinning credibility of athletics was stretched to breaking point when Maurice Greene, a double Olympic gold medal winner and outspoken advocate of life bans for those found guilty of doping, was himself accused of cheating in this manner. His name arose in connection with the prosecution currently brought against Trevor Graham, a coach who, like Marion Jones, is accused of having made false statements to federal investigators. The person making the allegations is Angel Guillermo Heredia, a key witness for the prosecution. Whilst some will see Mr. Heredia as a discredited figure who has made a judicial deal in order to save himself from criminal proceedings, the evidence which he ads provided to the authorities si apparently far-reaching and damning (The Times of 14/4/2008, p. 60).

According to the New York Times, Mr. Greene, who retired this year and has since been made an ambassador for the IAAF world governing body, is one of 12 athletes, including Marion Jones (see above), who were supplied with performance-enhancing drugs by Heredia, a former discus thrower from Mexico. He has alleged that Greene paid him approximately $40,000 for drugs, including steroids and stimulants, insulin and EPO, in 2003 and 2004. Mr. Greene, for his part, emphatically denied these accusations (The Daily Telegraph of 14/4/2008, p. B17). The IAAF, for its part, also dismissed these allegations (Daily Mail of 15/4/2008, p. 71).

However, Mr. Greene came under renewed pressure to explain such allegations a few days later, after a letter – widely believed to have been written by Ato Boldon, his former training partner and best friend – slammed the former 100 metres world-record holder as well as his coach, John Smith. The author, who is clearly a sprinter, makes furious references to the allegations made by Heredia that Greene paid him $40,000 for the products listed above. The letter, which a leading British newspaper claimed to have seen, was addressed to Messrs. Smith, Greene and Emmanuel Hudson, who used to represent Greene and Boldon for the management company, HIS International. It accused them of betraying the author by obtaining banned drugs unbeknown to him, lying about competing in a “clean” manner and leaving a stain on his own achievements (The Observer of 20/4/2008, p. S1). The IAAF promptly contacted Greene in order to explain himself about these allegations (The Daily Telegraph of 18/4/2008, p. S15). Again, Mr. Greene strenuously denied these charges (The Daily Telegraph of 23/4/2008, p. S10).

The trial of Mr. Graham had not yet been completed at the time of writing.
15. Drugs legislation & related issues

Doping issues and measures – Athletics

**Gatling is banned and thus misses Beijing Olympics (US)**

Previous issues of this Journal have already focused on accusations made against the former 100m and 200m world champion Justin Gatlin, of taking unlawful performance-enhancing drugs. Traces of the steroid testosterone and its precursors were found in a sample which he gave at the Kansas City relays in April 2006. The implications of these accusations were particularly serious for Mr. Gatlin, who had already tested positive for the use of amphetamines – for which offence he was banned for two years (later reduced to one year). If he were to be found guilty once more, he was undoubtedly facing a lengthy ban.

As the year 2007 drew to a close, Gatlin was found guilty for the second offence, and was duly issued with a four-year ban as a result of a split decision by the three-man panel. He had claimed that he had been the victim of sabotage by a therapist who massaged his legs with testosterone cream (The Guardian of 2/1/2008, p.S2). The therapist concerned has strongly denied these claims. In fact, Mr. Gatlin was fortunate to receive only a four-year ban. Normally, someone found guilty for a second offence should be banned for life. However, Gatlin reached an accommodation with the United States Anti-Doping Agency (USADA) which called for a maximum eight-year ban – which eventually was reduced to four (The Independent of 2/1/2008, p.56).

The athlete has appealed to the Court of Arbitration for Sport. However, this move may yet backfire on him, since the IAAF have requested the Court that the ban be doubled to eight years (Daily Mail of 4/3/2008, p. 79). The outcome of the proceedings was not yet known at the time of writing.

Doping issues and measures – Cycling

**Operation Puerto reopened (Spain)**

The reader will recall from previous issues that one of the major dope-busting actions in the world of cycling in recent years was operation Puerto, which investigated the goings-on in a Madrid clinic operated by Dr. Eufamiano Fuentes, from which he was said to have assisted around 200 top sporting figures with blood doping. This is a practice which involves removing and then re-inserting an individual’s blood, sometimes having been boosted with the illegal substance EPO. More than 200 bags of blood, along with blood transfusion equipment, as well as anabolic steroids, were discovered at the clinic. However, the operation was suspended when the judge in charge, Antonio Serrano, ruled that, because Spain’s anti-doping laws were not effective when the ring was in operation, he could take no action.

In mid-February 2008, it was learned that a Spanish Provincial Court had overturned that decision and pledged to reopen the case, which has already produced a devastating effect on the cycling. Of the alleged 200 clients, 56 were claimed to be professional cyclists, with footballers and tennis players also said to be involved. The original investigation led to the suspension of two favourites for the 2006 Tour de France, to wit Ivo Basso and Jan Ullrich. Basso is currently serving a two-year suspension for “intention to dope” (The Guardian of 15/2/2008, p. S10). As for Mr. Ullrich, the German prosecutors dropped their investigation into his alleged links with doping in April 2008 (The Guardian of 15/4/2008, p. S2).

The reopening of the case should finally establish the facts. The 2007 Tour winner, Alberto Contador, was repeatedly linked to Dr. Fuentes, although he had emphatically denied any connection – likewise Alejandro Valverde, an early favourite for this year’s Tour, who has denied claims that bags containing his blood were discovered in the clinic (Ibid).

This suspension was extended to four years after two more rowers had been found guilty of doping offences and suspended. However, the ban was lifted after the Russian federation agreed to dismiss those in charge of the sport and appoint a new body (The Daily Telegraph of 7/3/2008, p. S7).

Doping issues and measures – Rowing

**Russian rowing federation banned**

In late January 2008, it was learned that the Russian rowing federation had been fined 65,000 Swiss francs and banned for one year. This unprecedented move followed seven doping offences committed by Russian oarsmen in 12 months. The sport's world governing body, however, stopped short of excluding the Russian team from the Beijing Olympics, giving rise to accusations that they had failed to deal with offences sufficiently severely (The Guardian of 30/1/2008, p. S4).

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15. Drugs legislation & related issues

**Italian riders’ tribulations with the anti-doping laws**

Dinalo di Luca. Hormone doping was at the centre of the case brought against veteran Italian rider Danilo Di Luca. Following tests which he took after the 17th stage of the 2007 Giro d’Italia, Italian anti-doping officials decided that the results revealed abnormal levels of hormone growth, which would normal be seen in a child. This prompted a prolonged bout of intensive debate as to whether this constituted a breach of anti-doping rules. Mr. Di Luca himself has declared himself prepared to co-operate with the inquiry, even though this was not necessary under existing rules (The Independent of 28/2/2008, p. 58). As a result of these tests, Ettore Torri, the anti-doping prosecutor with the Italian Olympic Committee (CONI) called for the imposition of a two-year ban on Di Luca. A special CONI commission was appointed to investigate the matter, and in early April a hearing was held to decide whether this ban should in fact be imposed (The Guardian of 2/4/2008, p. S2). Di Luca was cleared for lack of evidence later that following month (The Guardian of 1/5/2008, p. S10).

However, in a separate development; Di Luca lost an appeal to the Court of Arbitration for Sport (CAS) against a three-month ban which had been visited on him for having requested Carlo Santuccione, a doctor suspected of supplying unlawful substances to athletes (Ibid).

**Eddy Mazzoleni.** Another Italian rider who has been in trouble over anti-doping rules is Eddy Mazzoleni – once again over alleged contact with Dr. Santuccione, referred to in the previous section. He was investigated over these claims, and found to be guilty of “attempted use of a forbidden substance and/or method”. As a result, he was given a two-year ban. Mr. Mazzoleni, who finished third in the 2007 Giro d’Italia, left the Astana team in June of that year over the inquiry (The Guardian of 9/4/2008, p. S2).

**Alessandro Petacchi.** In early May 2008, the Court of Arbitration for Sport confirmed this rider’s ban for excess salbutamol in the Giro d’Italia last year (The Daily Telegraph of 7/5/2008, p. S18).

**Doping issues and measures – Racing**

**Fallon banned for 18 months**

The controversial Irish jockey, Kieron Fallon, has been having a tough time lately with the authorities in more than one country. Initially, in December 2007, it seemed as though he might emerge triumphant from these tribulations, with the collapse of his trial at the Old Bailey (Britain) at which the judge ruled that he and five co-defendants had no case to answer on charges of conspiracy to defraud bettors. However, a month later he was on the receiving end of official action when he was issued with an 18-month ban in respect of his second positive dope test while riding in France (The Guardian of 26/1/2008, p. S1).

Mr. Kieron subsequently appealed against this verdict. There were some prima facie grounds for believing that there was more to this matter than met the eye. France Galop, the body which controls French racing, did not name the substance in question. However, as was the case with Mr. Fallon’s first positive test in 2006, it is understood to be a metabolite of cocaine, and there have been suggestions that the test, taken after the jockey’s race in Deauville last August, was positive for pure cocaine. This could suggest a flaw in the testing system and give rise to hopes of winning an appeal – or even a legal challenge (Ibid).

The appeal to the French racing authorities, however, failed. Mr. Fallon appeared to take the decision stoically, and spoke about coming back a “stronger person” as a result of the experience (The Independent of 8/2/2008, p. 55).

**Doping issues and measures – Baseball**

**Top star Clemens in legal battles over drug allegations (US)**

In early January 2008, it was learned that Roger Clemens, a seven-times winner of the famous Cy Young award, is suing his former trainer for making false and defamatory statements about his alleged use of steroids – which statements were chronicled by the Mitchell Report, commissioned by governing body Major League Baseball. The action in question was lodged with a Texas state court, and claims that the allegations made by Brian McNamme, the trainer in question, that he repeatedly injected Clemens with steroids were untrue and exposed the player to “public hatred, contempt, ridicule and financial injury”. It also
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claims that Mr. McNamee was threatened with jail if he failed to link the claimant with steroid abuse (The Guardian of 8/1/2008, p. S2).

Naturally, these contradictory claims have also engaged the attention of the US House of Representatives Committee which oversees the Mitchell report, and which called upon both parties to testify before it. The hearing took place in mid-February 2008, and assumed a dramatic turn when a private testimony made by Andy Pettitte, who pitched alongside Clemens in various teams, revealed that the latter had admitted using steroids and informed the House that he and Mr. Clemens had spoken about drug abuse in 1999 or 2000. It was also known that investigators had confirmed that McNamee injected Mr. Clemens’s wife Debbie. However, the hearing ended inconclusively and failed to incriminate either Clemens or McNamee decisively. Many democrats seemed to side with the latter, whereas Republicans tended favour the former (The Guardian of 14/2/2008, p. S9). Two weeks later, however, the Committee requested a federal investigation into Clemens’s actions (The Guardian of 28/2/2008, p. S2). The outcome of that investigation was not yet known at the time of writing.

Barry Bonds case – an update (US)

Another famous name in the annals of the great American sport to have had his name linked with the use of performance-enhancing substances is San Francisco Giants star Barry Bonds – whose trials and tribulations in this regard have been extensively covered in previous issues of this Journal and elsewhere. It will be recalled that Mr. Bonds was charged in November 2007 with lying to a grand jury about his alleged use of such drugs. This case was still pending at the time of writing. In late January 2008, the home run record holder filed a motion before the San Francisco court in which he neither admits nor denies taking these drugs, but argued that the questions asked by prosecutors during his Grand Jury appearance in December 2003 were vague, ambiguous and confusing. Prosecutors had asked Bonds whether the trainer Greg Anderson had supplied him with steroids and other substances as from the year 2000. Bonds answered “no” or “not at all”, but his lawyers are now arguing that the questions were unclear. Mr. Bonds has pleaded not guilty to four charges of perjury and one of obstructing the course of justice (The Guardian of 24/1/2008, p. S2).

Players and owners agree on doping procedures (US)

In mid-April 2008 it was learned that baseball players and owners have agreed to change the “drugs agreement” which they are all required to sign. This decision will allow for more frequent testing and cancelled the 15-day suspensions issued in December 2007 against Jose Guillen and Jay Gibbons. This agreement, reached after months of negotiations, strengthens the authority which the independent administrator has over the drugs programme. However, baseball has ignored the advice given by the World Anti-Doping Agency (WADA) that it should entrust dope testing to an outside agency (Associated Press, at www.findlaw.com of 11/4/2008).

Alfonzo suspended for positive dope test (US)

In late April 2008, it was learned that San Francisco Giants catcher Eliezer Alfonzo had been suspended for 50 matches for having tested positive for a performance-enhancing substance (Associated Press at www.findlaw.com of 1/5/2008).

Doping issues and measures – Other sports

Rugby Union

It will be recalled from a previous issue ([2006] 3 Sport and the Law Journal p. 45) that Wendell Sailor, the former Wallaby player, was issued with a two-year ban for having tested positive for cocaine. Having served this ban, he has been given the opportunity to revive his career in the other Rugby code, with National Rugby League team St George Illawarra (The Daily Telegraph of 13/5/2008, p. S22).

Tennis

In early January 2008, it was learned that Martina Hingis had failed in her attempt to clear her name of a doping offence. The International tennis Federation announced that Ms. Hingis had been issued with a two-year ban after an independent tribunal found her guilty of testing positive for cocaine during the 2007 Wimbledon tournament. During the two-day hearing, the tribunal dismissed claims by the former champion that there were doubts over the identity and integrity of her sample (The Daily Telegraph of 5/1/2008, p. B21).
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**Weightlifting**

*Factory error to blame for weightlifters positive tests, alleges federation (Greece)*

In early January 2008, it was learned that a mistake at a Chinese factory was to blame for 11 members of the Greek national weightlifting team testing positive for banned substances, according to the Greek Weightlifting Federation. The latter had announced a few days earlier that 11 of the 14 team members had tested provided positive with their A samples and that the squad could face expulsion from the Beijing Olympics in August if their B samples also proved positive. A federation official told reporters, on condition of anonymity, that the Chinese factory which had been supplying Greek athletes with nutritional supplements for months had sent a letter apologising for a mix-up in the ingredients.

The Chinese company said in the letter a number of banned toxic and cancer-causing substances had been accidentally added in the latest batch of supplements, the official said. The case has triggered a judicial investigation, led by an Athens prosecutor, and has shocked Greeks who have held the country’s weightlifting team in high esteem. The federation has suspended national coach Christos Iacovou, credited with a big weightlifting medal haul at recent Olympics, pending the investigation. His lawyer said Iacovou did not provide his athletes with drugs. “Iacovou never imagined giving his athletes banned substances” lawyer Michalis Dimitrakopoulos told reporters.

Former athletes and journalists have long been suspicious about Greece’s sudden success in the sport. But those suspicions were brushed aside by Iacovou and Greek sports bodies, especially ahead of the Athens 2004 Games where the sport was supposed to bring home a lot of medals. Only after Greece’s Leonidas Sampanis tested positive during the Athens Olympics, losing the bronze medal he had won in the 62kg category, did the questions become more vocal. Greece ended with only one medal, a bronze, from weightlifting at the Athens Olympics.

16. Family Law

[None]
17. Issues specific to individual sports

Football

G14 dissolved – peace in our time?
As the first month of the year reached the middle, news broke of a development which may restore some sense and dignity to the world of football. As a leading British newspaper described it:

Until recently, it was seen as a menace to the stability of the game: filing lawsuits, squabbling over television rights and occasionally threatening the creation of European super-leagues. No more. The G14, the organisation representing 18 of Europe’s biggest clubs – including Arsenal, Manchester United and Liverpool – will meet for what is expected to be the final time on February 15. Then, as part of a compromise deal reached yesterday with Fifa and Uefa in Zurich, it will disband and become a part of the newborn European Club Association (ECA), a body that, unlike the G14, will be recognised by Uefa (The Times of 16/1/2008, p. 67).

The deal is, to a certain extent, a victory for the leasing clubs in question (The Guardian of 16/1/2008, p. S4)
What this means is that, for the first time, clubs will have a direct relationship with football’s governing body. Although it will remain independent and have no decision-making power, the ECA will be able to lobby, argue with and influence Uefa’s decisions directly, rather than via Uefa’s member nations (such as the FA), as had been the case. So to a certain extent Jean Laporta, the president of leading Spanish side Barcelona, was right when he commented that “this is a victory for all.” The meeting at which the decision was taken was kept under wraps by all – including the Chief Executives of the British clubs involved (The Independent of 16/1/2008, p. 52).

The ECA is to replace the informal – but nevertheless Uefa-recognised – European Club Forum, a body set up by Uefa in 2003 to air and address the concerns of 102 European clubs. The European Club Forum was Uefa’s attempt to make the G14 redundant, but, in fact, the group did not prove as decisive a force as it at first appeared. The president of one member club even described it at a certain point as “(...) a joke – the G14 meet, decide what they’re going to decide and then they tell the rest of us. And then we all get ignored.”

The ECA promises to be more forceful. The G14 obtained assurances from Michel Platini, the Uefa president, that its concerns will be taken seriously. However, to compel the G14 clubs to concede, Uefa had to make a number of compromises on the two most contentious issues: compensation for players injured while on international duty (see above, p. 000) and the way in which Champions League and Uefa Cup revenues are divided. The first issue had long been a G14 talking point and the body had backed lawsuits on behalf of clubs who had players injured while playing for their countries. All such legal action will be abandoned as part of the agreement (The Times, loc. cit).

While details of the terms were not made public – and, indeed, at present the parties have agreed only on “principles” – a source close to the talks told a leading British newspaper that governing bodies Uefa and Fifa will set aside a compensation fund out of the revenue raised from television rights for the World Cup and European Championship. The issue of releasing players for international duty – and the number of days before a match that a club have to make them available – is also on the table and will be discussed soon. As for television revenues – which Uefa distributes in the form of prize-money in the Champions League (and, from next season, in the Uefa Cup) – the parties involved agree to review the arrangements on a more regular basis. Behind the scenes, it is believed that AC Milan, Barcelona, Juventus and Lyon, together with Chelsea and Rangers (the non-G14 members) were among the clubs seeking a more conciliatory and less confrontational relationship with Uefa (Ibid).

FIFA president proposes plastic pitches for 2010 World Cup....
As every football fan worthy of the name knows, the next World Cup is due to take place in South Africa in two years’ time. The location has not been without its problems, in terms of the question marks hanging over the chosen nation’s readiness to host the tournament. Recently, a new element has been added to his question, but one which is completely out of the nation’s control, to wit the quality of the playing surfaces. This was something which made an impression on Sepp Blatter the President of world governing body Fifa, when he attended the recent Africa Cup of Nations, and is caused mainly by an alternation of long spells of hot sun and torrential downpours (The Independent of 12/2/2008, p. 63). It prompted the long-serving President to raise the possibility of playing the 2010 World Cup on plastic pitches – a proposal which is currently under consideration by Fifa (The Daily Telegraph of 12/2/2008, p. S7).

Plastic pitches have a long history of approval and disapproval. It has to be said that the modern artificial pitches are much more advanced than the abrasive and
bouncy surfaces which were experimented with in the 1980s – notably in England. “Long-pile” turf is composed of tall, imitation grass blades embedded in a mixture of sand and rubber granules. It has assisted with the elimination of carpet burn and bizarre bounces, whilst at the same time greatly reducing the number of injuries. In addition, they are cheap, easy to maintain, and can be used at any time of the year, regardless of the weather. FIFA’s “Win in Africa with Africa” project is already being used to install artificial pitches in all 53 of its member countries on the continent – with the exception of South Africa (Ibid).

…. but considers computer-chip ball “unlikely”
The FIFA President’s enthusiasm for improving the game’s technology does not, apparently, extend to digitising match balls. In mid-February 2008, he states that it was “unlikely” that a ball containing a computer chip would be used within the next 10 years. He said "The chip is complicated and expensive. The game will lose its fun and no longer be a talking point among fans" (Daily Mail of 18/2/2008, p. 79)

Also under discussion is “hawk-eye” technology, as used in tennis. However, here again the FIFA president had reservations, saying that football was too fast-moving a game for such technological devices. Instead, he suggested that refereeing standards be improved – especially following the match-fixing scandals in Germany, Italy and Brazil in recent years (Ibid).

Atletico Madrid star suspended (Spain)
In mid-February 2008, Atletico Madrid striker Sergio Aguero was handed a two-match ban by European governing body Uefa. Mr. Aguero was shown a red card in the Uefa Cup last-32 first leg against English side Bolton Wanderers for spitting after reacting badly to a challenge from Matt Taylor. Atletico appealed against the decision, believing Aguero was spitting at the floor and not in the direction of an opponent, but the 19-year-old was suspended for two matches. This meant that the player missed the second leg at the Vicente Calderon stadium (The Independent of 21/2/2008, p. 66).

Cricket
Hair returns to international arena – amidst renewed controversy
The Darrell Hair saga, which started amidst the acrimony of the “ball-tampering” affair during the Final Test between England and Pakistan in 2006, has been extensively covered in this organ and elsewhere. As a result of accusations to that effect made by Mr the Australian umpire, the visiting team refused to return to the field, thus becoming the first team to forfeit a Test. In the ensuing controversy, Mr. Hair was dismissed from the elite panel of umpires by the world governing body in the sport, the International Cricket Council (ICC), and the Pakistan captain cleared of ball-tampering, even though he was also banned for bringing the game into disrepute. The penalised umpire later brought a legal action against the ICC, but the case later collapsed before an employment tribunal. In spite of this, Mr. Hair was cleared by the ICC to return as a one-day and Test umpire, with immediate effect, in mid-March 2008 (The Independent of 19/3/2008, p. 62).

Not unexpectedly, this turn of events sparked a good deal of controversy. In principle, it should have brought to an end to a saga which reflected very poorly on the manner in which the world game is governed. In accordance with a post-hearing agreement with the ICC, Mr. Hair had undergone a rehabilitation programme involving minor one-day internationals as far afield as Mombasa, Toronto and Belfast, as well as monitoring umpires during the under-19 World Cup, held in Malaysia. There is little doubt that, if the ICC board had ruled against offering him a route of return to the international arena, more legal action would have followed – with all that that would have entailed in terms of bad publicity and international turmoil (The Guardian of 19/3/2008, p. S2).

However, there were some angry reactions to Mr. Hair’s reinstatement, some of which emanated, predictably enough, from Pakistan. The man who captained the side accused of malpractice, Izamam-ul-Haq, bitterly criticised the decision, pronouncing himself “shocked” at this outcome. He blamed the Pakistan Cricket Board (PCB) for “bowing down” in this case – a claim which was vehemently denied by the PCB Chairman, Nasim Ashraf. Nevertheless, Mr. Hair made a definitive, if unspectacular, return to Test cricket by officiating in the Second Test between England and New Zealand at Old Trafford in May 2008. In spite of this, Pakistan made it clear that they did not want Hair to umpire any matches in which they would be playing (The Daily Telegraph of 29/4/2008, p. S10).
Regardless of how Mr. Hair’s career develops in the future, however, the damage done to the ICC’s reputation has been enormous. Writing in a leading British newspaper, Mike Selvey, the former England fast bowler turned columnist, suggests that it would probably not be wise to put Mr. Hair in charge of any matches involving Asian sides, and that South Africa would not be very enthusiastic at the prospect either. This, says Mr. Selvey “cannot last and it is not a situation that can last”. He goes on to describe Mr. Hair as a fine umpire, but a poor communicator, and one who would benefit from an improvement in this regard (The Guardian of 1/5/2008, p. S8).

Indian Cricket League dispute may end in court
In the past two decades, a game which for a long time was a by-word for stylised leisure and unhurried progress has changed almost to the point of being unrecognisable, mainly as a result of limited-overs cricket which has proved to be an overwhelming commercial success story. So endowed with riches has this part of the game become, that a national league based on the Twenty20 formula has been started in India and has attracted many of the world’s top players. Given the likely clashes between these fixtures and the international matches in which many of these players were expected to take part, the bodies governing the domestic game have naturally become quite concerned, to the point of motting the possibility that such cricketers as join the ICL may be refused recognition in their national competitions. In fact, the first domestic cricket authority so to decide was the England and Wales Cricket Board (ECB), which, just before the English domestic season was to get under way, refused county registration to five ICL participants. However, the reason –ostensibly at least – for their exclusion was unrelated to their ICL participation, but concerned a regulation requiring that non-England qualified players should not have played for their home countries for the previous 12 months. In fact, two more ICL players had been granted registration because they are not in infringement of this rule (The Daily Telegraph of 21/3/2008, p. S9). The players concerned immediately gave notice of their intention to take legal action in restraint of trade. As a result, the ECB withdrew its decision to refuse registration (The Guardian of 11/4/2008, p. 38).

Bans and fines imposed on leading cricketers
Marlon Samuels. The West Indian all-rounder has been banned with immediate effect from bowling in international cricket pending further assessment of his action. The International Cricket Council (ICC) considered the case after the Jamaican spinner was reported for a suspect action by the on-field umpires, Simon Taufel and Aleem Dar, and the third umpire, Brian Jerling, during the Third Test between South Africa and West Indies in Durban in January 2008. Dr Mark King, a member of the ICC’s panel of human-movement specialists, found that the 27-year-old straightened his elbow by an average of 27° when bowling off-breaks and by about 35° for his faster deliveries. The regulations merely allow 15° (The Guardian of 26/2/2008, p. S10).

Harbhajan Singh. In mid-April 2008, the controversial Indian bowler, whose involvement in the Andrew Symonds affair is related in an earlier section of this survey (see above, p. 000), was banned for five one-day internationals for slapping opposition player Sreesanth during a domestic Twenty20 match (The Daily Telegraph of 15/5/2008, p. S7).

Ishant Sharma. The Indian bowler was fined 15% of his match fee for pointing Australia’s Andrew Symonds the way to the pavilion after bowling him in the 47th over of a Commonwealth Bank Series match against Australia (The Guardian, loc. cit.).

Dhoni agrees to change rule-infringing gloves (India)
In late February 2006, it was learned that India’s Mahendra Singh Dhoni had agreed to wear smaller wicketkeeping gloves after the pair he wore during Sunday’s Commonwealth Bank Series game against Australia violated the game’s code of conduct. He had donned a pair which had extra webbing between the thumb and forefinger (The Guardian, loc. cit.).
Sport and the Law Journal
Reports
Contributory negligence – Duty to warn – Falls from height – Occupiers’ liability – Paralysis; Risk – Supervision

POPPLETON V TRUSTEES OF THE PORTSMOUTH YOUTH ACTIVITIES COMMITTEE

Court of Appeal (Civil Division) May J.; Richards, L.J.; Sir Paul Kennedy 12 June 2008. (Reporter: SG)

Facts
The appellant charity (C) appealed against a finding that it was in breach of its duty of care to the respondent (P) in relation to injuries sustained by P whilst he was rock climbing. P cross-appealed in relation to the extent that he was found contributorily liable. P was an inexperienced climber who had engaged in simulated rock climbing without ropes at C’s indoor climbing premises. Rules forbidding jumping were displayed outside the climbing room but P was not referred to them. P attempted to leap from the back wall to a buttress on the opposite wall. P lost his grip and landed on his head on the matting below. P was rendered tetraplegic and brought a claim for damages on the grounds that C failed to provide sufficient supervision and had breached the Occupiers’ Liability Act 1957 s.2. The judge concluded that there was nothing wrong with the state of the premises and that C was under no duty to assess P’s competence or ensure that he had the necessary training. However, the judge upheld P’s allegation that C was in breach of its duty of care to him by failing to warn him that thick safety matting did not make a climbing wall safe but might induce or encourage an unfounded belief that it did. The judge concluded that C was liable for 25 per cent of P’s loss but that as the majority of the blame for the accident rested with P he was contributorily negligent to the extent of 75 per cent. C submitted that the judge erred in finding that the adequate safety matting could be characterised as a hidden or latent danger; and that it was obvious that a climber who fell awkwardly might suffer injury, so that there was no duty to explain the obvious to a consenting adult who did not ask for advice or supervision when none was offered. P contended that the judge was wrong to find him 75 per cent to blame when he accepted that P mistakenly believed, because of C’s breach of duty, that it was safe to fall because of the matting; and that the judge should have found a duty to offer training and supervision.

Held
Appeal allowed, cross-appeal dismissed. It was extremely rare for an occupier of land to be under a duty to prevent people from taking risks which were inherent in the activities that they freely chose to undertake, Tomlinson v Congleton BC [2003] UKHL 47, [2004] 1 A.C. 46 applied. P engaged in the climbing activity of his own free will and the risk of falling was plainly obvious. The judge effectively held that it was not obvious that there was a risk that the matting might not always protect a climber from serious injury. That finding was not sustainable, since it was quite obvious that no amount of matting would avoid the possibility of injury from an awkward fall. There was an inherent risk in the activity that P voluntarily undertook. The law did not require C to prevent P from engaging in the activity and nor was it required to train or supervise him whilst he did it. If the law required training or supervision in the instant case, it would equally be required for a multitude of other commonplace leisure activities which nevertheless carried with them a degree of obvious inherent risk. It made no difference that C charged P to use the climbing wall, nor that the rules which they displayed could have been more prominent.

Commentary
Leisure and sports facilities are all too often presented with health and safety challenges from the many members of the public who come through their doors. It is inevitable that with most sports centre activities there will be a certain amount of risk; however those who do get injured increasingly look to place blame with operators of leisure facilities. This case illustrates a significant change in the attitude towards those who injure themselves while taking part in risky or even dangerous activities. Essentially it supports the notion that there is no duty to protect against obvious risk or self inflicted harm.
At the initial court hearing, Mr Poppleton’s solicitors tried to suggest that the Charity was liable; maintaining that there was a duty which extended to carrying out an induction and assessment as well as training and supervision. The charity was also criticised for failing to have a proper risk assessment in place. The trial judge correctly decided that there was no such duty. He did however go on to decide that the charity was in breach of its duty in failing to warn Mr Poppleton that the thick safety matting did not make a climbing wall safe and indeed might induce or encourage an unfounded belief that it did. The main thrust of the Charity’s appeal was that the initial finding that the safety matting, which the judge had decided was entirely adequate and appropriate safety matting could then be characterised as a hidden danger.

Lord Justice May opened his judgment by stating:

“Adults who choose to engage in physical activities which obviously give rise to a degree of unavoidable risk may find that they have no means of recompense if the risk materialises so that they are injured.”

This seems to be a common sense view provide by the Court of Appeal. Insurers should be relieved to see that adults will be held responsible where they have taken an obvious risk. If the first instance decision in this case had been upheld, it is likely that insurance premiums for adventure sports, or indeed any physical activities involving risk, would have had to increase, threatening the livelihood of many of the organisations providing these.

(2008) SLJR 2

Rugby – Trespass to the person – Vicarious liability

Gravil v (1) Carroll (2) Redruth Rugby Club Limited

Court of Appeal, Sir Anthony Clarke MR, 18 June 2008. (Reporter: OM)

Facts

The Claimant (C) was a prop forward employed on a part time basis with Halifax Rugby Union Club (Halifax). The First Defendant (D1) was similarly employed by the Second Defendant, Redruth Football Club Limited (Redruth) as a second row forward. On 31 October 2005 during an English Rugby Football Union (RFU) National League Division 2 game between Redruth and Halifax, D1 punched C and fractured C’s right eye socket. The incident occurred in the 46th minute of the game. Both teams were engaged in a scrummage when following a ‘knock on’ at the base of the scrum by a Halifax player, the referee stopped play. As the players disengaged from the scrum, a small and minor melee occurred during which D1 threw the punch. At the time of the incident, the referee gave D1 a yellow card and sent D1 to the sin bin for 10 minutes. After the match D1 was cited by Halifax and reported to the RFU disciplinary committee. At a subsequent disciplinary hearing convened to consider the matter, the yellow card was rescinded and substituted for a red card. D1 was also suspended from playing rugby for 8 weeks. No internal disciplinary action was taken by Redruth against D1 despite provision for the same in D1’s employment contract. As a result of the incident, C brought a claim of personal injury against D1 and Redruth.

C obtained default judgment against D1. At the first instance hearing against Redruth, the County Court concluded that D1 was not an employee of Redruth owing to D1’s status as a part time rugby union player and Redruth’s submission that part time rugby players play the sport for enjoyment, not financial gain. Redruth was held not liable for the injury C suffered. C appealed to the High Court and whilst the High Court accepted that D1 was an employee of Redruth, it concluded that, inter alia, the punch occurred outside the scope of his employment. C appealed the High Court’s decision to the Court of Appeal.

The issue before the Court of Appeal was whether or not D1’s actions were so closely connected with his employment that it would be fair and just to hold Redruth vicariously liable. Relying upon the cases of Lister v Hasley Hall Limited [2002] UKHL 22, Dubai Aluminium Co Limited v Salaam [2002] UKHL 48, Mattis v Pollack (t/a Flamingos Nightclub) [2003] EWCA Civ 887 and Bernard v AG of Jamaica [2004] UKPC 47, C argued that D1’s actions were so closely connected to his employment as a rugby player that Redruth was vicariously liable. Redruth argued that; first, D1’s act was not closely connected to his employment; secondly, the risk of injury from foul play conduct was one inherent in the sport and third employment as a professional rugby player had not enhanced this risk so as to make the club liable for D1’s actions and therefore in all the circumstances it would not be fair and just to hold Redruth liable for an intentional assault committed by one of its players.

Held

The Court of Appeal confirmed that the primary question in cases of injury following an intentional assault was, whether the tort was so closely connected
with the employment that it would be fair and just to hold the employers vicariously liable. The Court noted that it will ordinarily be fair and just to hold the employer liable where wrongful conduct may fairly and properly be regarded as done whilst acting in the ordinary course of the employee’s employment (Lister applied). In the Court’s opinion, there was a very close connection between the punch and D1’s employment “Regrettably the throwing of punches is not uncommon in situations like this...Indeed, they can be fairly regarded as an ordinary (though undesirable) incident of a rugby match” (Sir Anthony Clarke MR, Gravil v Carroll and Redruth Rugby Football Club Limited [2008] EWCA 689 at paragraph 23). Accordingly, C’s appeal was upheld.

**Commentary**

This is the first time the Court of Appeal has considered the issue of vicarious liability arising from an intentional tort, in the context of a professional rugby match. By upholding C’s claim, the Court of Appeal acknowledged that a rugby club which employs full time or part time players under a contract of employment may be liable for an unauthorised and deliberate assault caused by player employee against another player.

The boundary between an intentional tort closely connected to a player’s employment and an intentional tort that is not so closely connected, is difficult to define in the context of a professional rugby match. In this case, the Court made the point “that the melee (leading to the punch) was part of the game. It was certainly not independent of it. The melee was just the kind of thing that both clubs would have expected to occur” (ibid at paragraph 23). Whether a deliberate assault occurring in the players’ tunnel after the match or a similar incident occurring further from the ball, would be so closely connected to a player’s employment is unclear.

For professional players, this decision clarifies the extent of their personal liability in incidents of foul play conduct which cause injury. Professional players (or their agents) should enquire as to whether a club has insurance to cover injuries arising from a player’s negligent and intentional actions. In the event that a club does not have insurance or becomes insolvent, then a rugby player who negligently or intentionally causes injury to another player during a rugby match, is likely to be left to satisfy any judgment personally. The decision also reassures those players who suffer injury from incidents of foul play, that at least one party will likely have monetary resources to satisfy a personal injury claim.

For professional clubs, this decision confirms that they too can be liable for deliberate assaults occasioned by player employees and which cause injury. Clubs are advised to ensure that any insurance policy held, provides cover for injuries arising from their players’ deliberate acts as well as negligent acts even if those acts could be classified as ‘criminal’ assaults. Clubs should also ensure that employment contracts with players expressly reserve the club’s right to claim back any losses arising from a player’s deliberate or negligent actions.

Finally, liability must first be established against the player before issues of vicarious liability fall for consideration. The threshold for establishing negligence in the sporting arena is high; all circumstances of the game are taken into account, including any risks inherent in the sport (Caldwell v Maguire and Fitzgerald [2001] EWCA Civ 1054). Fortunately, very few acts of foul play lead to serious injuries. Although the Court has held a punch thrown in the circumstances of C’s case falls within the scope of a rugby player’s employment, the Courts are by no means opening the floodgates to claimants. The judgment’s greatest effect may be as a deterrent of foul play conduct since liability attaches to both a player and a club. There is now a greater incentive for clubs to ensure that players perform within the sporting code’s playing rules; something sports governing bodies will surely welcome.

(Nota: The Reporter for this case, Oliver Marns, is a solicitor with Chadwick Lawrence LLP and works in the Dispute Resolution and Sports Law Departments. He is a former professional Super League rugby league player and currently plays semi professional rugby league in the summer for Batley RLFC and rugby union in the winter for Halifax RUFC. He came to the case whilst working at Cramer Richards as he played for Halifax RUFC in the match in question).
There are three phases identifiable in the regulation of sport by the European Union (EU). The first is from the 1970s to the mid-1990s, where a number of European Court of Justice (ECJ) rulings indicated that where sports bodies were involved in economic-related activities, they could be subject to regulation under European Law as any other business. Phase two followed with the Bosman ruling in 1995, introducing free agency for out-of-contract footballers and indicating that the football transfer and registration system operating in Belgium specifically and in Europe generally, was contrary to the fundamental right of freedom of movement to work or look for work throughout the Member States. The subsequent years into the new millennium saw sport very much under the gaze of the EU Commission on this ground and also specifically under competition law provisions. A period of partnership and dialogue emerged with sports bodies accepting some notion of ‘supervised autonomy’ within the context of EU regulation. However, phase three can be identified as having emerged more recently where sport has gained confidence and flexed its muscle, often arguing that sport should be treated differently from general business and be granted a ‘specific exemption’.

This book is a welcome addition to the literature concerning this regulatory dynamic. Based on a seminar held in 2006, the collection of essays presents a number of perspectives to this on-going relationship. The essays are divided into three sections: the regulation of economic activity in sport; the regulation of labour markets; and thirdly, sport in the multi-media age.

The first and most substantial section in the book focuses on the fundamental questions around how the specificity of sport should be understood in the context of the EU regulatory regime and the likelihood and efficacy of a ‘specific exemption’ for sport. Erika Szyszczak and Stephen Weatherill both present a general analysis of the development of EU sports policy. Szyszczak recognises that much of this policy is predicated on soft law provisions and the notion of a distinct European Model of Sport. That litigation that has resulted in ECJ case law has demarcated a ‘space in which regulatory (sporting) bodies can continue to operate with a degree of autonomy’. However it is clear that the recent decision of Meca-Medina has narrowed this area of autonomy. Weatherill provides a detailed analysis of the implications of this case and believes the ruling takes a ‘much less generous’ approach to sporting autonomy and the notion of sporting rules that can remain untouched by EU Law. He argues that the ruling’s significance is that it is clear that it will be beholden upon sporting bodies to show and justify why certain sporting rules are legitimate in pursuing goals such as fair play and unpredictability of outcome.

The third contribution by Robin White focuses on freedom of movement provisions under Art 39 EU Treaty, the basis of the Bosman ruling and subsequently in Kolpak. Professional sports men he concludes cannot be exempted from EU provisions in this area. It is surprising however that there is little on the issue of sporting nationality quotas, which are increasingly supported as a way of preserving national identity in sport. Bosman of course swept away such quotas in European football as they clearly infringed Art 39. But the belief by sporting cognoscenti such as FIFA’s Sepp Blatter, that footballers are ‘artists’ and not mere workers and the view that home grown players should be protected, show the growing belief in some sporting minds that a quota could be legally justified.

The final contribution by Adam Cygan charts the Fédération Internationale de l’Automobile (FIA)/Formula 1 investigation which upheld the potential abuse of a monopolistic position (and therefore anti-competitive) by the FIA as the sole international sports federation in motor racing by its undue favouring of F1. The forced divesting of its connection and commercial interest in F1 has been presented as a good exemplar of the managing of potential conflicts of interest between sporting governing bodies managing the commercial interest in sport on the one hand, and managing the organisational sporting rules on the other.

The second section provides three essays that provide a wider context of the regulation of labour markets. Tim Kerr’s brief examination of disciplinary regulations has little EU Law content but focuses on national and international mechanisms such as the Court of Arbitration for Sport (CAS). Argued by many as a mechanisms of self-regulation and keeping disputes within sport, the role of CAS can be compared with the role of the EU in proving an area of ‘supervised autonomy’. Luca Barani and Richard Disney both
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provide useful economic analysis of ways that the sports market can be understood within Europe and whether alternative ‘North American’ models might develop in the future.

The third and last section has three contributions by Barbara Bogusz, Jennifer Davis and Estelle Derclaye focusing on the symbiotic relationship that new media technology has had with professional sport. The significant commercialisation of sport over the last few years, with vast inflows of new money due to the increase in the value of media rights, has been replicated by sport being an important driver for the promotion of these new technologies. The contributions all highlight the possible conflicts that commercialisation has on the inherent qualities and nature of sport.

These individual essays are well written and accessible. They provide a range of perspectives of the past role of the European Union in regulating professional sport and suggest some very useful insights into how this may evolve in the future.

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