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# sport and the law journal





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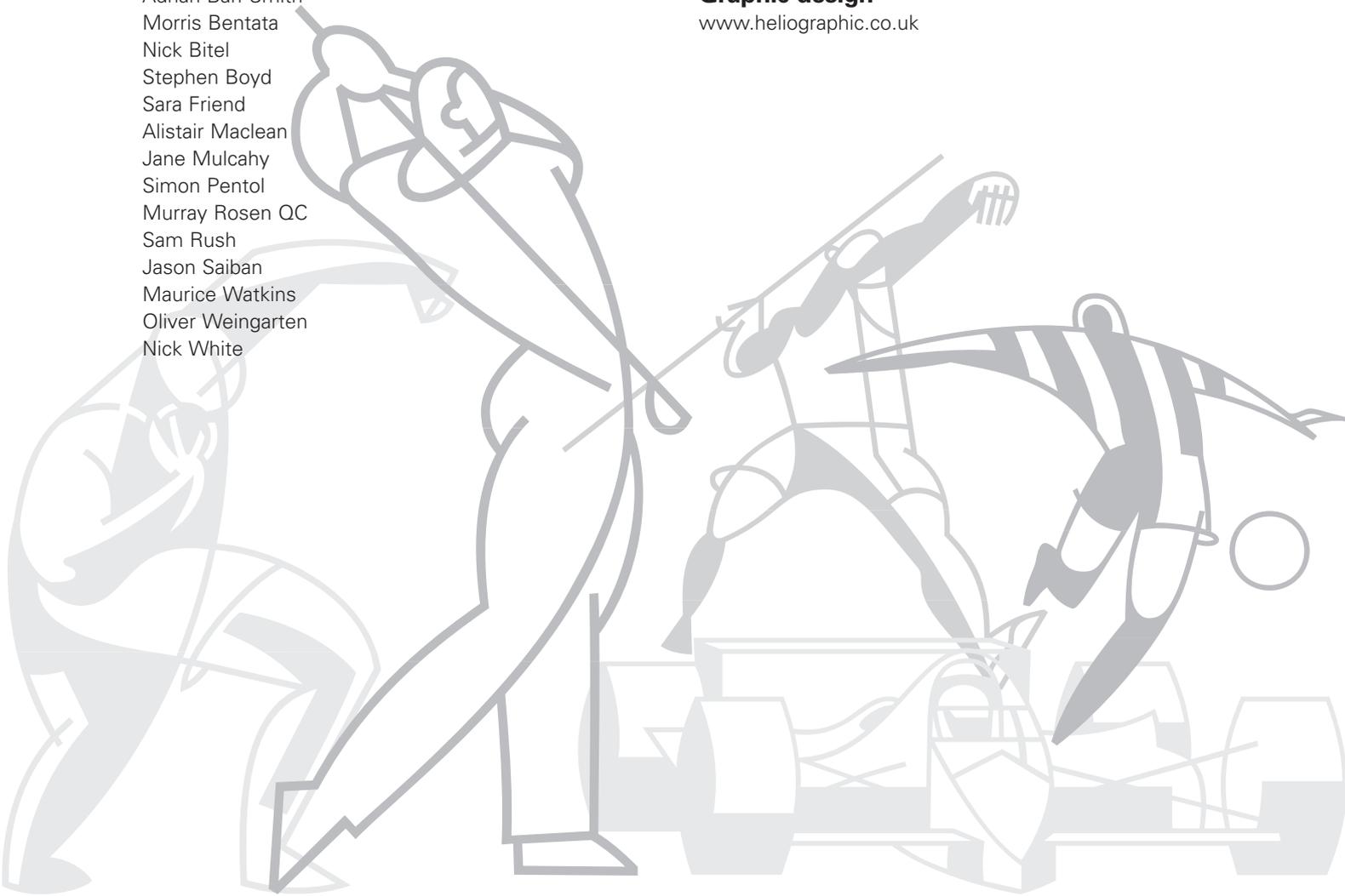
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# Editorial

**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 an analysis of the construction of a right to privacy under UK law and how that has and could be applied in sporting scenarios.

The **Analysis** section features two articles focusing on two new developments. Firstly, Stephen Weatherill's 'Article 82 EC and sporting 'conflict of interest': the judgment in MOTOE' provides an excellent analysis of this recent ECJ case which provides guidance on when EU Law, especially in the context of competition law, can intervene into the affairs of sporting bodies and builds upon the guidance provide in the earlier Meca Medina case. Secondly, George Castro's 'Should the Football Authorities Allow Third-Party Ownership of the Registrations of Football Players?' evaluates the legal implications of third party ownership within FIFA and FA rules and has a focus on the Tevez case.

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

The horrendous scenes that occurred in Lahore recently involving the Sri Lankan cricket team and various cricket officials will have lead to many sports administrators thinking long and hard about the security and risk management plans in operation within their particular sports. It has long been argued about whether sports and politics are intertwined. Ideally sport flourishes in an environment dominated with sporting values, but the reality is that sport is subject to many competing political and social forces. Sport also has an immense media profile so it is perhaps surprising that sports events and personnel have not been the target of terrorist activities where publicity and the promotion of fear are main aims of the perpetrators.

Sporting bodies and event organisers have significant expertise and experience in terms of managing many risks associated with sporting activity. The threat of terrorist attacks has long been there only now it has become something more real and immediate.

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



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# Opinion and practice



# Playing with confidence

by **Matthew Himsworth, Associate Solicitor, Schillings**

*“The phenomena of ‘cheque-book journalism’, intrusive telephoto lenses, surreptitious surveillance, gross invasions of personal privacy, deliberately deceptive ‘stings’ and trespass to land ‘with cameras rolling’ are mainly phenomena of recent times”.*

**Kirby J, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 C.L.R. 199, para 172***

Seven years on Kirby J’s words in the oft-quoted Australian breach of confidence case ring truer than ever. The sporting press’ appetite for gossip, rumour, scandal and revelation is today as insatiable as ever.

From the “*intrusive telephoto lenses*” which captured the small piece of paper in Nick Faldo’s hand before he officially named his Ryder Cup team, to the “*surreptitious surveillance*” that follows the Beckhams from Los Angeles to Milan to London and from the “*gross invasions of personal privacy*” experienced by Max Mosley at the hands of the News of the World to the “*deceptive ‘stings’*” suffered by Sven Goran Eriksson and, later, by his former mistress Faria Alam. The UK tabloid press have stopped at nothing to get their scoop. That is, unless and until restrained by the Courts.

Privacy, scandal and tittle-tattle  
*“Inexorably and insidiously the British press is having a privacy law imposed on it”*  
**Paul Dacre, Editor-in-Chief of Associated Newspapers to a conference of the Society of Editors, 9 November 2008<sup>1</sup>**

Crucially, when Paul Dacre attacked senior libel and privacy judge Mr Justice Eady in his speech to the Society of Editors, he was vocalising a frustration felt by the tabloid press as the courts are seen to be increasingly willing to restrain publication of private and confidential material that is the stuff of hot gossip and scandals.

Of course, as he has had pointed out to him by no less than Desmond Browne QC, Andrew Caldecott QC, Adrienne Page QC, Richard Rampton QC, Geoffrey Robertson QC, Lord Pannick, Lord Lester and Lord

Falconer, Mr Dacre’s comments were misguided both in terms of him singling out Mr Justice Eady as creating a law of privacy by “*arrogant and amoral judgments*” but also by his assertion that the law of privacy is one not made by parliament.

The Human Rights Act 1998 received royal assent on 9 November 1998. The Act incorporated the European Convention on Human Rights which guaranteed the right to privacy, under Article 8 of the Convention, and the right to freedom of expression under Article 10. The bill had been the subject of fevered debate and, as is often the case, the media lobbied parliament in an effort to protect its own interests. The press argued that it was entitled to complete immunity from obligations under Article 8. Parliament considered these submissions and rejected them.

What is true is that, since the Act commenced in 2000, a body of privacy case law has developed to the extent that tabloid editors are clearly fearful of their ability to scandal monger. As Dacre himself puts it, “*If mass-circulation newspapers, which, of course, also devote considerable space to reporting and analysis of public affairs, don’t have the freedom to write about scandal, I doubt whether they will retain their mass circulations with the obvious worrying implications for the democratic process*”.

Naomi Campbell issued her privacy claim against the Daily Mirror<sup>2</sup> in 2001 during the early days of the Human Rights Act and based her claim on breach of confidence, privacy and the rights guaranteed under the Data Protection Act 1998.

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Miss Campbell's claim was upheld by a majority of 3 to 2 in the House of Lords in 2004 with Lord Hoffman (one of the dissenting judges) remarking that *"the importance of this case lies in the statements of general principle on the way in which the law should strike a balance between the right to privacy and the right to freedom of expression.."*<sup>3</sup> and Baroness Hale pointing out that *"The tests which the court must apply are familiar ones. They are whether publication of the material pursues a legitimate aim and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy."*<sup>4</sup>

It is the court's correct application of this test that has upset tabloid editors so much. The court has shown a willingness to prevent publication of tittle-tattle<sup>5</sup> about celebrities' lives, where that information is private by nature, and this has prevented the salacious publication of revelations about matters such as an extra marital affair<sup>6</sup> and the marital problems<sup>7</sup> of persons in the public eye.

As to the Mosley case<sup>8</sup> itself the crucial passage from Eady J's judgment stated "it is not for the media to expose sexual conduct which does not involve any significant breach of the criminal law...it is not for journalists to undermine human rights...merely on grounds of taste or moral disapproval... where the law is not breached...the private conduct of adults is essentially no-one else's business". On any view of Article 8 of the European Convention on Human Rights, Eady's comment appears to be a sensible approach.

***"Everyone has the right to respect for his private and family life"***<sup>9</sup>

The European jurisprudence, however, goes even further in its interpretation than Eady J needed to go in Mosley. In *Von Hannover v Germany*<sup>10</sup> the European Court of Human Rights held that Princess Caroline of Monaco was entitled to a private and family life including the right not to be the subject of invasive paparazzi photography as she went about her daily life. Princess Caroline's complaint related not to sensitive medical information, as in Campbell, or intimate details of her sex life, as in Mosley, but to mundane and ordinary aspects of her every day personal life, which had been invaded and recorded by the paparazzi press. Photographs included those taken whilst she was skiing and whilst shopping. All photographs were taken whilst she was in public but, crucially, given that she was not performing her official duties, the European court held that she was entitled to go about her daily private life without being photographed against her will.

The English courts have recognised the importance of the Von Hannover judgment and, at least insofar as children are concerned, the Court of Appeal in an interim judgment in *Murray*<sup>11</sup> (applying principles stated by the House of Lords in Campbell) has recognised the right of an individual not to be the subject of invasive photography in public when they are going about their private life. The case, brought by the author JK Rowling and her husband Dr Neil Murray on behalf of their son David Murray, seeks damages and an injunction to restrain the paparazzi agency Big Pictures Ltd from taking and publishing photographs of their son in the future, without express consent. The case arose when David was photographed whilst being pushed in his pram along a public street and those photographs were sold to, and published in, the Sunday Express.

Big Pictures, and their owner Darryn Lyons, were the Defendants again in Hollywood actor Sienna Miller's recent privacy and harassment claim which settled in November 2008. Miss Miller has been the victim of disturbing and deeply invasive photography and harassment at the hands of paparazzi photographers who, she claimed, work for or on behalf of Big Pictures. As with the Von Hannover case Miss Miller did not complain about the revelation of intimate or sensitive personal information relating to her sex life or health, her complaint centred on her right to enjoy her private life without invasive or abusive interference from the picture press. In Miss Miller's case the tabloid press appears to accept, as Paul Dacre begrudgingly appears to also, that individuals are entitled to privacy and to a private life. Apologies to Miss Miller were published by the Sun, the News of the World and the Daily Star and, in a carefully worded letter to the actor from News Group's legal manager, Tom Crone, the group accepted that *"on the specific facts and circumstances of this case you had a reasonable expectation of privacy in respect of the information and the photographs that we published ... We also accept that we should not have published such information or photographs"*.

As well as a payment of £53,000 damages and legal costs Miss Miller's settlement with Big Pictures reportedly included an agreement about where the actor can and cannot be photographed. Big Pictures agreed that they will not pursue Miss Miller by car, motorcycle or on foot and will not *"doorstep"* Miss Miller at her home or the home of her family. They will be entitled to take photos of her when she goes to bars, nightclubs or restaurants, is out in public, or at a *"red carpet event"*.

## Playing with confidence

### The Law of Confidentiality – A Sporting Chance?

*“The equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust. The Statute of Uses, 1535, is framed in terms of ‘use, confidence or trust’; and a couplet, attributable to Sir Thomas More, Lord Chancellor avers that:*

***Three things are to be ... in Conscience: Fraud, Accident and things of Confidence”***  
***Megarry VC, Coco v A.N. Clark (Engineers) Ltd (1969)***  
***R.P.C. 41 at 46***

Whilst the law on privacy and the adoption of European jurisprudence has a distinctly new feel to it the origins of the law of confidentiality, and the restraint of publication of private and confidential information, date back centuries. In the seminal 19th Century case of *Prince Albert v Strange*<sup>12</sup> Mr Strange was restrained from distributing private etchings made by Queen Victoria and her husband long before the advent of the kiss and tell story.

The law of confidentiality is best summarised by the judgment of Megarry VC in *Coco v Clark*:

***“In my judgment, three elements are normally required if ... a case of breach of confidence is to succeed. First, the information itself ... must ‘have the necessary quality of confidence about it’. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it”***<sup>13</sup>

Ordinarily one would expect confidential information to cover sensitive business secrets as identified by Lord Shaw in *Herbert Morris Ltd v Saxelby*<sup>14</sup> – *“Trade secrets, the names of customers [and] all such things”*, however, what of confidential sporting information relating to tactics, team line ups and motivational team talks? They surely satisfy Lord Greene MR’s test in *Saltman Engineering*<sup>15</sup> of information that can be described as “a formula, a plan, a sketch, or something of that kind [of] which ... the maker of the document has used his brain”.

A team line up, tactics, strategy or team talk clearly, in the author’s view, has the quality of confidence which is needed to satisfy the first part of the test in *Coco v Clark*. As to the information being “*imparted in circumstances importing an obligation of confidence*” as stated in *Toulson and Phipps on Confidentiality*<sup>16</sup>, “*The courts have recognised that a person who uses*

*underhand methods to obtain information which he knows that the target intends not to allow to become publicly available (or not until he chooses to do so) may be held to be under a duty of confidentiality”*.

So what of the long lens camera shots of Nick Faldo’s hand holding his Ryder Cup team line up prior to the mutual announcement of Europe’s and the United States’ cards last year? It is impossible to know, without more information, how far the press’ publication of this information before the official announcement gave the United States team an advantage, both in terms of team morale and in choosing their own line up, however, as regards publication in England and Wales, it is the author’s view that the requirements for a claim in breach of confidence were satisfied in this case.

It should matter not that Nick Faldo was holding the card in a public place, though he did, of course, admit that he regretted the naivety of his actions. In the *Spycatcher*<sup>17</sup> case Lord Goff stated that “*it is well settled that a duty of confidence may arise ... where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is picked up by a passer by”*<sup>18</sup>.

Lord Goff seems to be saying that, no matter whether the claimant has been careless, the defendant should not be entitled to a windfall because of his good fortune in receiving the confidential information. He will not be entitled to publish where he is on notice that the information is confidential. This was the case in *Shelley Films v Rex Features*<sup>19</sup> where a photographer was present at the film studios of Shelley Films during the filming of Mary Shelley’s *Frankenstein* starring Robert De Niro. An extraordinary feature of the film was the advanced prosthetics which De Niro wore to play the part of Dr Frankenstein’s monster. Though it was accepted by Shelley Films that members of the public had been entitled to enter the film set, though only a limited number, this did not rob the image of De Niro in full make up of its confidential nature. Shelley Films were held to be entitled to an injunction to restrain the photographer from publishing, or causing to be published, any further photographs of De Niro as Frankenstein’s monster. A key comparison to Faldo’s situation is the fact that Shelley Films held the confidential information with the intention of exploiting the information at a later date for commercial profit. Though the “*commercial profit*” which Faldo intended to gain from his line up may not be immediately clear, his decision, to pair certain golfers together, was to be released and used during the Ryder Cup with the

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intention of winning the tournament, for commercial and sporting gain.

Without the element of surprise Frankenstein's audience would be robbed of the excitement and surprise of the revelation of De Niro's character. Similarly, Faldo was robbed of the opportunity to surprise his American counterpart with his team selection and thus lost a huge tactical and psychological advantage in the build up to the prestigious tournament.

The Arsenal manager, Arsene Wenger, was also a recent victim of the press' eagerness to reveal the inner tactical secrets of sports teams. Following Arsenal's Premiership match against Bolton Wanderers at the Reebok Stadium this season the press received an internal Arsenal document which had apparently been left at Arsenal's team hotel. Headed "*Confidential*" and on Arsenal-headed notepaper the document set out the core beliefs and motivations of the Arsenal team. Though the document stopped short of announcing secret tactics that may be employed against future opposition, and thus arguments may still arise as to whether the document had the quality of confidence, it is surprising that newspaper legal departments allowed publication of the document and that they, apparently, received no complaint from the Gunners. In *English & American Insurance Ltd v Herbert Smith*<sup>20</sup>, a case where papers intended to be sent to a barrister were, instead, sent to the opposing solicitors, Sir Nicholas Browne-Wilkinson V.C. rejected the argument that breach of confidence did not apply where there was "*an accidental escape of information to the third party*", crucially as far as the Arsenal matter is concerned, he stated:

***"If somebody is handed a letter addressed to another marked 'Private and Confidential', that letter having been handed to him in error, and he chooses to read it notwithstanding seeing that it is marked 'Private and Confidential', and as a result acquires information contained in that letter, I find it difficult to say that he is not implicated in the leakage of the information contained in that letter"***<sup>21</sup>

The circumstances of publication are not clear from the press reports, however, unless (which is unlikely) Arsenal deliberately leaked the memo themselves it would appear clear that the document was leaked in breach of confidence notwithstanding the fact, as it appears, that a member of Arsenal's staff may have carelessly left the document at the team hotel. The obligation of confidence applies where a person is on notice that the information is confidential by nature. As stated in the *Spycatcher* case "*a duty of confidence arises when confidential information comes to the*

*knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential"*<sup>22</sup>.

We live in a time of instant access where most citizens of the UK have access to the internet and, as it follows, access to a means of publishing information. Fansites and sports-related forums offer fans the opportunity to post material and opinions about their favourite, or least favourite, teams. Already this has seen libel proceedings brought by a club against anonymous posters on a fansite forum. In *Sheffield Wednesday v Hargreaves*<sup>23</sup> Richard Parkes QC ordered the host of the website OwlsTalk.co.uk to disclose information which would lead the Claimant to be able to identify anonymous posters who had made defamatory statements about the directors of Sheffield Wednesday FC.

The obsessive nature of fans, particularly in football, means that rumours are spread and photographs are taken in and around the ground and sometimes at training facilities. It can surely only be a matter of time before a fanatical fan, or a fan of an opposing team, manages to discreetly film private training sessions prior to a match and posts those sessions, featuring proposed tactics for the upcoming game, on YouTube, or a similar website. Such an action could certainly be an actionable breach of confidence and potentially hugely damaging to the club involved.

In circumstances where fans, or professional photographers, scale walls, sneak into training grounds, or otherwise surreptitiously seek to photograph or video training sessions in which top secret practice of tactics take place (or in which any other confidential information is contained) or even seek to photograph or video, and sell for commercial gain, training sessions or other photo opportunities which are the subject of exclusive deals (such as may exist on MUTV and Chelsea TV, for example) then, it is the author's view, the observation of the Court of Appeal in *Douglas v Hello*<sup>24</sup> must apply:

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

Where an exclusive deal is involved, then "*using or publishing th[e] information ... to profit commercially*" is

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not difficult to establish. Where confidential tactics are concerned then, it is submitted, simply employing those tactics in a game must constitute “using” those confidential tactics for commercial gain, where professional sport is concerned.

Given the continuing invasive nature of the press, the hunger for scandal and exclusives, and the willingness of the public, bloggers and forum users to read, and interact with, such information, it can only be a matter of time before an English court is asked to restrain publication of sporting confidence. BASIL

- 1 *The Guardian*, 10 November 2008 - <http://www.guardian.co.uk/media/2008/nov/10/paul-dacre-press-threats>
- 2 [2002] E.M.L.R. 30
- 3 [2004] 2 A.C. 457 at 469
- 4 *Ibid.* at 489
- 5 *Jameel (Mohammed) and another v Wall Street Journal Europe Sprl* [2007] 1 A.C. 359, at [147] “the most vapid tittle-tattle about the activities of footballers’ wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it”
- 6 *CC v AB* [2007] E.M.L.R. 11
- 7 *X and Y v Persons Unknown* [2007] E.M.L.R. 10
- 8 [2008] E.M.L.R. 20
- 9 *European Convention for Protection of Human Rights and Fundamental Freedoms* [1950]
- 10 [2004] E.M.L.R. 21
- 11 [2008] E.M.L.R. 12
- 12 (1849) 1 De. G. & Sm. 652, (1849) 1 Mac. & G. 25.
- 13 (1969) R.P.C. 41, at 47
- 14 (1916) A.C. 688 at 714
- 15 *Saltman Engineering Co. Ltd v Campbell Engineering Co. Ltd* (1948) 65 R.P.C. 203 at 219
- 16 *Toulson and Phipps – Confidentiality Second Edition*
- 17 *Att-Gen v Guardian Newspapers Ltd (No. 2)* (“*Spycatcher*”) (1990) 1 A.C. 109
- 18 *Ibid.* at 281
- 19 *Shelley Films v Rex Features Ltd* (1994) E.M.L.R. 134
- 20 (1988) F.S.R. 232
- 21 *Ibid.* at 238
- 22 *Supra* at 281B to 282E
- 23 [2007] EWHC 2375 (QB)
- 24 (2005) EWCA Civ 595; (2006) QB 125

# Analysis



# Article 82 EC and sporting ‘conflict of interest’: The judgment in MOTOE

by Stephen Weatherill, Somerville College, Oxford

## 1. Introduction

The decision of the Grand Chamber of the European Court of Justice in *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* (hereafter: MOTOE)<sup>1</sup> is striking for its refusal to allow a sporting body that mixes regulatory functions with economic activities to claim immunity from the application of EC law. Article 82 EC prevents the abuse of a dominant position held by a sporting body and this may affect decisions about whether or not to sanction the staging of new events, which was the issue in the litigation in MOTOE. The subjection of such decisions to the requirements of the EC Treaty is not in itself surprising or new. Case law which stretches back some 35 years, from *Walrave and Koch* through *Bosman* to *Meca Medina*<sup>2</sup>, demonstrates the Court’s consistent view that sport, in so far as it constitutes an economic activity, falls within the scope of application of the EC Treaty, albeit that it is open to sport to explain and justify its practices in so far as they are necessary for its proper organisation. In short, EC law accepts that sport is ‘special’ – it has features, such as the need for balanced competition and uncertainty as to outcome, which are not found in typical industries – but it is not so ‘special’ that it can be granted a blanket exemption from the rules of the EC Treaty. MOTOE, which concerns the sport of motorcycling in Greece, follows this well-established approach. However, the ruling in MOTOE is of interest for three reasons in particular. First, it concerns the Treaty competition rules, specifically Article 82, whereas most (though not all) previous sports cases before the Court have involved the free movement provisions in the EC Treaty. Second, the clarity of expression in the judgment is unusually vigorous, in particular in its concern to assert legal control over the consequences of a conflict of interest between a sporting body’s regulatory and commercial motivations. Third, MOTOE, as a decision of the Grand Chamber, carries particular weight, and it confirms that

the Third Chamber’s readiness in *Meca Medina* to subject detailed aspects of sports governance to the scrutiny of EC (competition) law was not simply an oddity created by the five judges who comprised the Third Chamber in *Meca Medina*.

## 2. The litigation

The decision in MOTOE is a preliminary ruling delivered in response to a reference made by the *Diikitiko Efetio Athinon* in Greece, seeking an interpretation of Articles 82 and 86 EC in the particular context of the sport of motorcycling.<sup>3</sup> It arises from proceedings brought before the Greek courts by MOTOE – the Greek Motorcycling Federation, a non-profit-making association governed by private law – against the Greek State seeking compensation for the pecuniary damage which MOTOE claims to have suffered in consequence on the State’s refusal to grant it the authorisation required under Greek law to organise motorcycling competitions.

Greek law provides that such authorisation would be granted only after consent had been secured from the official representative in Greece of the *Fédération Internationale de Motocyclisme* (the International Motorcycling Federation). That official representative was ELPA (Elliniki Leskhi Aftokinitou kai Periigiseon, Automobile and Touring Club of Greece) and it too organises sporting competitions in Greece. ELPA entered into negotiation with MOTOE, providing MOTOE with information about a number of regulations which had to be observed in the planning of competitions and asking for a range of details about MOTOE’s planned events. But ELPA did not give its consent and the Greek State accordingly did not authorise MOTOE to proceed.

## Article 82 EC and sporting 'conflict of interest': The judgment in MOTOE

MOTOE claimed it had been treated unlawfully by the Greek State. It sought GRD 5 000 000 as compensation. Its argument based on EC law was that a violation of Articles 82 EC and 86(1) EC had occurred. The Greek law in question conferred on ELPA a position of monopoly power over the organisation of motorcycle events in Greece which, MOTOE claimed, ELPA had abused by withholding consent to MOTOE's plans. Article 82 EC does not forbid the grant or existence of a dominant position or monopoly, but it does forbid abuse of that position and it therefore provides a basis for reviewing the lawfulness of decisions taken by the sports regulator which is typically placed in that position of monopolist. The thematic approach of EC law persists: an extreme approach, whereby the challenged sports rule would be treated as necessarily unlawful because of its economically damaging effect, is excluded, but so too is an approach at the other extreme, whereby the mere fact that the rule arises in the context of sport would immunise it from legal supervision. Instead EC law operates by putting the rule to the test in so far as it has an economic effect. What is it for? Is it necessary for the organisation of sport? In this way, the EC develops a sports law and a sports policy, even in the absence of any concrete depiction of the role of sport in the Treaty itself.<sup>4</sup> This is characteristic of the expansionist dynamic of EC trade law.

### 3. Legal analysis

ELPA's role and functions are clearly important in the legal assessment. Only an 'undertaking' is subject to the Treaty rules on competition. The concept of 'undertaking' goes undefined in the Treaty but it has been consistently interpreted to require engagement in an economic activity, and neither legal form nor the method of financing is of importance. It is, then, a functional test.<sup>5</sup> The most important and awkward case law on this point has tended to deal with bodies equipped with important public functions and fulfilling (more or less well) defined social tasks which nonetheless also perform activities with economic implications. Consider, for example, institutions responsible for social security<sup>6</sup> or those dealing with air traffic control.<sup>7</sup> They fall outwith the category of 'undertakings' for the purposes of EC competition law where the activity is not pursued in the market in actual or potential competition with other economic operators – where the activity lacks an economic nature of the type required to bring it within the scope of the EC Treaty.

It is admittedly not always easy to determine when a body counts as an 'undertaking'. A 'pure' regulator may escape subjection to the Treaty. The Bar of the

Netherlands occupies an influential position of power but it is not an 'undertaking' since it does not carry on an economic activity.<sup>8</sup> So naturally this is the preferred status for sports bodies – to avoid being classified as an 'undertaking', thereby to avoid subjection to control under the Treaty competition rules. But the key is 'economic activity'. And the reference made by the *Diikitiko Efetio Athinon* stated that ELPA's activities are not limited to purely sporting matters, but that it also engages in activities classified as 'economic', which consist in entering into sponsorship, advertising and insurance contracts. These activities generate income for ELPA. And it organises its own sporting events. This made it rather easy for the Court.

ELPA may be vested with public powers for the purposes of some of its functions but this 'does not, in itself, prevent it from being classified as an undertaking for the purposes of Community competition law in respect of the remainder of its economic activities'.<sup>9</sup> ELPA is engaged in 'the organisation and commercial exploitation of motorcycling events'.<sup>10</sup> It is an undertaking for these purposes. And non-profit making though its objectives might be, its activities potentially co-exist with those of other operators which do seek to make a profit. There is therefore the necessary commercial aspect to ELPA's activities which brings it within the scope of the EC Treaty.

The Court is not twisting the law to catch a sports federation. Its approach is perfectly consistent with its orthodox approach in EC competition law. For example, an entity responsible for air traffic control has in a similar way been treated as carrying out not only purely administrative activities but also the management and operation of airports subject to remuneration by commercial fees. Providing facilities for which airlines pay constitutes an economic activity.<sup>11</sup> So too some, though not all, of ELPA's activities in Greece constitute an economic activity.

So ELPA is an 'undertaking'. But – to proceed with the orthodox analytical structure used in cases arising under Article 82 EC - does it occupy a dominant position within the common market? In the context of an Article 234 preliminary reference the matter ultimately falls for determination by the national court. However, the Court provided relevant interpretative guidance. The relevant market, it appeared to the Court, is the 'functionally complementary'<sup>12</sup> organisation of motorcycling events plus their commercial exploitation by means of sponsorship, advertising and insurance contracts on Greek territory.<sup>13</sup> A 'dominant position' under Article 82 EC concerns 'a position of economic strength held by

## Article 82 EC and sporting 'conflict of interest': The judgment in MOTOE

an undertaking, which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers'<sup>14</sup> and this position of strength may be held as a result of the statutory grant of special or exclusive rights to fix the conditions on which other undertakings may gain access to the relevant market. And although Article 82 applies only on condition that trade between Member States is affected, the Court pointed out that even where the undertaking's conduct relates only to the marketing of products in a single Member State it is perfectly possible that it may 'have the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about'.<sup>15</sup> As Advocate General Kokott put it in her Opinion, following the Commission, 'the business of sport is becoming international'. The Greek rules hinder that evolution and, since their actual or potential effect is not felt solely on Greek territory, they consequently fall within the scope of the EC Treaty.

For all the due deference to the role of the referring national court in disposing of the case, the Court's judgment in MOTOE is designed to leave little room to doubt that ELPA's conduct is subject to the control of Article 82. Its dominant position is however the consequence of State regulation. This, then, invites consideration of Article 86 EC, which in its first paragraph provides that, in the case of undertakings to which Member States grant special or exclusive rights, Member States are neither to enact nor maintain in force any measure contrary, in particular, to the rules contained in the Treaty with regard to competition. This plainly fits the situation into which ELPA has been placed by Greek law. And though Article 86(2) EC allows Member States to confer exclusive rights which may be damaging to the competitive process in so far as they promote the operation of services of general economic interest, the Court noted that as regards the organisation and commercial exploitation of motorcycling events it had not been claimed that ELPA's functions derived from an act of public authority; whereas, approving the approach of Advocate General Kokott, it added curtly that the Greek State's allocation to ELPA of an exclusive right to give consent to applications to organise events does not count as an 'economic activity'. So the protection afforded by Article 86(2) EC did not fit the case.

Reaching the final stage of orthodox analysis under Articles 82 and 86 EC, and assuming the existence of a

dominant position held by ELPA, the question is whether there has been an abuse of the type forbidden by Articles 82 and 86(1).

The referring Greek court pointed out that while ELPA is named under Greek law as the only legal person entitled to give consent to any application for authorisation to organise a motorcycling event, ELPA is also itself directly involved in the organising of events and the determination of prizes as well as the associated economic activities such as sponsorship and advertising. And focus on this conflict of interest provided the cutting-edge of the Court's judgment in MOTOE.

A Member State violates the Treaty, specifically Articles 82 and 86(1) EC, where the undertaking exercises the special or exclusive rights conferred upon it and thereby is led to abuse its dominant position. But not only that. A violation occurs where such rights are liable to create a situation in which that undertaking is led to commit such abuses; or where they give rise to a risk of an abuse of a dominant position.<sup>16</sup> This approach seems fatal to the possibility that the Greek arrangements governing the organisation of motorcycle events could be permitted under EC law. For the Court went on to insist that a 'system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators'.<sup>17</sup> ELPA organises and commercially exploits motorcycling events; ELPA also decides whether to give consent to applications to organise competing events, while itself needing no consent from any other body. It therefore has 'an obvious advantage over its competitors'; its right may lead it 'to deny other operators access to the relevant market'.<sup>18</sup> It could 'distort competition by favouring events which it organises or those in whose organisation it participates'.<sup>19</sup>

This is stark and it is quite brutal! The judgment comes very close to an approach that can be termed 'inevitable abuse'. In principle the identification of a dominant position is distinct from a determination whether that dominant position has been abused, for Article 82 prohibits only the abuse of a dominant position, not its acquisition nor its existence. However, where it has been found that in practice the creation of a dominant position carries with it an inevitable stench of abuse, then the separation in principle between the finding of a dominant position and the finding of abuse is conflated. The one leads to the other. This seems to lie at the heart of the Court's approach in MOTOE. It should again be appreciated that this is not a twist in the law

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designed to catch sporting practices. Admittedly the Court's approach represents a remarkably vigorous reading of the scope of control exercised by Articles 82 and 86 EC, but it is not inconsistent with orthodox practice under EC competition law. Instances of 'conflict of interest' remote from the sports sector dot the Court's decision-making record pursuant to these Treaty provisions.<sup>20</sup> However, sporting bodies may be especially vulnerable to findings of acute conflict of interest. And MOTOE's message holds that an acquisition of exclusive power to determine which events are to be permitted in circumstances where the commercial interests of the holder of that exclusive power are directly affected seems to bring with it an inevitable finding of at least a risk of abuse, which is sufficient to trigger a finding of violation of Article 82 EC (and, in so far as State regulation is also involved, Article 86 EC).

### 4. Comment

The identification of a conflict of interest from which ELPA suffers lies at the heart of the Court's disapproval. ELPA has a 'dual role', in the phrase employed by Advocate General Kokott, and this leads to legal consequences under Article 82. So does MOTOE imply that sporting federations must ruthlessly separate their regulatory functions from any whiff of commercial advantage in order to avoid condemnation under Article 82 – and that the State too must withdraw special rights granted to such sporting bodies in order to escape condemnation under Article 86? It certainly pushes in that direction. There is, moreover, existing practice of the Commission in this vein. In FIA (Formula One) part of the Commission's objections related to rules that provided a financial disincentive for contracted broadcasters to show motor sports events that competed with Formula One.<sup>21</sup> This was also a case of sporting 'conflict of interest' to which the Treaty competition rules were applied, albeit that there was no State involvement. The Commission was satisfied with a solution according to which the FIA retreated to a regulatory role, thereby releasing broadcasters to make their own commercial choices about which events to show. And commitments were made that objective and transparent criteria would govern the FIA's decisions on the number of events to be authorised.

Nonetheless there is some room for manoeuvre for sports bodies wishing jealously to cling on to the bundle of regulatory and commercial functions they typically discharge. In fact, MOTOE, as a ruling requiring adaptation in but not abandonment of established patterns of sports governance, stands with other

judgments concerning sport such as Bosman, Lehtonen, and Meca-Medina. In Bosman the whole notion of a transfer system was not ruled incompatible with EC law, only that transfer system was condemned.<sup>22</sup> In Lehtonen the whole notion of transfer 'windows' was not ruled incompatible with EC law, only that (discriminatory) window was impugned.<sup>23</sup> In Meca-Medina the whole notion of doping controls was not ruled incompatible with EC law, only rules that are excessive judged with reference to a finding of doping or with regard to the severity of penalties would infringe the Treaty competition rules.<sup>24</sup>

So in MOTOE the whole notion of regulated access to the market for staging sports events was not ruled incompatible with EC law, only that system which generated such plain and profound conflict of interest was condemned.

Accordingly MOTOE does not imply that EC law expects that organisation of sports events should become a free-for-all. A system involving prior consent is not of itself objectionable: acting as a 'gatekeeper' is an obvious task of a sports federation. The Opinion of Advocate General Kokott in MOTOE is helpful on this point. She observed that as a matter of EC law:

***'there can be no objection if the national legislature provides in certain cases that the relevant authorities should obtain expert advice before granting authorisation for an activity. Generally, it may therefore be appropriate to involve the sports associations concerned in decisions relating to sport. The particular characteristics of sport and of the sport in question can best be taken into account in this way.'***

And accordingly sport can certainly be regulated. Structures for checking matters such as the safety of planned events, based on prior licensing, are capable of complying with EC law despite their restraining effect on would-be organisers. But beyond safety there is a more general and proper regulatory role to be performed by sports federations. Advocate General Kokott accepted that there is typically a need for overarching control, involving the setting of a timetable for events and the fixing of uniform rules for a sport. There is not necessarily an objection per se to the 'pyramid' system of governance which is common in sport<sup>25</sup> (though detailed decisions made under its auspices may be vulnerable to challenge<sup>26</sup>). Advocate General Kokott is rightly anxious to declare the lawful nature of practices that serve an 'objective justification in the interests of sport'.<sup>27</sup> The objection in MOTOE is not to regulation of sport but rather to this system of which MOTOE fell foul.

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The Court does not directly address the issue of the admitted special expertise of sports federations with the care helpfully demonstrated by its Advocate General, but nothing in the Court's ruling is inconsistent with her approach. Sports federations do have special expertise (in rooting out doping, in planning a calendar of events, in fixing the 'rules of the game', and so on) and EC law does not require that they be dislodged from their position of authority. But the detailed manner in which the sports regulator performs its task must be checked for compliance with EC law. Acceptance of the special role of a sports federation as regulator does not carry with it an uncritical acceptance of all its chosen practices. And it is the mixing of regulatory functions and economic incentives which leads sports regulators into difficulties under EC law.

But it remains the case that prior approval is a potentially proper and lawful feature of a regime governing the staging of sports events. Would-be event organisers should not read the ruling in MOTOE and assume the gate has been flung open. Sports federations will continue to arrange the calendar and to decide how many events should be permitted. They will doubtless periodically refuse to give prior approval to new events. That is not of itself abusive, even if plainly frustrating to would-be new organisers. The key issue is the conduct of the prior approval system. A sports regulator can clearly be centrally involved, indeed exclusively responsible, but the procedure must be adapted to reflect its incentives. In MOTOE both the referring Greek court and the European Court make some play of the absence of any procedural restraints on the way that ELPA exercises its powers. There are no restrictions, obligations or opportunities for review laid down by Greek law.<sup>28</sup> And indeed the operative part of the judgment concludes with reference to this feature which maximises ELPA's autonomy and power:

***'A legal person whose activities consist not only in taking part in administrative decisions authorising the organisation of motorcycling events, but also in organising such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts, falls within the scope of Articles 82 EC and 86 EC. Those articles preclude a national rule which confers on a legal person, which organises motorcycling competitions and enters, in that connection, into sponsorship, advertising and insurance contracts, the power to give consent to applications for authorisation to organise such competitions, without that power being made subject to restrictions, obligations and review.'***

So it is possible and, in my view, correct to interpret the judgment as envisaging that a sporting federation may

be given exclusive rights to decide which competitions may take place, even where it has a direct commercial interest in the matter itself, provided that its procedures and criteria for selection are transparent, objectively justified and non-discriminatory and provided also that they are followed faithfully and openly. There should moreover be a right to a hearing afforded to the applicant promoter and a there should be duty to give reasons for decisions taken, which should be subject to the possibility of review by an independent body. As a matter of EC law one would argue that such safeguards eliminate the risk of abuse and therefore shelter the arrangements from condemnation pursuant to Article 82. This approach is visible elsewhere in the case law dealing with Articles 82 and 86<sup>29</sup> and, in fact, it is consistent with the Court's approach to the law of free movement, where systems requiring prior approval before a product or service may be marketed can be justified only if the restriction on trade is proportionate to the objective pursued and provided applicable criteria are objective, non-discriminatory and known in advance.<sup>30</sup> The concern is to define as tightly as possible the basis of the decision-making process in order to prevent arbitrary or self-motivated choices. Clearly, however, the safeguards attached to the authorisation procedure must be genuine and effective. They must be sufficiently robust to provide a convincing counter-balance to the risk that the sports federation's commercial interests will influence its attitude to the authorisation of competing events. As mentioned above, the core of the Court's concern in MOTOE is to require 'equality of opportunity' between the various economic operators'.<sup>31</sup> Any preference for the authorising federation's own commercial interests in choosing whether or not to grant consent irredeemably taints the system. That may well suggest a need for structural change within federations so that the regulatory arm is kept organisationally scrupulously separate from the commercial arm. A sports regulator which went so far as completely to surrender its commercial activities would be in the safest position – it might not even constitute an 'undertaking' within the meaning of EC law<sup>32</sup> and, even if it does, the risk of abuse would be minimised. But EC law does not go so far as to demand that surrender of commercial activities by a sports regulator. It is the conflict of interest under which sports regulators may labour – and of which ELPA was egregiously guilty – which raises concerns, and they may be met by structural separation of regulatory and commercial activities within a sports regulator combined with effective procedural safeguards to ensure fairness in the decision-making process.

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### 5. Conclusion

Meca-Medina was a landmark judgment.<sup>33</sup> It was one of the first rulings of the Court applying the Treaty's competition rules to sport.<sup>34</sup> But more broadly it provided a clear and (in my view) intellectually satisfying framework for understanding how and why EC trade law applies to sport. It insists that the legally central questions surround the identification of which sporting rules are truly necessary for the organisation of a particular sport. Such rules are not incompatible with EC law even though they may have economic implications that are detrimental to individuals.<sup>35</sup> Naturally the ruling in Meca Medina did not offer answers to the many detailed questions raised about the scope of intervention of EC law into sporting practices. Instead it assumes that those questions need to be resolved on a case-by-case basis. As Advocate General Kokott put it in MOTOE, citing Meca Medina, 'each individual activity that exhibits a connection with sport must on each occasion be examined to ascertain whether it is economic in nature or not'. And if it is, its compatibility with EC law needs to be checked.<sup>36</sup> For this reason the judgment in Meca Medina has attracted criticism from those engaged in sports governance for its perceived contribution to uncertainty.<sup>37</sup> But the alternative – finding bright lines that limit the reach of EC law, beyond which sporting autonomy reigns supreme – is inconsistent with the very nature of EC trade law, a broad functionally-driven system, and in any event lacks any demonstrated intellectually robust justification for the exclusion of legal supervision from an economically significant sector.<sup>38</sup> Meca-Medina in short accepts that sport may be special – but invites sporting bodies to show how and why this so, and thereby to show that practices that have economic effects are nevertheless necessary elements in sporting competition and therefore compatible with EC law.

MOTOE is a decision of the Grand Chamber. It mentions Meca Medina, a ruling of the Third Chamber, but does not explicitly follow its reasoning. But it has in common with it the ready acceptance that regulatory decisions taken by sports bodies frequently have significant economic consequences and that accordingly legal supervision pursuant to the EC Treaty is required. Most of all, the Grand Chamber in MOTOE has shown no interest in resuscitating the extraordinarily profound deference shown to the autonomy of sport by the Court of First Instance in Meca-Medina.<sup>39</sup> Nor has it been tempted by the partisan case in favour of maximising the autonomy of sports governing bodies made in the 'Arnaut Report' – the so-called Independent European Sport Review published in October 2006 which is deeply flawed in its legal analysis as a result of its

reliance on the CFI ruling in Meca Medina to the almost complete exclusion of the ECJ's.<sup>40</sup> Few rules are purely sporting in nature: and, following this key insight, the Court's ruling in MOTOE adheres to that in Meca Medina by excluding the very broad claims to autonomy strategically made by sports bodies. Instead the European Court, in Meca Medina and now in MOTOE, has treated sport realistically: as a sector with economic weight which is therefore within the scope of the EC Treaty, albeit that EC law must be sensitive to the special characteristics of sport.<sup>41</sup> That too is the message of the European Commission's White Paper on Sport issued in July 2007.<sup>42</sup> Its legal analysis is heavily and properly dependent on the ECJ ruling in Meca-Medina, and concludes that the judgment reveals an interpretation of Articles 81 and 82 which 'provides sufficient flexibility to take account of the specificity of sport and does not impede sporting rules that pursue a legitimate objective (such as the organisation and proper conduct of sport), are indispensable (inherent) to achieve the objective and proportionate in light of the objective pursued'.<sup>43</sup> Case-by-case inquiry into sporting practices is required. Quite so. Were the Commission's White Paper to be re-drafted today, the ruling in MOTOE would certainly need to be absorbed into the discussion on matters such as the licensing of clubs and in particular into the legal analysis pertaining to competition law but nothing in MOTOE contradicts the essential features of the sober and careful analysis prepared by the Commission in its White Paper.

In conclusion, there is room in EC law to defer to the special expertise possessed by sports regulators. MOTOE does not demolish the legitimate claim of sports regulators to set a calendar of events, just as Meca Medina does not outlaw doping controls. But the details of the procedures involved are not immune from the application of EC law in so far as they exert economic effects. The structuring of the decision making process in sport must ensure that priority is not given to the economic interests of the sports federation. The frequently endemic 'conflict of interest' must be recognised and avoided so that regulatory power is not used to promote commercial advantage. Ultimately EC trade law puts public and private practices that fall within the scope of the Treaty to the test and frequently requires their adaptation, but it always leaves room for the relevant public and private actors to show justification for the cherished status quo. BASL

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- 1 Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* judgment of 1 July 2008.
- 2 Case 36/74 *Walrave and Koch* [1974] ECR 1405, Case C-415/93 *Bosman* [1995] ECR I-4921, Case C-519/04 *P Meca-Medina and Majcen v Commission* [2006] ECR I-6991, all cited at para 22 of the judgment in MOTOE.
- 3 Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* judgment of 1 July 2008.
- 4 See e.g. R Parrish, *Sports law and policy in the European Union* (2003) Manchester, Manchester University Press; R Parrish and S Miettinen, *The Sporting Exception in European Law* (2007) Den Haag, T M C Asser Press; S Weatherill, *European Sports Law* (2007) Den Haag, T M C Asser Press; L Barani, 'The Role of the European Court of Justice as a Political Actor in the Integration Process: The Case of Sport Regulation after the Bosman Ruling' (2005) 1 *Journal of Contemporary European Research* 42; S Van den Bogaert and A Vermeersch, 'Sport and the European Treaty: a Tale of Uneasy Bedfellows' (2006) 31 *ELRev* 821; D Dimitrakopoulos, 'More than a Market? The Regulation of Sports in the EU' (2006) 41 *Government and Opposition* 561; E Szyszczak, 'Is Sport special?', Ch 1 in Bogusz B, Cygan A, and Szyszczak E (eds), *The Regulation of Sport in the European Union* (2007), Cheltenham, Edward Elgar Publishing.
- 5 E.g. Case C-41/90 *Höfner and Elser* [1991] ECR I-1979; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *ADK Bundesverband and Others* [2004] ECR I-2493, all cited in para 21 of the judgment in MOTOE. Also helpful is Case C-55/96 *Job Centre* [1997] ECR I-7119 and for discussion from the perspective of general EC competition law see W-H Roth, Annotation, (2007) 44 *CMLRev* 1131.
- 6 Eg *Joined Cases C-159/91 and C-160/91 Poucet and Pistre* [1993] ECR I-637.
- 7 Eg Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, Case C-82/01 *P Aéroports de Paris v Commission* [2002] ECR I-9297, both cited at para 24 of MOTOE.
- 8 Case C-309/99 *Wouters* [2002] ECR I-1577, paras 111-115.
- 9 Para 25 of the judgment in MOTOE.
- 10 Para 26 of the judgment.
- 11 Case C-82/01 *P Aéroports de Paris v Commission* [2002] ECR I-9297, paras 68-83.
- 12 Para 33 of the judgment.
- 13 At para 60 of her Opinion AG Kokott raises the (perfectly logical) possibility that the market may extend beyond motorcycling, but the Court does not pursue this. The national court might.
- 14 Eg Case 27/76 *United Brands and United Brands Continentaal v Commission* [1978] ECR 207, Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, Case 322/81 *Nederlandsche Banden-Industrie-Michelin v Commission* [1983] ECR 3461, all cited at para 37 of MOTOE.
- 15 Para 42 of the judgment.
- 16 Eg Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, Case C-260/89 *ERT* [1991] ECR I-2925, Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, Case C-323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077, Case C-380/05 *Centro Europa 7* [2008] ECR I-0000, all cited in paras 49 and 50 of the judgment in MOTOE. Also helpful is Case C-320/91 *Corbeau* [1993] ECR I-2533.
- 17 Para 51 of the judgment.
- 18 Para 51 of the judgment. The Court cites, as analogies, Case C-202/88 *France v Commission* [1991] ECR I-1223 and Case C-18/88 *GB Inno BM* [1991] ECR I-5941.
- 19 Para 52 of the judgment.
- 20 See the decisions mentioned in n 16 above. For examination see R Whish, *Competition Law* (Lexis Nexis Butterworths, 5th ed, 2003), Chapter 6, dealing in particular with cases on 'conflict of interest' at p.228.
- 21 COMP 35.163, Notice published at OJ 2001 C169/5.
- 22 Case C-415/93 note 2 above. Cf S Gardiner and R Welch, 'The Contractual Dynamics of Team Stability versus Player Mobility: who rules the 'The Beautiful Game'', (2007) 5/1 *Entertainment and Sports Law Journal*, available via <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj>.
- 23 Case C-176/96 *Lehtonen v FRBSB* [2000] ECR I-2681.
- 24 Case C-519/04 *P* note 2 above, para 48 of the judgment.
- 25 Para 96 of AG Kokott's Opinion.
- 26 See S Weatherill, 'Is the Pyramid Compatible with EC Law?' 2005/3-4 *International Sports Law Journal* 3.
- 27 Para 96.
- 28 Paras 18, 19, 48 and 52 of the judgment.
- 29 See eg Case C-67/96 *Albany International BV* [1999] ECR I-5751 paras 88-122, esp para 120 on respect for the expertise of the decision-making body and para 121 on safeguards attached to its decision-making process. In *Albany* the Court expressly finds differences from the situation at stake in Case C-18/88 n 18 above.
- 30 Eg Case C-390/99 *Canal Satellite Digital SL* [2002] ECR I-000 esp para 35; Case C-432/03 *Commission v Portugal* [2005] ECR I-9665, esp para 50; Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers* judgment of 19 June 2008, esp paras 33-37.
- 31 Para 51 of the judgment.
- 32 Cf n 8 above.
- 33 Case C-519/04 *P* n 2 above.
- 34 See also, considering Art 82 in the case of agents, Case T-193/02 *Piau v Commission* [2005] ECR II-209, upheld in Case C-171/05 *P Piau v Commission* [2006] ECR I-37.
- 35 For comment see S Weatherill, 'Anti-doping revisited – the demise of the rule of 'purely sporting interest'' [2006] *European Competition Law Review* 645; E Szyszczak, 'Competition and sport' (2007) 32 *ELRev* 95; M Wathelet, 'L'arrêt Meca-Medina et Majcen: plus qu'un coup dans l'eau' 2006/41 *Revue de Jurisprudence de Liège, Mon et Bruxelles* 1799; A Rincon, 'EC Competition and Internal Market Law: on the existence of a Sporting Exemption and its withdrawal' (2007) 3 *Journal of Contemporary European Research* 224. For exploration of the evolution of the Court's case law see R Parrish and S Miettinen, *The Sporting Exception in European Law* (2007) Den Haag, T M C Asser Press.
- 36 For a good example of how the approach of the Court in *Meca Medina* now provides the starting point for assessing the compatibility of particular sporting rules with EC law see A Klees, 'Die sogenannte 50+1 Regel im deutschen Profifussball im Lichte des europäischen Wettbewerbsrechts' 13/2008 *EuZW* 391.
- 37 See eg G Infantino G [Director of Legal Affairs at UEFA], *Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport?* UEFA paper 02/10/06, available at [http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf); J Zylberstein, 'Collision entre idéaux sportifs et contingences économiques dans l'arrêt Meca-Medina' 2007/1-2 *Cahiers de Droit Européen* 218.
- 38 For a particularly incisive critique of the pretensions of the lex sportiva see K Foster, 'Is there a Global Sports Law?' (2003) 2 *Entertainment Law* 1, available via <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number1/foster.pdf>.
- 39 Case T-313/02 *Meca-Medina and Majcen v Commission* [2004] ECR II-3291, set aside by the ECJ in Case C-519/04 *P Meca-Medina and Majcen v Commission* n 2 above. For criticism of the CFI judgment see S Weatherill, 'Anti-doping rules and EC Law' [2005] *European Competition Law Review* 416.
- 40 *Independent European Sport Review*, available at [www.independentfootballreview.com](http://www.independentfootballreview.com).
- 41 S Weatherill, 'On overlapping legal orders: what is the 'purely sporting rule'?', Ch. 3, pp.48-73, in Bogusz B, Cygan A, and Szyszczak E (eds), *The Regulation of Sport in the European Union* (2007) Cheltenham, Edward Elgar Publishing.
- 42 *White Paper on Sport*, COM (2007) 391, 11 July 2007, available via [http://ec.europa.eu/sport/index\\_en.html](http://ec.europa.eu/sport/index_en.html). For comment see S Weatherill, 'The White Paper on Sport as an Exercise in Better Regulation' [2008] 1-2 *International Sports Law Journal* 3.
- 43 Page 69, Annex I of the Staff Working Document n 42 above.

# Should the Football Authorities Allow Third-Party Ownership of the Registrations of Football Players?

By George Castro, solicitor at Teacher Stern LLP

## Introduction

The approach proposed by the FA Premier League (PL) to third-party ownership of the economic rights attaching to the registrations of football players is both ultra-protectionist and not in the interests of the global game. Although only football clubs can own the federative rights attaching to the registrations of football players, following the recent transfers of Javier Mascherano (Mascherano) and Carlos Tevez (Tevez), there has been intense speculation within the media and football circles generally as to the efficacy of third-parties owning the economic rights attaching to the registrations of football players. The reality of the Tevez and Mascherano situation was that third-party companies owned such rights. The agreements entered into with the third-party companies entitled those companies, amongst other things, to receive the proceeds of the transfer fees pursuant to the sale of the players. The controversy surrounding the Tevez and Mascherano affair has resulted in the Fédération Internationale de Football Association (FIFA) amending its regulations and the PL announcing that it will be taking a much keener interest in such third-party relationships,<sup>1</sup> to the extent that it appears intent on banning such arrangements outright.<sup>2</sup> This contrasts with the approach of some European and many South American football associations who adopt a fairly laissez-faire approach to the issue. This article will examine whether the football authorities should allow these kinds of third-party arrangements to exist at all. After analysing the reasons for and against such third-party arrangements it will conclude that third-parties should be allowed to own an interest in the economic rights attaching to a player's registration. However, this is not to say that the practice should be unregulated. Protecting the integrity of the sport and the authenticity of sporting results is of paramount importance. Therefore, the conclusion is subject to a number of caveats including the requirement for transparency.

## FIFA and the FA's Stance

FIFA's Regulations on the Status and Transfer of Players (the FIFA Regulations) currently provide that only players registered at an association are eligible to participate in organised football. In order for a player to be able to play within a league, such player must be registered with a club within that league.<sup>3</sup> The FIFA Regulations go on to state that a player can only be registered with one club at a time.<sup>4</sup> Clearly, only a club can own the registrations of football players. Therefore, a distinction needs to be drawn between the federative and economic rights attaching to a player's registration.

The federative right attaching to a player's registration refers to the right to register a player with a national association thus ensuring that the player can only play for a particular club. This is obviously a right that can only be owned by a club. The economic rights attaching to a player's registration refers to the right to receive the proceeds of the transfer fee following the sale of a player's registration to another club. This is purely an economic right. Given that the FIFA Regulations provide that the federative rights of a player's registration can only be owned by a club, this article is concerned with whether the football authorities should allow third parties to own the economic rights attaching to a player's registration, i.e. the right to receive all or a share of the proceeds of the transfer fee following the sale of a player. Each football player is an asset of the club with which he is registered. Like any other asset belonging to a business, football players can be bought, sold and even loaned. It therefore follows, at least theoretically, that clubs, as they can do with any other asset, should be entitled to raise finance against the value attaching to its football players. Why should the football authorities intervene if a football club and a third-party agree to enter into a private agreement whereby such third-party pays a certain amount of money to the club in return for a percentage share of the future transfer fee that the club is able to negotiate in the event that the club decides, at its sole discretion, to sell the player?

## Should the Football Authorities Allow Third-Party Ownership of the Registrations of Football Players?

### The Current Regulatory Position

The current regulatory position is as follows. In October 2007 the Executive Committee of FIFA voted to tighten FIFA's rules surrounding third-party ownership of players. As of 1 January 2008, the FIFA Regulations came into effect. New Article 18bis states that:

***"No club shall enter into a contract which enables any other party to the contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams."***

Article 18bis goes on to grant the FIFA Disciplinary Committee the ability to impose disciplinary measures on those clubs that do not abide by the rule. What is meant by 'disciplinary measures' remains to be seen. The change to the FIFA Regulations brought FIFA into line with the PL rules set out in the Premier League Handbook 2007/2008 as now superseded by the Premier League Handbook 2008/2009 (PL Rules). Specifically, Article 18bis mirrors PL Rule V20 (formerly PL Rule U18) which provides that:

***"No Club shall enter into a contract which enables any other party to that contract to acquire the ability materially to influence its policies or the performance of its teams in League Matches or in any of the competitions set out in Rule E.10."***<sup>5</sup>

Article 18bis of the FIFA Regulations and rule V20 of the PL Rules do not of themselves expressly prohibit third-party ownership of the economic rights attaching to a player's registration. Rather, the focus is to prevent a third-party from being able to 'influence' the policies of a club. Therefore, the first question must be: does an arrangement whereby a third-party owns the economic rights attaching to a player's registration mean that such third-party has the ability to materially influence a club's employment and transfer-related matters or its independence, its policies or the performance of its teams? Largely, this will depend upon the contractual terms governing the relationship between the club and the third-party.

### The Tevez Affair

In April 2007 a Premier League tribunal fined West Ham United £5,500,000. This fine was by way of sanction for West Ham United's breach of then Premier League rules B13 and U18 by entering into the Tevez and Mascherano agreements and for its subsequent conduct. The tribunal decided not to dock any points from West Ham United for its breach of the aforementioned rules.<sup>6</sup> Sheffield United was subsequently relegated from the Barclays Premier League by virtue of finishing 3 points behind

West Ham United at the end of the 2006/2007 season. Following its relegation, Sheffield United lost an appeal against its relegation from the Barclays Premier League. Sheffield United subsequently launched a further action against West Ham United seeking compensation for losses suffered and for lost business opportunities as a result of its relegation from the Barclays Premier League which, it claimed, was due to West Ham United's breach of then Premier League rules B13 and U18. On 23 September 2008, the tribunal presiding over the arbitration ruled in Sheffield United's favour<sup>7</sup> and Sheffield United is now seeking £30,000,000 in compensation. Furthermore, Sheffield United has been granted a temporary injunction against West Ham United by the high court preventing West Ham United from appealing the decision of the tribunal to the Court of Arbitration for Sport.<sup>8</sup> It has been reported that West Ham United has lodged an appeal against the high court ruling.<sup>9</sup> Consequently, it appears that the legal battle surrounding the Tevez affair will stretch into the new year. The Tevez and Mascherano agreements caused such a furore because they gave the third parties involved the right to unilaterally terminate the players' playing contracts with West Ham United during any transfer window.<sup>10</sup> Clearly, such a provision allows the third-party to materially influence a club's independence in employment and transfer-related matters. Had the third-party agreement merely recognised the right for the third-party to receive a percentage share of any future transfer fee obtained by the club for the players, it is very difficult to see how such an agreement could be said to materially influence a club's employment and transfer-related matters or its independence, its policies or the performance of its teams.

### The Regulatory Position Going Forward

Although article 18bis of the FIFA Regulations and PL Rule V20 would appear to leave the door open for third parties to continue to invest in the economic rights attaching to a player's registration, there have been reports that the PL will interpret the PL Rules more severely to restrict the practice<sup>11</sup> and in fact go beyond new Article 18bis of the FIFA Regulations. It is expected that a statement of principles, agreed between the PL and the Barclays Premier League clubs, concerning third-party ownership will be formalised. It has been reported that the key change states that:

***"Before registering a player for a club the board [of the PL] will need to be satisfied that there exists no agreements with third parties under which such third parties continue to own any registration or economic rights or the like in the player following registration."***<sup>12</sup>

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Furthermore, it is understood that any ownership of the economic rights attaching to a player's registration by a third-party such as an agent will be considered to be a 'material influence' upon the policies of the club for the purposes of PL Rule V20.<sup>13</sup> The PL can afford to take such an approach as it only has to consider the interests of the clubs forming the Barclays Premier League. FIFA, as custodian of the global game, cannot adopt such a position without first giving due consideration to the needs of football worldwide. As will be demonstrated, third-party investment in the economic rights attaching to a player's registration does provide tangible benefits to poorer clubs in poorer leagues. For this reason FIFA cannot afford to be as gung-ho as the financially secure and independent PL. At this point it is pertinent to ask the question why are FIFA and, particularly, the PL so concerned about third-party ownership of the economic rights attaching to a player's registration?

### Third Party Ownership

Third-party ownership of the economic rights attaching to a player's registration is a growing phenomenon in European football. It has been estimated that there are up to 15 players currently plying their trade in the Barclays Premier League whose economic rights are not entirely owned by the clubs at which they are registered.<sup>14</sup> The practice is even more prevalent within other European football leagues notably the Spanish, Portuguese and Italian leagues.<sup>15</sup> Such activity causes concern for the football authorities for a number of reasons. Speaking following the introduction of the FIFA Regulations, FIFA President Sepp Blatter stated:

***"FIFA has decided to take action in order to protect the unpredictability of sporting results and the integrity of competition which have been under threat recently within football... The Strategic Committee demonstrated right from its first meeting in October that it would tackle these problems head on."***<sup>16</sup>

Furthermore, a PL spokesperson speaking about the possibility of tightening the PL Rules said:

***"Clubs develop players either to become better clubs or to sell them on. Third-party ownership takes away from that... Secondly, we are concerned about dual influence. In a situation where companies own players across a competition, does that raise issues about the integrity of that competition?"***<sup>17</sup>

From these two statements it is possible to discern some of the reasons why the PL and FIFA are concerned by the growing phenomenon of third-party ownership of the economic rights attaching to a player's

registration; namely, the potential threat posed by such ownership to the integrity of the sport and the sporting competition and the ability of the clubs to 'become better clubs' by receiving all of the proceeds of a transfer. Although the concern that third parties may be able to influence the independence and performance of the clubs involved has largely been addressed by the new FIFA Regulations, the other concerns of the PL and FIFA have potentially not yet been safeguarded.

### Protecting the Integrity of the Game

One of the key roles of any governing body, irrespective of the sport that it governs, is the role of safeguarding the integrity of the sport by protecting the integrity of competition and the authenticity of sporting results.<sup>18</sup> This was recognised by the Court of Arbitration for Sport's decision in ENIC.<sup>19</sup> Although the ENIC case dealt with the dual ownership of football clubs, the considerations that led the Court of Arbitration for Sport to rule in favour of the rules of UEFA and against ENIC are potentially equally applicable to the debate surrounding third-party ownership of the economic rights attaching to a player's registration. If the integrity of a sport is damaged or tarnished in any way then the sport's reputation becomes affected, fans become discontented and, ultimately, the popularity and interest in the sport could wane. This can be seen, for example, in the decline in popularity of baseball and athletics following the Bay Area Laboratory Co-Operative scandal involving athletes such as Barry Bonds and Marion Jones.<sup>20</sup> The achievements of these athletes were called into question or dismissed due to their connection to performance enhancing drugs. As the general public began to tar all the competitors with the same brush, interest in, and viewing figures for, those sports waned. When the general public loses faith in the sport it is watching, that sport becomes nothing more than glorified 'sports entertainment'. If third-party ownership of the economic rights attaching to a player's registration really can damage the integrity of football then the authorities are right to be concerned. Of course, the question that must be answered is whether or not third-party ownership of the economic rights attaching to a player's registration really can damage the integrity of football.

From the PL's perspective the answer appears to be yes. The PL believes that third-party ownership of the economic rights attaching to a player's registration has the potential to damage the integrity of football because there is the potential to affect the authenticity of sporting results. Imagine a situation whereby a third-party individual or entity owns a share of the economic

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rights of many players within the Barclays Premier League, each of whom is registered with different clubs. When these players play against each other there is the potential for such third-party to affect the outcome of the fixture if it is able to influence either the clubs with which the players are registered or the players involved.

The ability to influence a club in this situation would depend upon the contractual relationship between the club and the third party. In order to affect the result of any fixture the third-party would have to be able to influence the selection policies of the club. Clearly, if the contract between the club and the third-party allowed the third-party to influence the selection policies of the club, such a contract would be contrary to the FIFA Regulations and the PL Rules. It is difficult to see how the third-party would be able to influence the independence of the club in its selection policies – and therefore the authenticity of sporting results – if the contract between the club and the third-party solely conferred upon the third-party the right to receive a share of the proceeds of a future transfer fee and no other right. Consequently, the integrity of the sport and the authenticity of sporting results are already sufficiently protected against this type of abuse by the current FIFA Regulations and the PL Rules. There appears to be no need to bolster these provisions as has been contemplated by the PL. That said, the sanction for non-compliance with rules such as new article 18bis of the FIFA Regulations or PL Rule V20 must provide a real punishment and deterrent. In the recent Tevez affair, the £5,500,000 fine imposed upon West Ham United was not a suitable punishment for West Ham United's breach of the then PL Rules B13 and U18. When compared to the alternative facing West Ham United at the time, i.e. relegation, a fine does not constitute proportionate punishment for West Ham United's breaches. Any club found guilty of allowing a third-party to influence its policies and therefore call into question the integrity of the sport and the authenticity of sporting results ought to be punished accordingly.

### Register of Third Party Ownership

The ability to influence the authenticity of sporting results by influencing the players themselves appears to be something of a red herring. Assuming that the third-party owner of the economic rights attaching to a player's registration has no control over the amount of remuneration that the player is able to attain, it is difficult to see how such a third-party would be able to influence the player. Provided that the contractual

relationship between the clubs and the third parties are correctly drafted in compliance with the FIFA Regulations and the PL Rules and that such third parties are unable to control the remuneration that a player receives, the risk of such third parties being able to influence the authenticity and unpredictability of sporting results and therefore damage the integrity of the sport is very small. However, in order to ensure that such risk is minimised even further and to ensure the transparency and legal certainty in relation to these transactions, as in Argentina,<sup>21</sup> there ought to be a register maintained by each football association which notes any third-party ownership of the economic rights attaching to a player's registration. In this way, the football authorities would be aware of the true state of play. Going further than in Argentina, the football authorities should use and review the register in order to prevent a situation where one third-party owns a share of the economic rights of too many players within a particular club or competition as this could, rightly or wrongly, lead to a claim of a third-party having the ability to materially influence the conduct of a club or the integrity of a competition. The football authorities and the fans are entitled to know all the facts in relation to the players playing at the clubs and such a register would make this possible.

Whilst both FIFA and the PL are keen to prevent direct influence by a third-party upon a club or player, it would appear that neither FIFA nor the PL have thought about how to deal with the potential problem of indirect influence. A third-party could damage the integrity of the game and affect the authenticity of sporting results by influencing clubs or players by exerting influence over their respective agents or via "gentlemen's agreements". This sort of influence cannot necessarily be controlled by contractual provision as the influence would not take place via the contractual relationship between club and third-party. Nor can it be policed by rules and regulations. FIFA's or the PL's rules only apply to their members. As a third-party investor is not a member of FIFA it would not be bound by FIFA's rules as they do not have the force of law. The only way to prevent this type of potential indirect influence is to bring third-party investors within the framework of football and, therefore, FIFA. FIFA ought to pass a regulation stating that any club wishing to sell economic rights attaching to a player's registration to a third-party must first ensure that the third-party registers with its national association and FIFA as a third-party investor. In order to register as a third-party investor, the third-party ought to be made to sign a standard form agreement with FIFA whereby it agrees to certain terms and conditions. Amongst the terms and conditions ought to

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be a provision whereby the third-party agrees not to exert any influence over a club, player or any of the club's or the player's representatives. The third-party and its interests could then be listed on the register discussed above. In this way, FIFA would have a direct legal recourse against a third-party that damages the integrity of the game by attempting to exert influence over clubs and/or players. If the activities of player's agents can be subject to regulation there is no reason why the activities of third-party investors cannot also be regulated. At present it appears that neither FIFA nor the PL have explored this option.

### Potential Benefits of Third Party Investment

As set out above, the PL has highlighted, as justification for its desire to bolster the PL Rules, the argument that third-party ownership detracts from a club's ability to develop players, either to become better clubs or to sell those players to other clubs for a financial gain. Does third-party ownership really do what the PL claims that it does? Arguably, this type of third-party investment allows smaller, poorer clubs to keep and develop their young players for longer than they would otherwise be able to and, therefore, to procure a larger transfer fee than they might otherwise be able to command. The most successful football clubs are known to scout the best young talent worldwide and to take this talent away from poorer clubs that cannot afford to compete with the financial packages offered by the larger clubs. This tends to occur either before the young player has signed a professional contract with the club that has developed the player since junior level,<sup>22</sup> or soon after they have signed their first professional contract but whilst they are still relatively young, unproven and, therefore, cheap. By comparison, the example of Cristiano Ronaldo and Sporting Lisbon provides an interesting alternative to the age old story of wealthy clubs poaching young talent from poorer clubs at a huge discount.

It has been reported that whilst Cristiano Ronaldo was a 16 year old boy at Sporting Lisbon, a hedge fund bought a 35% stake in the economic rights attaching to the player's registration for £450,000.<sup>23</sup> If £450,000 accurately represented 35% of the player's value then 100% of his value at that time was worth £1,285,714. Two years later, Cristiano Ronaldo was sold to Manchester United Football Club for £12,200,000. Of this transfer fee, £4,270,000 (an amount representing 35% of the transfer fee) was paid to the hedge fund. This left £7,930,000 for Sporting Lisbon. Initially this may seem incredibly unfair. However, had the hedge fund not invested the money that allowed Sporting

Lisbon to be able, financially, to keep and develop Cristiano Ronaldo, it is possible that a larger club could have purchased the player as a 16 year old for an amount somewhere in the region of £1,285,714 (being his value at that time). By being able to develop the player for another two years, Sporting Lisbon was able to earn £6,644,286 more than it might have done had it been forced to sell the player two years earlier. Clearly, this type of investment is not always to the detriment of the selling club.

The implication of the PL spokesman's comment set out above<sup>24</sup> alludes to the fact that money is removed from the game that should not and would not otherwise be removed from the game. Taking the example of Cristiano Ronaldo above, one could argue that the money paid to the hedge fund investor (£4,270,000) represents money that should not and would not ordinarily be removed from the game. This is not technically correct. Firstly, one must take into account the original investment of £450,000 made by the hedge fund. Therefore, the total amount of money 'removed' from the game by virtue of this transaction was £3,820,000. This is still a large sum. However, it is possible that player's value was inflated to the sale price of £12,200,000 because of the investment of the hedge fund and that without such investment he would not have developed into a player with a transfer value of £12,200,000 so quickly, if at all. Third-party investment in the economic rights attaching to a player's registration can aid the development of players at poorer clubs thus raising the transfer value of such players more quickly than would otherwise be possible. This in turn arguably brings more money into the game (by virtue of transfer fees) more quickly than would otherwise be possible. Sporting Lisbon's ability to keep hold of Cristiano Ronaldo for an extra two years before the sale to Manchester United FC meant that as much as an extra £7,094,286<sup>25</sup> was brought into football than if the player had been poached by a larger club as a 16 year old. In turn, this money then filters down through the sport. Whether one accepts this argument or not, the truth of the matter is that whilst the hedge fund effectively made a profit of £3,820,000 on its investment in Cristiano Ronaldo, this was in no way guaranteed when the hedge fund made its investment. The player could have suffered a career threatening injury, become disillusioned with the game or simply never have realised his potential. Had either of the first two possibilities occurred then the hedge fund would not have received any return on its investment. The third-party investor is not guaranteed a return on its investment and so is not always going to be removing money from the game.

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If the hedge fund had purchased 100% of the economic rights of Cristiano Ronaldo and so received 100% of the transfer fee payable there would be far more weight to the argument that third-party investment of this type siphons more money out of the game than it brings into it. In order to guard against this situation, the football authorities could consider a policy whereby third-parties are prevented from purchasing more than a certain percentage of a player's economic rights. In Argentina, for example, third-parties are not allowed to own more than 70% of the economic rights attaching to a player's registration.<sup>26</sup> Such a threshold would allow poorer clubs to find third-party investment whilst allowing the football authorities to prevent against a situation where too much money is siphoned out of the game. By adopting, maintaining and reviewing a register of third-party holders of the economic rights attaching to a player's registration the football authorities would be able to monitor not only how many players a certain third-party has invested in but also the percentage share of the right that has been purchased. This would not only allow the football authority to police the practice to guard against any claim of causing damage to the integrity of the sport and the authenticity of sporting results but also to ensure that the amount of money removed from the game is reasonable.

### The Approach of other football associations to Third-Party Ownership

The approach proposed by the PL is not one that is adopted by all football associations globally. In Europe, many football associations including the Italian,<sup>27</sup> Spanish and Portuguese football associations accept the practice of third-party ownership of economic rights attaching to a player's registration. In Brazil,<sup>28</sup> Argentina,<sup>29</sup> and Uruguay<sup>30</sup> the practice of third party ownership is openly accepted because there is simply not as much money in the game either from gate receipts, sponsors or, most importantly, broadcasting rights as there is in Europe. The clubs in South America do not have the financial resources of their European counterparts. The same is true of African clubs in relation to their European counterparts. This is evidenced by the fact that the best South American and African players are eventually transferred to European clubs. In order to raise finance for the development of South American football, clubs regularly sell a share of the economic rights attaching to a player's registrations. Without the practice it is not beyond the realms of possibility that many South American clubs would go into administration. The benefits conferred by such third-party investment are many. It allows the club to develop its infrastructure, train the pool of playing talent at its

disposal and to actively participate in the transfer market. Third-party ownership of the economic rights attaching to a player's registration provides many clubs with money that they might otherwise never have access to and allows them to, ultimately, be more competitive. It is because of this reality that the South American football authorities embrace the practice of third-party ownership of the economic rights attaching to a player's registration. Consequently, if FIFA was ever to entertain the idea of banning the practice altogether (as the PL is proposing to do), FIFA would have to give regard to the effect such a ban would have on the game globally and, in particular, in those countries where finance does not readily flow into the game as it does in Europe. It is the author's belief that banning the practice of third-party ownership of the economic rights attaching to a player's registration as proposed by the PL is not necessarily in the interests of the global game.

### Conclusion

In conclusion, the football authorities ought to allow third-party ownership of the economic rights attaching to a player's registration, this being the right to a share of the transfer fee received by the club holding such player's registration pursuant to the sale of the player. Considering the needs of the game globally, it is clear that such third-party investment has tangible benefits for poorer clubs within poorer leagues. The investment allows these teams to keep their young talent for longer, participate in the transfer market and potentially recoup larger transfer fees than they might otherwise be able to. This conclusion is subject to a number of caveats. Firstly, the contractual relationships between the club and third-party must comply with the requirements of article 18bis of the FIFA Regulations. Unlike the Tevez and Mascherano arrangements, the contracts between the club and the third-party must not allow the third-party the ability to influence either the club's transfer or selection policies or the player's ability to earn remuneration. Secondly, going further than the current FIFA Regulations, FIFA should enact a regulation whereby clubs cannot sell economic rights to third-parties that have not registered with FIFA as third-party investors. The investors should be made to contract with FIFA that they will not attempt to influence any club, player or club or player's representatives. In this way FIFA would have direct legal recourse against those third-parties that then attempted to exert influence and, therefore, potentially damage the integrity of the game. From a third-party investor's perspective, the inability to influence the club's decision on when to sell the player that is the subject of the investment does mean that the third-party has no

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control or security over its investment. This may make it an unattractive investment opportunity. However, if the third-party desires control and influence then, arguably, it should not be investing at all. Thirdly, each national football association should maintain and review a register listing the third-parties that own an interest in the economic rights attaching to such players' registrations. In this way legal certainty and transparency are maintained thus allowing the relevant football authority the ability to ensure that no one third-party owns interests in too many players at one club or within a competition as this could lead to claims questioning the integrity of the sport. Finally, the sanctions imposed by the football authorities for a breach of rules such as article 18bis of the FIFA Regulations must provide a suitable deterrent to prevent clubs and third parties breaching such rules and regulations. Provided these ideals are complied with and for the reasons detailed above, it is difficult to see how third-party ownership of the economic rights attaching to a player's registration genuinely calls into question the integrity of the sport by casting doubt on the integrity of competition and the authenticity of sporting results. Consequently, it would seem unnecessary to adopt the draconian approach being discussed by the PL for dealing with the issue of third-party ownership as such rules could eventually do harm to the global game by removing a source of finance from poorer clubs in poorer countries that aids the development of youth players and the ability of such clubs to deal in the transfer market. Ultimately, a third-party owning the right to a share of the transfer proceeds received by a selling club when that club sells the relevant player is in reality no different from a sell-on fee whereby a club sells a player to another club and part of the consideration for the sale is the right to receive a percentage of any transfer fee procured by the purchasing club in the event that the purchasing club eventually sells the player. If this arrangement is acceptable between clubs then it should also be acceptable for a third-party to own the right to receive a percentage of a future transfer fee in the event that a club decides, in its absolute discretion, to sell a player in whom such a third-party has invested. ■ **BASL**

## Should the Football Authorities Allow Third-Party Ownership of the Registrations of Football Players?

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- 6 John Ashdown, *Sheffield United confirm victory over West Ham in Tevez case in the Guardian*, 23 September 2008.
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- 9 *Ibid.*
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- 12 Jeremy Wilson, *Premiership Third-Party Ownership Set to End in the Daily Telegraph*, 2 February 2008.
- 13 David Bond, *League Act to Prevent Carlos Tevez Repeat in the Daily Telegraph*, 15 November 2007.
- 14 [www.uk.eurosport.yahoo.com/20072007/fa-press-third-party-fears.html](http://www.uk.eurosport.yahoo.com/20072007/fa-press-third-party-fears.html) *FA to Press FIFA on Third-Party Fears on 20 July 2007*.
- 15 Luca Ferrari, *Player Ownership: Europe and Italy talk given at The Global Game: Ownership of Football Clubs and Players conference held in London on 26 September 2007*.
- 16 [www.fifa.com/aboutfifa/federations/bodies/news/newsid=709098.html](http://www.fifa.com/aboutfifa/federations/bodies/news/newsid=709098.html) *FIFA to tackle areas of concern on 12 March 2008*.
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- 21 Miguel Remmer, *Argentina: Registration of Beneficiaries from Player Contracts W.S.L.R. volume 4 issue 12 December 2006*.
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- 23 Fay Goodman, *Football Ownership: Third Party Investment: investigating the concerns W.S.L.R Volume 4 Issue 10 October 2006*.
- 24 Anon, *Premier League Wants to Tighten Third-Party Player Ownership Rules W.S.L.R Volume 5 Issue 11 November 2007*.
- 25 *This figure represents the total money spent on Cristiano Ronaldo (being the purchase price paid by Manchester United FC (£12,200,000) plus the third-party investment (£450,000) minus the price Sporting Lisbon could have obtained for Cristiano Ronaldo had he been sold as a 16 year old (£1,285,714) and minus the return paid to the hedge fund (\$4,270,000). The figure does not take into account the cost of training the player, agency fees or solidarity payments.*
- 26 Miguel Remmer, *Argentina: Registration of Beneficiaries from Player Contracts W.S.L.R. volume 4 issue 12 December 2006*.
- 27 Luca Ferrari, *Player Ownership: Europe and Italy a talk given at The Global Game: Ownership of Football Clubs and Players conference held in London on 26 September 2007*.
- 28 *By virtue of law number 9,615/98 "Lei Pele"*.
- 29 *By virtue of resolution of the Executive Committee of the Argentinean Football Association number 3819*.
- 30 Miguel Remmer and Augustin West, *Third Party Ownership in Latin America a talk given at The Global Game: Ownership of Football Clubs and Players conference held in London on 26 September 2007*.

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# Sports Law Foreign Update

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

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# 1. General

Conferences, meetings, lectures, courses, etc.

[None]

## Obituaries

### Ove Andersson

The celebrated Swedish rally driver and manager died in June 2008 at the age of 70. His career as a rally driver was nothing short of brilliant, and had there been a drivers' title whilst he was in his prime he would unquestionably have won it. He was involved in legal controversy in 1995, with the eruption of a scandal when his outfit, Team Toyota Europe (TTE), was caught using unlawful turbo restrictors. Mr. Andersson, an honest operator, declared this to be his failure because he had omitted to keep a close watch on what his engineers were doing. However, Toyota kept faith with him (*The Independent of 23/6/2008, p. 34*). In 2002, he was appointed as team principal for the Toyota Formula One team, which started to compete using Finnish driver Mika salo and the Scottish competitor Allan McNish. This represented entirely new territory for him, and he gave the impression of finding it difficult to come to terms with the political ways of Formula One (evidence of which is copious in these pages!) after what he regarded as the relatively straightforward rally driving scene. He retired soon afterwards, but remained active – in fact, his death came as a result of a head-on collision whilst competing in a vintage care rally in South Africa (*The Guardian of 12/6/2008, p. 38*).

### Jules Tygiel

With the death of Mr. Tygiel, from cancer, at the too early age of 59, the world of baseball has lost a foremost historian and chronicler of some of the more momentous episodes in the sport's history, notably in the field of racial harmony. The story surrounding the manner in which Jackie Robinson, of the Brooklyn Dodgers, broke the 80-year-old segregation of major league baseball in the US was epically documented by this eminent academic. As Professor of History at San Francisco State University, he specialised in American labour relations and the 20th century development of California. However, his best work resulted from his love of baseball, instilled during his childhood when he idolised the Dodgers in general and Robinson in particular.

In his seminal work, Jackie Robinson and his Legacy (1983), Tygiel wove the baseball player's story around the

history of black sporting figures in baseball and in the US. It represented a cultural history of American integration, an area in which sport proceeded ahead of most other walks of life in that country. Professor Tygiel saw the integration of baseball as a mirror for that of the nation itself. Often cited as the sport's leading historian, Tygiel also produced many introductions to other works, including a moving preface to the reissue of *It's Good to be Alive*, the autobiography of Roy Campanella, the Dodgers' great catcher of the 1940s and 1950s – himself the product of a mixed-race marriage. His introduction to Irwin Silber's *Press Box Red* (2003), the story of Lester Rodney, sports editor of the *Daily Worker*, places Mr. Rodney as a key force in the battle for baseball's racial integration (*The Guardian of 27/8/2008, p. 33*).

### Eliot Asinof

Like Mr. Tygiel, this sports writer, who died in June 2008 at the age of 88, was also a chronicler of the sport of baseball, although he focus of interest concerned a less admirable part of its history. He is best remembered for *Eight Men Out*, his 1963 study of the "Black Sox" scandal, which arose when it emerged that members of the 1919 Chicago White Sox team conspired with gamblers deliberately to lose the World Series. Although his writings concerned a good deal else besides this sport, the book used baseball as a window on the US's social problems. Mr. Asinof's works, including his fiction, were about outsiders forced into difficult stands against those with power. He also famously interviewed Abe Attell, the featherweight boxing champion and go-between for gangster Arnold Rothstein during the infamous baseball fix, at boxing legend Jack Dempsey's restaurant. It is said that Dempsey himself came to the table and asked Asinof: "Why are you talking to that scum?" (*The Guardian of 26/6/2008, p. 37*).

### Dottie Collins

Race was not the only focal point for discrimination in the sport of baseball, and no-one was more aware of this than Ms. Collins, who has died at the age of 85. The breakthrough for her gender came in 1943, with many male baseball players being away on military service. It was then that Philip Wrigley, the chewing-gum magnate and owner of the Chicago Cubs team, started the All-American Girls Professional Baseball League. Ms. Collins became assigned to the Minneapolis Millerettes, where she enjoyed a successful career as a pitcher. In 1980 an association for players in the League was formed, and Ms. Collins became its treasurer, newsletter editor and

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spokesperson (*The Guardian of 13/10/2008, p. 34*).

### Papa Wendo

The former boxer, who has died aged 82, was one of the major stars of what was then the Belgian Congo. He was also a talented musician, and his works resulted in his being jailed by the Belgian colonial authorities. He went on to become a national hero as the singer and songwriter who helped to lay the foundations for the rumba dance style. (*The Guardian of 1/8/2008, p. 37*)

### William S. Stevens

William S. Stevens, who has died at the age of 60, was the author of the slyly humorous law review note on the relationship between baseball's infield fly rule and Anglo-American common law which became one of the most celebrated and imitated analyses in American legal history. Mr. Stevens was a law student at the University of Pennsylvania in 1975 when he authored an anonymous note for the University's law review that drew an ingenious analogy between the infield fly rule and development of common law, writing that the dynamics of the common law and the development of one of the most important technical rules of baseball, although superficially almost completely different in outlook and philosophy, shared "significant elements"

Published as a semi-parodic "aside" in June 1975, "The Common Law Origins of the Infield Fly Rule" quickly achieved legal fame, partly because nothing of its kind had ever appeared in a major law review, and partly because of its concise, elegant reasoning. It continues to be cited by courts and legal commentators. It is taught in law schools, and is credited with giving birth to the "Law and Baseball Movement", a thriving branch of legal studies devoted to the law and its social context. It made lawyers think about the law in a different way. Writing in a US sister law journal, Robert Jarvis, of the Nova Southeastern University, wrote:

**"It encouraged a whole generation of law students, some of whom became law-review editors, to look at subjects previously beyond the pale. After Stevens, law reviews were never the same. It was a cultural revolution. It cannot be overstated."** (*"The Common Law Origins of the Infield Fly Rule" [2002] Entertainment and Sports Lawyer p. 45*)

The much-misunderstood infield fly rule was adopted in the 1890s to prevent fielders from taking advantage of a force-out situation at third base. It states that, where there are fewer than two outs, and there are men on first and second base, or the bases are loaded, any fly

ball in fair territory which, in the judgment of the umpire, is catchable by an infielder "with ordinary effort" is automatically deemed an out, even if the fielder drops the ball. The rule prevents a fielder from intentionally misplaying a fly and then turning a double play by throwing out the runners anticipating a caught fly ball. Mr. Stevens was intrigued by the spirit of the rule, and the piecemeal way in which it had developed over time, which suggested the incremental way that common law evolved. Bolstering his argument with a raft of footnotes, Mr. Stevens described the infield-fly rule as a technical remedy for underhand behaviour that would not have occurred in the days when baseball was a gentlemen's sport played for exercise.

Baseball, to keep alive the gentlemanly spirit underlying the game, drafted rules to enforce correct behaviour. In civil society, the writ system evolved, giving plaintiffs a specific rule to appeal to when seeking redress. Conduct was governed by general principles; but to enforce a rule of conduct, it was necessary to find a remedy in a specific writ, according to Mr. Stevens. Like common law, the infield-fly rule developed bit by bit, with refinements added to address new problems as they arose, just as common law uses judicial decisions and legislation to make legal remedies conform to new situations. Within a year of its publication, the infield fly article began being mentioned in judicial decisions and generated imitations and commentaries with titles. Mr. Stevens's note has also been featured in scholarly articles on subjects as diverse as bankruptcy, constitutional law and ethics (*New York Times of 11/12/2008, p. 12*).

### Boris Shakhlin

The Russian gymnast, who has died at the age of 76, won 11 Olympic medals in the course of his illustrious career. He later also served his sport as an international judge. He was a member of the men's technical committee of the Fédération Internationale de Gymnastique (FIG) from 1968 to 1992 (*The Daily Telegraph of 4/6/2008, p. 25*).

### Joey Giardello

The boxing champion of the 1960s, who has died aged 78, spent nearly two decades in the ring, but is best remembered for a legal dispute arising from the description on film of his famous title fight with Rubin "Hurricane" Carter. The bout in question saw Giardello survive a mauling in the opening rounds, and to impose himself subsequently on the famously relentless Carter by dint of nimble footwork and intelligent use of his jab. By the closing stages, Mr. Giardello was bleeding

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profusely from a head wound which had been opened up by an accidental head-butt during the early stages of the fight. However, he won by a unanimous verdict.

Several years later, when the film *The Hurricane* was issued, Mr. Giardello brought a federal defamation action, claiming that the bout had been wrongly depicted. In the film, Carter, played by Denzel Washington, is shown administering a heavy beating to Giardello (portrayed by Ben Bray), but losing by a racially-inspired decision. The lawsuit alleged that the film, which recounts how Carter spent two decades in prison after being wrongfully convicted of a triple murder, created a false impression of the fight. More particularly, Giardello claimed that this depiction "demeaned" him in furthering the notion that Carter's life was destroyed by racialism. After the case was settled, an explanation as to what really happened was added to the video, and scenes from the real fifth were added to the DVD production (*The Independent of 12/9/2008, p. 41*).

### Gene Upshaw

Mr. Upshaw, who has died aged 63, was a Hall of Fame American footballer who later became a leading figure in the sport's labour relations. He had spent 15 seasons as guard with the Oakland/Los Angeles Raiders, twice winning the Super Bowl. In 1983 he became the executive director of the players' association, and led them through the 1987 dispute which resulted in the introduction of substitutes. He later pioneered a system of free agency and salary caps which left both the players and the team owners happy. It was his greatest legacy to the sport he served with such distinction (*The Independent of 29/8/2008, p. 41*).

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### Lawyers in sport

[None]

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### Digest of other sports law journals

#### Recent issues of *Zeitschrift für Sport und Recht*

The July/August 2008 issue of our German sister journal features a problem which is highly relevant to this year's events in Beijing – may disabled sporting performers take part in the "non-disabled" Games if they meet the qualifications for such participation?

More particularly this issue has arisen in the case of the South African runner Oscar Pistorius, whose lower limbs have been amputated (on the latest developments in this saga, see below p.116). This case confronts the sports lawyer with issues of discrimination, equality of opportunity on the one hand, and competitive advantage as well as endangering the safety of other competitors on the other hand. One of the contributors to this issue, Christian Krähe, examines the question of "techno-doping" in this context, i.e. the question of increasing the human body's capacity to perform by means of technical assistance which was already prohibited by UNESCO in its Convention of 19/10.2005 (*reviewed in (2008) 33 Neue Juristische Wochenschrift p. XXII*).

The next issue (5/2008) of this Journal features in the first instance an article on German competition law by the author Martin Stopper. More particularly this concerns a background paper issued by the German Competition Authority (Bundeskartellamt) relating to the central marketing of broadcasting rights in the German Football league (Bundesliga), in respect of which the Authority had advocated that such marketing could only be justified in competition law terms if the television viewer was allowed sufficient access to such matches by means of matches summaries broadcast free of charge. The author opines that television viewers should only be protected under Article 81 of the EC Treaty where they are directly affected by agreements between broadcasting media which have the effect of increasing prices.

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### Sport and international relations

#### Zimbabwe issue continues to play havoc with international cricket

The political troubles afflicting this African nation have occupied many a page in previous issues of this publication, mainly on account of the widespread misgivings over the regime presided over by Robert Mugabe, who has ruled the country ever since it threw off the yoke of minority white rule in the early 1980s. This was not, however, the only issue to bedevil Zimbabwe's international sporting links, since, as was reported in the previous issue (*[2008] 1 Sport and the Law Journal p. 14*), the suspicion of irregularities in the financial management of the country's central cricketing authority had raised number of issues which had also cast doubts on its future participation in the sport at the world level. In addition, the prospect of change at the political level, which was a distinct possibility as a result

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of the general election held earlier this year, also had possible implications at the sporting level, in terms of what its consequences could be for the prevailing Zimbabwe Cricket leadership.

Indeed, it was the very outcome of the elections which gave rise to the greatest uncertainty, given that, in spite of what appeared to be a sizeable majority of the voting public having dismissed the Mugabe regime, the incumbent president seemed intent on using every conceivable ploy, including violence, in order to remain in office. An uneasy truce was reached when it was agreed to hold a run-off ballot for presidential office on June 27. In the meantime, the plight of his people had become all the more desperate when, in early June 2008, he barred aid agencies from operating in his country, prompting accusations that he was manipulating food aid for political purposes. As he attended a UN food summit in Rome, the British Government Minister, Lord Malloch Brown, was moved to compare him to the Cambodian tyrant Pol Pot (*The Guardian of 10/6/2008, p. S1*).

The position has been complicated because – at least at the level of cricket – the game’s international authorities have been far from unanimous on the desirability of taking proscriptive action against Zimbabwe. It will be recalled from the same issue of this Journal referred to above (p. 14) that Malcolm Speed, the Chief Executive of the International Cricketing Council (ICC), the world governing body in the sport, had resigned because of a continuous dispute with the ICC President, South African Ray Mali, who had been a staunch ally of Zimbabwe Cricket’s position, and whose support had enabled the latter to maintain its ICC status.

The continued hardship to which the Zimbabwean people were being subjected by the continuation of the Mugabe regime inevitably renewed calls for sporting contacts with Zimbabwe to be discontinued as long as this situation persisted – particularly in view of the tour by the national cricket team which was due to take place in England during the summer of 2009. Calls for cancellation of this tour were not, however, restricted to Mugabe’s political opponents or to Western commentators. They acquired a new dimension when issuing from Archbishop Desmond Tutu, one of the world’s leading humanitarians who played a leading part in the sporting boycott of South Africa during its apartheid years. Speaking exclusively to a leading British newspaper, he commented that banning the planned tour would send a powerful message that the world community considered Mr. Mugabe to be a “pariah”. He continued:

***“I would say that it is a non-violent pressure that can be brought to bear. People will say Mugabe doesn’t play cricket but the more you make him aware that he has become a pariah the better. I believe that a significant part of the population in Zimbabwe would say [the cricketers] should not be here, because you are lending legitimacy and respectability to a country that is in a shambles because of one person”*** (*The Guardian, loc. cit.*).

Archbishop Tutu voiced these sentiments at the prestigious Spirit of Cricket lecture organised by the Marylebone Cricket Club (MCC) at its Lord’s home in London. This address was followed by a panel discussion, at which a prominent England player, opening batsman Andrew Strauss, said that there was a strong possibility of England’s cricketers considering a refusal to play against Zimbabwe during the scheduled tour. He claimed that amongst the players there had been a general feeling that the previous tour should not have proceeded, thus raising questions over their participation in the next event. He also expressed the view that the players had been “left in the lurch” by the English cricketing authorities and the British Government, neither of whom – as has been repeatedly shown in previous issues of this Journal – have been notable for their clarity of purpose and decisiveness of action on this matter in the past (*The Independent of 11/6/2008, p. 51*).

Mr. Strauss’s position received a boost the next day, when the players’ union leader gave the England cricketers an assurance that they would not be allowed to become political pawns if Mugabe were to win the run-off election. Sean Morris, the Chief Executive of the Professional Cricketers’ association, confirmed that every effort would be made to prevent the players from having to make a political protest. He pledged that, once the election was over, the PCA would confer with the Government and the England and Wales Cricket Board (ECB) in order to avoid a reoccurrence of such a scenario (*The Daily Telegraph of 12/6/2008, p. S14*). Other developments combined to increase the pressure on the British authorities, both sporting and political. It was becoming increasingly clear that the presidential ballot was being fraudulently manipulated and marred by violence. In mid-June, Cricket Zimbabwe’s hitherto firmest supporter, Cricket South Africa, discontinued its bilateral ties with the country (*The Daily Telegraph of 25/6/2008, p. S1*).

Calls for suspension of the tour also came from an authoritative source in the shape of Andy Flower, the former Zimbabwe Test player who, together with his colleague Henry Olonga, had made the brave stance of

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openly protesting against the Mugabe regime during the 2003 World Cup. Applauding the decision made by Cricket South Africa referred to earlier, he pointed out the narrow links between the political and the cricketing authorities in Zimbabwe, singling out for particular criticism Peter Chingoka, whom he described as forming part of the dictator's "despicable clan" and as an embarrassment for the international game (*The Independent of 25/6/2008*, p. 46). It was also announced that Zimbabwe's international status was to be discussed at the general meeting of the ICC in Dubai a few days later, at which no lesser person than ray Mali had tabled an emergency discussion about the situation in that country following strong pressure from within South Africa and the British authorities. (*The Guardian of 25/6/2008*, p. S9).

The British Government took the next important step, which assumed the form of a letter issued by Andy Burnham, the Secretary of State for Culture, Media and Sport, which informed the ECB that Zimbabwe would not be permitted to complete the one-day series planned for the following summer. As a result, the ECB immediately severed all its ties with Zimbabwe and cancelled the tour. However, the letter stopped short of preventing Zimbabwe from participating in the Twenty20 World Championship, also due to be staged in England later that year. Nevertheless, during Prime Minister's Questions in the House of Commons, the Prime Minister, Dr. Gordon Brown, urged other cricketing nations to follow the lead given by the ECB by banning Zimbabwe from that tournament (*The Daily Telegraph of 26/6/2008*, p. S12). The next day, it was learned that the British Foreign office had instructed its embassies in key ICC member states, including India, to communicate its disapproval of Zimbabwe's continued involvement in international cricket. The Indian Government was a particularly attractive target for lobbying because the Board of Control for Cricket in India (BCCI) holds the key to any vote against Zimbabwe. These manoeuvres betrayed the British authorities' discomfiture at extending their ban to the Twenty20 tournament. Allowing Zimbabwe to participate in the event one month after they had been prevented from playing England would raise accusations of hypocrisy, whereas banning them could result in the tournament being moved and opening the country to reprisal boycotts – in particular the 2012 Olympics (*The Guardian of 27/6/2008*, p. S9).

However, as the date for the ICC conference approached and the latter unfolded, it became increasingly clear that no clear-cut and lasting solution to the problem would be found. On the eve of the event, Niranjana Shah, the Secretary of the BCCI,

announced that the latter intended to support "fully" Zimbabwe's continued full membership, and therefore also its right to participate in the world tournament, thus raising the distinct possibility of the event being moved elsewhere (*The Independent on Sunday of 29/6/2008*, p. 78). Once the conference had opened, Zimbabwe Cricket launched a solid defence of its right to continue as a full member. Its managing director, Ozias Bvute, stated that any action by the ICC would be out of step with other global sports, asserting:

**"We are a full member of FIFA and are currently participating in World Cup qualifying campaign, we have a swimming programme which has produced Kirsty Coventry, a recent winner in the world championships, so it would be strange that the only sport to take action on so-called current worries is cricket"**

(*The Guardian of 30/6/2008*, p. 13).

Predictably, the ZC Chairman, Peter Chingoka, also weighed in, addressing a letter to ICC President Mali in which he described it as "unfair" for Zimbabwe's status to be placed on the agenda without prior discussion. It was also somewhat unclear what mechanism could be employed to exclude Zimbabwe, and ICC lawyers were said to be considering the various options. One possibility mooted was to exclude them from one-day internationals (ODIs), a move which would exclude them from the World Cup without endangering their ICC status. In addition, because Zimbabwe voluntarily abandoned its Test status a few years earlier, it was hoped that it could be persuaded to withdraw – which would still enable them to receive funding as ICC members (*ibid*). It also emerged that, for the ECB, the stakes could not be higher, since, if Zimbabwe managed to retain its ODI status, the inevitable loss of the tournament for England would cost its cricketing body as much as £10 million (*The Daily Telegraph of 2/7/2008*, p. S3).

The jockeying for support intensified as the meeting progressed, particularly since India appeared to continue its pro-Zimbabwe stance – a lead which was likely to be followed by other Asian countries. Particularly interesting was the position which would be taken by Sri Lanka, since the ECB was reportedly about to invite the latter to tour England instead of Zimbabwe. There was also uncertainty as to what would be the location of the Twenty20 tournament if, as a result of deadlock at the conference, England would lose the event. The back-up venue had been Canada, but the government of the latter had also adopted a hard-line stance against the Mugabe regime (*The Daily Telegraph of 30/6/2008*, p. S20). Another significant development arose when Kenya, one of the leading second-tier associate

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members of the ICC, called for Zimbabwe to be expelled from the African Cricket Union. It was also learned that Cricket Zimbabwe was to face a new financial probe as a result of the ICC's decision to consider its international status (*The Guardian of 1/7/2008, p. S8*).

As the final day of the conference approached, the mood seemed to be shifting against England and its allies, and towards Zimbabwe. The notion of Zimbabwe being either expelled or suspended from full ICC membership, initially floated as a genuine possibility, receded rapidly, with the Asian countries increasingly being inclined to follow their usual instincts of supporting India. England's cricket authorities were not for moving either, even if it meant losing the Twenty20 tournament and incurring all the financial consequences outlined above. At all events, it became clear that it would be almost impossible to base any decision on political strife. The ICC Constitution does not allow it, and the previous day, Peter Chingoka had arrived with a retinue of lawyers in tow to advise the assembled gathering of the illegality of such a move (*The Daily Telegraph of 3/7/2008, p. S5*). On the other hand, to ban Zimbabwe on cricketing grounds only would be somewhat bizarre, since in order to improve their performance Zimbabwe would have to have the continued opportunity of competing. At all events, it would be regarded as a very unsatisfactory fudge if Zimbabwe were to be allowed to retain full membership and all voting rights whilst not being allowed to compete. Indeed, the ICC later insisted that the subject of Zimbabwean politics was not formally discussed at the meeting. Although this was technically correct, it could not be denied that this topic had dominated proceedings in and out of the chamber (*The Independent of 3/7/2008, p. 53*).

It had also become clear that the determined attempts made by ICC President Ray Mali to obtain a consensus that Zimbabwe should accept a temporary loss of international status on cricketing grounds had foundered on the firmness of the Indian opposition to such a design. Mali wanted the issue resolved without a vote, but it was clear that India would exact a high price for any concessions (*The Guardian of 3/7/2008, p. S6*). As the meeting drew to a close, however, it emerged that India had urged Zimbabwe to withdraw from the Twenty20 tournament. The latter, however, refused to heed this advice, with Peter Chingoka seemingly determined to force the ICC's hand (*The Daily Telegraph of 4/7/2008, p. S12*). It also emerged that all the tickets for the Twenty20 tournament had already sold out (except for those in which Zimbabwe were scheduled

to play), thus adding to the potential financial implications if the tournament were to be moved (*The Independent of 4/7/2008, p. 56*).

As the tortuous negotiations pursued their meandering course, however, there occurred an event which appears to have determined the decision. At a London dinner marking his 90th birthday, the former President of South Africa, Nelson Mandela, referred to the "tragic failure of leadership" in neighbouring Zimbabwe, without further comment or embellishment. However, as an evidently relieved Giles Clarke, Chairman of the ECB, said afterwards, it was clearly enough (*The Independent of 5/7/2008, p. 66*). Another development which turned the tide against Zimbabwe was the fact that the latter refused to reveal how many of their members had ties to Mugabe's ZANU PF party. They had also failed to reply to questions put by South Africa as to how many of their cricketers had been killed or arrested during the presidential run-off ballot (*The Daily Telegraph of 5/7/2008, p. S9*).

As was almost inevitable, the final outcome to emerge from the proceedings was an unsatisfactory compromise which masked the tensions underlying international cricket, which will ultimately be more decisive for the future of the game than the Zimbabwe episode. On the surface, it appeared that England and its allies had won the day, since Zimbabwe agreed to withdraw from the tournament rather than lose a vote once it became clear that India had displayed sufficient pragmatism to accept that it had lost the argument and that, in order to avoid a damaging schism in the international game, it had to broker Zimbabwe's "voluntary" withdrawal from the tournament. Zimbabwe retains its ICC membership – and the cash, worth up to £5 million per year – but expulsion was never a possibility. Zimbabwe will play no international cricket of any consequence until an ICC task force is convinced that the time is right. That time will clearly not be right whilst Robert Mugabe remains in power (*The Guardian of 5/7/2008, p. 13*). However, as some commentators pointed out, this outcome merely sets the scene for future confrontations on the manner in which the sport is to develop – more particularly in relation to the Indian Premier league and its implications for world cricket (*Ibid*).

However, any illusion that this outcome provided even a temporary solution to the Zimbabwe problem evaporated the next month. It was learned that the Zimbabwe board had failed to endorse the agreement to withdraw from the tournament, and that it had requested its Chairman, Peter Chingoka, to clarify a number of points. As a result, Mr. Chingoka was

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summoned to Dubai for a meeting with ICC President David Morgan (*The Guardian of 19/8/2008, p. S12*). At the time of writing, it was not as yet clear whether Cricket Zimbabwe had ultimately ratified the agreement.

### Can football contribute towards Middle Eastern peace?

Ever since that famous football match took place in no man's land between German and British soldiers during World War I, football has been regarded as a method of bringing peace in times of conflict (this in spite of the fact that, in South America, some time ago, it nearly sparked off an armed conflict). The extent to which the "Beautiful Game" is capable of bringing harmony to that most embattled of regions, the Middle East, has been the subject-matter of a book recently published by author James Montague (*When Friday Comes – Football in the War Zone*). The author is the first to concede that football cannot act as a "silver bullet" for this most fractious of regions. [Indeed, some past issues of this Journal might give a contrary impression.] However, he has performed a subtle form of shuttle diplomacy which he achieved by collecting passport stamps from Israel and the Arab countries, and by talking about the game with Israelis, Palestinians, Iranians and Iraqis using football as a lingua franca.

By way of practical developments in this field, some progress appears to have been made during the period under review. In mid-October 2008, it was learned that the Palestine national football team, which has been featured in these columns before (*e.g. [2007] 3 Sport and the Law Journal p. 21*), has succeeded in finding a home ground on which to play its international fixtures. More particularly Palestine played Jordan in a friendly match on 26 October at the Ram stadium in Gaza City, after 10 years of playing home games in Jordan and Qatar. The renovated stadium was officially opened by FIFA President Sepp Blatter, the world governing body having financed its upgrading to international standards. Mr. Blatter also inaugurated a second football pitch on Palestinian territory, at Majed Al-Asaad in El Bireh (*Associated Press of 17/10/2008, at www.findlaw.com*).

This does not, however, mean that the Palestinian side's politically-inspired problems are over. Israel having declared the Gaza strip as "hostile territory", it allows only inhabitants proving humanitarian hardship to leave its borders. This caused Palestine to fail to arrive for a recent World Cup qualifying fixture in Singapore because of such restrictions, with 18 players and officials living in the Gaza Strip having been denied passports. FIFA had declined a request from the

Palestinian federation to reschedule the match, declaring it a forfeit and a 3-0 win for Singapore, thus eliminating the Palestinians 7-0 on aggregate (*Ibid.*)

### Armenia and Turkey try football diplomacy

Armenia is another contentious area of the Middle East which has been racked by cross-border strife, more particularly with its Western neighbour Turkey – even though the last time a shot was fired in anger in this conflict was several generations ago. However, that bloody episode in history has queered relations between the two countries ever since, and the two nations have long been at odds over Turkey's refusal to acknowledge as genocide the deaths of up to 1.5 million Armenians at the hands of Ottoman troops during World War I. The Turks insist that the total number of deaths was much lower, and that many of these were caused by starvation and disease. However, they have proposed the establishment of a joint historical commission in order to examine the issue.

In spite of this long-standing agreement, Turkey was one of the first nations to recognise Armenia's independence after the collapse of the Soviet Union in 1991. However, formal relations once again reached freezing point when Armenia occupied the contentious Nagorno-Karabakh region following a war with Azerbaijan, which is a close ally of Turkey. Turkey also takes exception to Armenian territorial claims on its eastern borders. It was against this troubled backdrop that the two countries were pitted against each other for a World Cup qualifying fixture. The first of the two matches involved was due to be played in the Armenian capital, Yerevan, in early September, and an invitation to attend was duly despatched by the Armenian President, Serge Sarkisian, to his Turkish counterpart, Abdullah Gul, to attend the fixture.

For several weeks it was uncertain whether Mr. Gul would accept the invitation. Initially, opposition politicians urged Gul not to attend, with Deniz Baykal, leader of Turkey's oldest party, the Republican People's Party, declaring that he would rather watch the game in Baku, the capital of Azerbaijan. However, the Turkish government has for some time supported rapprochement with Armenia as part of a proposal made by Recep Tayyip Erdogan, the country's Prime Minister, to formulate a Caucasian stability pact, promoted by Turkey following the clash earlier this year between Russia and Georgia. It is also keen to prevent the genocide issue from clouding relations with the EU and the US, which have both given favourable hearings to arguments presented by Armenian "diaspora" groups (*The Guardian of 5/9/2008, p. 25*).

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This is why, ultimately, the Turkish president decided to accept the invitation in an attempt to initiate relations between the two nations, which at present do not enjoy any diplomatic ties. In a carefully-worded statement, the President asserted that the occasion had "meaning beyond the being just a sporting event", and that it would contribute towards a climate of friendship in the region. It would be an opportunity to overcome obstacles and prepare new ground in order to bring the two peoples together. In another goodwill gesture, the Armenian authorities waived normal visa controls for the 5,000 Turkish fans who were expected to follow their team – even though the presence of such a large travelling army of supporters had provoked fears, largely unfounded in the event, of violent clashes with Armenian nationalists, who had vowed to demonstrate against Mr. Gul's visit – the first to modern Armenia by a Turkish head of state. In addition, plans for a parliamentary delegation from the ruling Justice and Development Party to accompany Gul were abandoned amid fears of the trip becoming submerged in party politics (*Ibid*). It is hoped that, nevertheless, the event assisted the process of détente between the two countries.

### **Sport still fails to bridge the North/South Korea divide**

Korea is a nation riven by internecine strife ever since the end of World War Two, when it was split into two parts – one Communist, the other based on western democracy. As has been documented in earlier issues of this Journal, it had for some time been hoped that sport would help to bridge the divide and bring about, if not total unity, then at least some form of harmonious co-existence. However, recent events appear to indicate that any such prospect is as far away as ever.

Thus it had been hoped, and even expected, that the athletes representing the two nations would march together as one contingent during the opening ceremony of the Beijing Olympics. However, with the Games about to start, the governments of both countries put paid to any such prospects – even though they succeeded in doing precisely that for the 2000 and 2004 Games. Instead, the South marched into the stadium ahead of the North, in Chinese alphabetical order (*Daily Mail of 8/8/2008, p. 9*). No explanation was provided for this turn of events.

In fact, it was a sporting development which highlighted, rather than downgraded, the nature of the divide separating the two countries. When Choi Hyun-mi won the World Boxing Association women's featherweight title, following a bruising bout with her

Chinese opponent, her circumstances threw an unwelcome spotlight on the sorry fate of defectors from behind the "bamboo curtain". Poor, female and North Korean, the 17-year-old arrived in Seoul four years ago as part of the largest group of Northern refugees ever to land in South Korea's capital. A former amateur boxing champion, she had been plucked as an 11-year-old from a school in the North Korean capital of Pyongyang by government scouts who lost no time in priming her for the 2008 Olympics. However, in 2004 the champion's businessman father opted for a fresh start in the South. This decision took his family on a dangerous journey through China and Vietnam before they arrived in Seoul four months later (*The Independent of 3/11/2008, p. 24*).

However, life has been extremely hard for the boxer in her new home. Her father is unemployed, her mother extremely melancholic and thoughts often turn to what they left behind. Yet they know they cannot now turn back. Choi's story is by no means unusual. Although provided with Government assistance and cash aimed at their resettlement, the defectors, some 11,000 in number, struggle with cultural differences, poverty, alienation and even with local accents. Following a lifetime in a time-warped Stalinist state, most lack the skills required to thrive in the technologically advanced society that is South Korea. Two years ago, in a survey of 300 North Korean refugees, 60 per cent said that they were unemployed, over half felt discriminated against, and two-thirds wished to emigrate. Some have even returned home to the country they abandoned.

To make matters worse, the feelings of most South Koreans towards the emigrants appear to be at best ambivalent, at worst downright suspicious. Such suspicion, on this peninsula still divided along Cold War lines, have deepened since a South Korean court sentenced Won Jeong Hwa to five years' imprisonment for spying for the North – the second spy jailed inside a decade. Won, who reportedly set honey traps for military and intelligence officers, had also arrived in Seoul, falsely claiming asylum. Such tales add to the stereotypes of North Koreans, according to the boxer (*Ibid*).

### **IOC bars Iraqi Olympians, then relents**

It is obvious that an august body such as the International Olympic Committee (IOC) needs to maintain certain standards and abide by its rules. However, the manner in which it does so has sometimes been open to criticism for lack of consistency. This was very much the case when the IOC took action against the Iraqi National Olympic

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Committee, which it initially decided not to recognise because of “political interference” in its ranks. Marina Hyde, a trenchant critic on all matters sporting in the British newspaper *The Guardian*, reminded the latter’s readership that, for many years, the IOC enjoyed extremely cordial relations with the previous Iraq Olympic committee – when it was under the leadership of Uday Hussain, the son of the notorious autocrat Saddam. It is legitimate to assume, writes Ms Hyde, that Uday H’s appointment at the head of this body was not entirely without political connotations (*The Guardian of 31/7/2008, p. S12*).

The IOC had stated in its defence that the Iraqi government had been invited to negotiate after the initial ruling against them, but were slow to respond. The fact that the current Iraqi leadership might conceivably have other matters on its collective mind presumably did not occur to them. Also, writes Ms. Hyde:

***“does it not beggar belief that an organisation that has been a byword for institutional corruption can seek to expel a nation that could really use a boost on the eve of the Games? If the IOC despise political placemen, how come it has allowed so many relatives of corrupt dictators to swell its ranks over the years? Come to that, you’d think it had forfeited the moral right to make points about politicisation of sport the second it awarded the Games to China” (Ibid).***

However, the IOC later reversed its decision, and allowed the four-strong team – two rowers and two athletes – to compete (*Daily Mail of 5/8/2008, p. 76*).

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Other issues

**[None]**

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### Corruption in sport

#### **Match-fixing in world football – are the football authorities equal to the challenge?**

This journal has frequently related instances of blatant corruption in the “beautiful game” before, but hitherto mainly on a piecemeal basis. However, it would seem that the various refereeing and other match-fixing scandals which have rocked the sport in individual countries are all part of a more widespread phenomenon – which has criminal implications way beyond the loss of betting stakes by a few unfortunate punters. This has emerged from a major three-part investigation conducted by the author Declan Hill, writing for the British newspaper *The Sunday Telegraph* into the various networks involved, the horrific lengths to which they stoop, and the action – or in some cases the lack of it – taken by the governing bodies to prevent and/or penalise it.

A few months ago, the bodies of two good-looking Chinese students, residing in Newcastle-upon-Tyne (UK), were found tortured to death in the living room of their apartment. Initially, the police were mystified as to the reason why anyone could conceivably kill them. Then they established that they worked in the Asian gambling market, and that they had crossed the wrong people. This has thrown new light on the issue of football corruption. The interest taken by Asian gamblers in European football has reached extraordinary levels – in terms of the sheer size of the market and the minor importance of many of the fixtures on which the wagers are placed. Thus there are games played by Scots teenagers, and watched by a mere 20 people – but one or two of the latter will be Chinese, as indeed were the two unfortunate victims referred to above, who will relay information to the large illegal gambling markets of Beijing, Bangkok or Batam (*The Sunday Telegraph of 19/10/2008, p. S5*).

The author spent four years investigating these markets, as well as the fixers who attempt to distort them, interviewing over 220 people, including players, referees, administrators, policemen, prosecutors and, most crucially, the fixers themselves. As the case detailed above shows, it can be an extremely dangerous world in which to move. Every night, before retiring to bed, the author arranged the furniture in such a way as to give him a few seconds in order to throw any murderous intruder off-balance. He certainly reports receiving several warnings from them.

The world of Asian football gambling is, in fact, a world full of violence, real or implied, threats and intimidation. The author discovered a world where poisonous cobras are put in competitors’ cars, and telephone conversations which end in “we know where your sister goes to school”. He likens the Asian gambling world to that which prevailed during the days of prohibition in the US – in that the gangsters are controlling a “sin” which almost everyone wishes to engage in. In Asia, almost everyone wants to gamble, yet betting is unlawful in virtually every country of this continent. The amounts of money generated for the criminal underworld is, almost inevitably, enormous. A recent study in a US journal estimated the entire Asian gambling market at \$450 billion per year.

As was the case in Al Capone’s Chicago, the cash which is available on this market is so enormous that it corrupts almost every institution it touches. In the course of his research, the author encountered many accusations made against the police in this respect; however, he claimed to find almost surreal levels of corruption in the football leagues. One Malaysian cabinet minister alleged that 80 per cent of professional fixtures in the country were fixed. In fact, the widespread corruption of matches provoked a popular riot in China at the opening game of the 2004 Asian games. The major leagues in many other Asian countries have all suffered from match-fixing scandals. In Vietnam, the fixers were so confident that they even corrupted the matches of the Hanoi police team. Accordingly, the credibility of these leagues has suffered enormously. As a result, attendances at these fixtures have dropped dramatically, which explains why many fixers have subsequently turned their attentions to Europe. In Belgium, a Chinese fixer is understood to have corrupted several dozens of games. In addition, suspicion has surrounded fixtures in countries as disparate as Finland, Italy and Poland (*Ibid*).

However, it appears that the most extraordinary example of the extent to which the Asian fixers have infiltrated the European football scene has occurred in Germany. Last year, in a virtually unnoticed Frankfurt court, a Malaysian-Chinese fixer rejoicing in the name of William Lim bee Wah was put on trial – but for some reason he was released on bail during the court proceedings. He took advantage of this opportunity to escape, and had to be judged in absentia. Should any British football fan feel that this is a matter for the European continent “about which we know so little”, the author claims to have identified some suspicious betting patterns in this country, to wit for matches in which the odds movements were mysteriously large –

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without any evidence of weather changes or other factors which could explain these developments.

The author also claims to have uncovered evidence that the dead hand of Asian football corruption is no longer confined to low-grade national fixtures, but has even penetrated the citadel of the global game, in the shape of the World Cup. He relates an incident which he experienced in November 2005, when a long-standing Asian match-fixer agreed to an interview. Not only did one particular German league match finish exactly as the fixer had predicted; he also revealed that the influence of this corruption might even have reached World Cup matches. The author at first was disinclined to believe such allegations, but rapidly became aware that there could be a good deal of substance to them. One factor which had to be taken into consideration was the sheer poverty experienced by some of the teams competing in the world tournament – with some of the implications thereof having been reported in earlier editions of this Journal (more particularly in the case of some African countries). The author alleges that, a few months after the 2006 World Cup had taken place, a leading Ghanaian player had informed him that he had been approached by a fixer during the tournament. Although he had declined the offer, he stated that he had known this particular fixer for many years (*The Sunday Telegraph of 26/10/2008, p. S6*).

Inevitably, the author also examines what the authorities, whether sporting or otherwise, are doing about this state of affairs. It would seem that, for the most part, any investigations undertaken by them have not been very far-reaching. Thus three years ago, he claims, a Chinese fixer was found to have approached at least 14 top Belgian teams and several players to distort games for him and his gambling syndicate. He was allowed to leave the country, and at the time of writing the trial date yet to be set. The general pattern appears to be that the authorities start out with brave words as to “rigorous investigations” and “leaving no stone unturned”, only to allow the inquiry to fade away with the real culprits remaining untouched. And then there is the world governing body, FIFA....

The author travelled to Zurich in order to interview the organisation’s President, the controversial Sepp Blatter, about this issue. The latter made much of the “Early Warning System”, a method for using the information from betting companies in order to monitor the gambling market for fixes. The object is to ensure that, if a warning is received, FIFA executives will swing into action and prevent any problems from occurring. The author then explained to him why he, and many

gambling executives, considered the warning system to be a good start, but not particularly effective at detecting all potential fixes at a World Cup finals tournament. More particularly, the amount of money staked on a World Cup fixture is so great that one cannot see many of the betting anomalies caused by fixing, especially where the fixers are helping the favourite squad to win. Mr. Blatter replied that the system was so sound that the International Olympic Committee (IOC) were considering implementing it at the Beijing Olympics to monitor any potential fixing of their matches. In fact, they subsequently did, and it was subsequently announced that there were no irregular betting patterns on football at this year’s Olympics.

Moreover, developments since the Early Warning System was initiated have appeared to confirm the latter’s shortcomings. The Women’s World Cup of 2007 was held in China – a country which, as is pointed out above, has had its own problems with football match-fixing. The problem arose with the Ghanaian team, who were staying at the Radisson Plaza Hotel in Hangzhou. Two days before the match against Norway, a few players reported that fixers had approached them about deliberately losing the match by five clear goals. The fixers attempted to telephone the players a few times, and one was reported to be walking around the hotel lobby trying to find the players’ room numbers. The Ghanaian officials collected the names of the fixers and the numbers of the hotel rooms involved, and declared themselves ready to testify. However, they later reported that the attitude of the local FIFA representative was extremely odd. They announced that they would monitor the game carefully, but implied that the fault lay with the players. Then the representative in question refused to investigate the case, and instead communicated it to the local Chinese organising committee. The latter heard the Ghanaian officials’ complaints but replied that there was no point in arresting the match fixers since there was no “evidence that they had done anything wrong”. Four months later, at the Africa Cup of Nations, the German coach Reinhard Fabisch reported that he had been approached by the same, Asian, fixers... (*The Daily Telegraph of 9/11/2008, p. S9*).

Whether coincidentally or not, it was only several days after the last of these press reports that FIFA held its first major anti-corruption conference in Zurich in order to promote the work of its Early Warning System (EWS) subsidiary. This firm, established by FIFA and managed by Dr. Urs Scherrer, a Swiss sports lawyer, collates information from a global network of over 400 bookmakers about the amount staked on specific

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outcomes. As is mentioned above, where a rush of money occurs on a particular result, alarms are triggered pointing to an irregular betting pattern (*The Guardian of 11/11/2008, p. S2*). Earlier, the European controlling body UEFA had already brought the EWS system into operation at the Euro2008 tournament. It claimed to have evidence of the effectiveness of this scheme (*The Guardian of 6/6/2008, p. S2*).

### FIFA “did not act in good faith” over ISL affair

One of the problems faced by the world governing body in football FIFA is that it has itself a somewhat ambiguous record as regards financial probity – more particularly over the ISL affair, which has been featured in several earlier issues of this Journal. It will be recalled that ISL, which was FIFA’s marketing company, collapsed in the spring of 2001, and that, following a seven-year investigation, six of its directors were placed on trial in Switzerland earlier this year, accused of embezzling £45 million which should have been paid to FIFA. Since the last issue went to press, however, it was learned that the case collapsed when a defence lawyer produced a secret memorandum purporting to reveal that FIFA leaders always knew that the money was missing (*The Daily Telegraph of 30/7/2008, p. S10*).

The focus of the trial then shifted to FIFA. In a 228-page criminal indictment, the prosecution revealed that ISL paid £9 million in secret kickbacks during the final 18 months of the company’s existence. Two of these, totalling \$130,000, allegedly went to Nicolas Leoz, the Paraguayan president of South American football and a member of FIFA’s ruling executive who awarded the contracts to ISL. Mr Leoz, however, had denied any wrongdoing. Five of the defendants alleged that they had no idea who finally obtained the bribes. They claimed that fellow-director Jean-Marie Weber, a close associate of FIFA president Sepp Blatter, organised the payments. He allegedly laundered them through the Nunca foundation in Liechtenstein, then forwarded them to a company located in the British Virgin Islands, which subsequently allocated the cash to front companies and individuals. A total of £3 million was diverted to the “Sicuretta” account managed by Swiss lawyer Guido Renggli, who allowed Weber to remove sizeable amounts in order to distribute them to officials. Weber later conceded to the investigators that the money was intended for the “acquisition of rights”, but refused to identify any recipients, repeatedly informing the court that these payments were “confidential” and claiming that he was bound to respect such confidentiality (*Ibid*).

The Swiss judge, Marc Siegwart, appeared to be irritated by Weber’s delaying tactics and, during the most electrifying stage of the trial, claimed evidence that, between 1991 and 1999, ISL paid an additional amazing total of £60 million in bribes. He then asked the defendants if this was true, and one by one the defendants replied in the affirmative. The testimony of one defendant was especially devastating. Former Chief Executive Christoph Malms stated that, after joining ISL in the 1990s, he was shocked to discover that the business had been built on corruption, saying:

***“I was told the company would not have existed if it had not made such payments. I was always told they went to well-known decision-makers in the world of sports politics” (Ibid).***

He added that kickbacks were quite common in the world of sports marketing and in the global business of sporting politics. Former ISL finance director Hans-Juerg Schmid supported Mr. Malms’s testimony, informing the court that if the company had not made the payments, the other parties would not have signed the contracts. The other side did not wish to be named, he added, this being the “very sensitive” aspect of this business. Two more officials were named during the trial. Mr. Malms’s lawyer, Werner Wurgler, alleged that Blatter had approached his client and informed him that, if ISL wanted to retain FIFA’s business, Weber should keep his post at the company, and that, if not, this would be “bad for ISL”. Mr. Wurgler also claimed that, in the course of the 1998 World Cup, the FIFA President, Joao Havelange, had made the same demand. He added that anyone at FIFA who knew about the bribes, and who was receiving them, could exercise great power over fellow-officials. ISL became a private source of money for FIFA – in fact, virtually its private bank (*Ibid*).

Mr. Weber was fined £41,000 for embezzling money for which he refused to account. Two others were issued with modest fines for false accounting. Three more men were cleared (*Ibid*).

### Corruption continues to beset Italian football

The corruption scandals which have hit Italian football of late have been adequately documented in recent editions of this Journal – more particularly the various attempts at match-fixing which resulted in a variety of severe penalties being imposed on several leading sides in the Serie A. The repercussions of this affair continue to rumble on in judicial terms, and in early October 2008 it was learned that Luciano Moggi, the former Juventus general manager, was, along with 24

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others, sent for criminal trial for their alleged role in the affair. Mr. Moggi could face a prison sentence if found guilty, given that a judge officiating at a preliminary hearing in Naples decided that prosecutors had presented sufficient evidence to warrant a trial. The accused also included Lazio president Claudio Lotito, the Reggina president Pasquale Foti, and the Fiorentina honorary president Diego Della Valle – along with a number of club directors and former match and federation officials. It will be recalled that Mr. Moggi had already been banned from football for five years by a sporting court in 2006 on charges of influencing the outcome of fixtures (*[2006 2 Sport and the Law Journal p. 21]*). The trial is due to start in late January 2009.

Unfortunately, there have in the intervening period occurred further developments which indicate that the spectre of financial malpractice continues to stalk the arenas of *il calcio*, judging by recent events and revelations. First of all, it emerged, in mid-June 2008, that six Italian sides were penalised for false accounting. Champions Inter Milan, and close rivals AC Milan, were each fined €90,000 for financial irregularities which occurred between 2003 and 2005, which included inflating transfer fees. Venetian club Sampdoria were issued with a €36,000 fine, whilst seven of the three clubs' directors were also penalised. Later, it was learned that Genoa, Udinese and Reggina were also charged with similar offences. The outcome of this case was not yet known at the time of writing (*The Daily Telegraph of 13/6/2008, p. S11*).

Shortly afterwards, it emerged that Italian police had arrested seven people who were alleged to be part of an organised criminal group which attempted to buy Roman club Lazio using laundered cash. Rome police announced that they had started an investigation targeting nine Italians and one Hungarian, who tried to obtain ownership of the club by means of money resulting from the illegal activities of the Casalesi clan, a branch of the Naples-based Camorra crime syndicate. At the time of writing, three men were still at large in the investigation. These included the former Italian international Giorgio Chinaglia, who was believed to have moved to the US two years previously when the authorities ordered his arrest on charges of extortion and insider dealing at Lazio (*The Guardian of 23/7/2008, p. 20*).

Mr. Chinaglia, who was instrumental in enabling the Roman side to win their first Italian title in 1974, and subsequently became the club's President, is still wanted on charges of attempting to influence the price of Lazio shares. He allegedly attempted to oust the current Club President, Claudio Lotito, by falsely

claiming that a Hungarian investment group was interested in buying a controlling stake in the club. At the time, Mr. Chinaglia had given interviews to the Italian media in which he denied any wrongdoing (*Ibid*).

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

### Polish FA accused of corruption – but nation averts international ban

In late September 2008, it was learned that the Polish Football Association, which has been preparing to co-host the 2012 European Championships, was suspended by the country's sports ministry on corruption charges. The Minister for Sport, Miroslaw Drzewiecki, announced that his Ministry had conducted an audit of the association and found irregularities in its functioning, and that its leadership had been removed to be replaced by appointed administrators. He claimed that the Association had taken inadequate steps to address issues of corruption. However, the administrators issued a letter to Michel Platini, the President of the European governing body UEFA, that the organisation of the tournament would continue undisturbed (*The Guardian of 30/9/2008, p. S4*).

However, the matter naturally reached the attention of world governing body FIFA, which demanded that the Polish Government reinstate the country's FA or risk suspension from all football competitions, losing the right to co-stage the 2012 tournament in the process. Initially, the reaction by the Polish authorities was defiant, with Prime Minister Donald Tusk stating that it would not "submit to blackmail" (*Daily Mail of 6/10/2008, p. 73*). However, the Government later relented and reinstated the independence of the Polish FA, and agreed to a "road map" which was charted following a similar dispute the previous year (*The Independent of 7/10/2008, p. 53*). The matter will be reviewed by the FIFA Executive at some later date (*The Daily Telegraph of 7/10/2008, p. S8*).

### Corruption at the Olympics

The Olympic Games organised this year in China have not been entirely free from corruption. In fact, it had already been learned from previous issues of this Journal that Liu Zhihua, a former vice-mayor of the capital city, who was in charge of overseeing Olympic construction projects, had been prosecuted before the Intermediate People's Court in Hengshui for taking bribes. It was later learned that he was sentenced to death. However, the sentence was suspended for two

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years, which means that his sentence will be commuted to lifelong imprisonment if he displays good behaviour (*The Independent of 20/10/2008, p. 24*).

As for the possibility of gambling-inspired corruption, the International Olympic Committee (IOC) concluded, just before the Games were due to start, an agreement with the internet gambling site Betfair for the exchange of information about irregular betting patterns on Olympic events. This meant that the IOC was, for the first time, able to request the identities of account holders whose wagers arouse suspicion. Since Betfair is the world's largest betting exchange, the deal represented a significant addition to that which the IOC already holds with the FIFA subsidiary Early Warning System (EWS), which has already been referred to above. However, EWS offers no access to private data, unlike the memorandum of understanding signed with Betfair (*The Guardian of 31/7/2008, p. S2*).

Taking into account the threat of fraud posed by result-fixing in sport, the IOC president, Jacques Rogge, had set in motion plans to tackle corruption during an Executive Committee meeting the previous December. The Betfair deal was announced as the IOC was decamping to the capital of a nation whose annual turnover in gambling activity reportedly amounts to some £50 billion. In addition, all competitors, coaches, officials and journalists attending the Games were, for the first time ever, required to sign documents under which they pledged not to bet on any Olympic sport (*Ibid*).

Exactly how necessary these safeguards were had been demonstrated two months earlier when it was reported that Li Yongbo, the head coach to the Chinese women's badminton team, fixed the result of the women's single semi-final between two of his players at the 2004 Athens Olympics. Suspicions that there might be more than a grain of truth in these reports grew with the nation's badminton authorities' apparent reluctance to investigate this matter. First, they failed to produce a full response to the 10 questions raised by the Badminton World federation's major incident review team in time for its Council meeting in Jakarta in May. Then the Chinese authorities missed a new deadline set to explain the interview which Li gave to Chinese state television in March 2008, in which he appeared to admit ordering player Zhou Mi to "throw" the match against the eventual gold medallist Zhang Nong in order to increase China's chances of winning the title (*Daily Mail of 1/6/2008, p. 91*).

The IOC has also attempted to tackle any potential corruption connected with attempts by sports

federations bidding to join its roster. It may be recalled from previous issues of this Journal that, following the Salt Lake City corruption scandal, the IOC, in December 1999, initiated an evaluation report of candidate cities to replace visits to those cities by voting members, in order to shield the latter from the temptations of corruption. However, what was still lacking was a formal process by which sports may lobby for admission to Olympic status – and the higher profile and funding that this entails (*The Guardian of 13/8/2008, p. S2*).

As is reported below, baseball and softball have been refused admission to the 2012 London Olympics. However, this has not prevented these sports, as well as golf, squash, and rugby sevens, from campaigning to win a place at the 2016 Games. The IOC Congress is due to vote on the issue in Copenhagen in October 2009, and new regulations have been issued to the bidding sports federations. Thus it is specifically stated in these rules that no gifts may be made, and no advantages promised, to IOC members or to members of the Olympic Programme Commission. This rule applies to both the federations and to the professional lobbyists who represent them, and extends even to the holding of receptions for IOC members or paying their expenses to attend competitions in the sports concerned. The only in which the IOC will permit formal approaches by federations is at their own sports events and at major exhibitions (*Ibid*).

(There have also been suspicions of corruption surrounding the International Cycling Union (UCI) and the decision to admit the discipline known as "keirin" as an Olympic sport – see below, p.46).

The other source of corruption has occurred in the form of ticket fraud. First of all, it was learned that many fans had been swindled by an internet racket offering thousands of bogus tickets for the Games. The International Olympic Committee immediately announced that it would take steps to shut down the fraudsters' operation; however, a newspaper investigation revealed that, some time later, one of the sites concerned was still selling seat tickets at a price of over \$2,150 (*Daily Mail of 5/8/2008, p. 71*). The other problem in this regard concerned ticket price distortion. In late July 2008, Beijing police announced that they had detained 26 people for selling Olympic tickets at up to 10 times their nominal value. They were arrested near one of the booths selling the final batch of 250,000 tickets for events. Fourteen others were also detained but were released after being fined. The authorities had already declared that 60 people had been detained since May for touting, and that they faced up to 15 days

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in jail (*The Daily Telegraph of 29/7/2008, p. S9*).

However, these ominous developments were insufficient to deter a horde of British touts who descended on the Chinese capital once the Games had started. It emerged that the majority of the 6.8 million tickets sold went at low prices to ordinary Chinese who then sold them to touts, who in turn were to sell them to foreign visitors at inflated prices. At a certain point, the touts were observed operating openly outside the Olympic Park in spite of assurances from security chief Liu Shaowu that action was being taken to curb the trade. However, a British newspaper journalist discovered ticket touts operating just a few hundred yards from where Mr. Liu was sitting. The most sought-after tickets, such as those for the swimming, more particularly the 100-metres final, were changing hands at up to 10 times their face value, with one operator requiring 4,000 yuan for a swimming finals ticket worth 400 yuan. Some touts appeared to have taken advice from their local partners and tapped into the vein of corruption which is alleged to run through the Beijing police – with one British trader saying that the constabulary were no problem – “we just bung ‘em” (*The Daily Telegraph of 14/8/2008, p. S9*).

### Cricket corruption scandal – an update

#### *Samuels’s lawyers seeking judicial review of ban*

It will be recalled from a previous issue of this Journal ([2008] 1 *Sport and the Law Journal* p. 25) that the West Indies Cricket Board had decided to investigate alleged links between Test batsman Marlon Samuels and a certain bookmaker., more particularly dealing with the accusation that Mr. Samuels had communicated 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). Shortly afterwards, he was banned by the Board for two years. It was subsequently learned that the batsman was to seek judicial review of this ban, with his lawyers describing the disciplinary decision as “flawed and in defiance of logic” (*The Daily Telegraph of 26/5/2008, p. B20*). The outcome of any such application was not yet known at the time of writing.

#### *Indian cricket leagues battle corruption*

The Indian Premier League is an initiative which has plunged the world of cricket into crisis as it threatens to change the face of the sport for ever. (For some of its ramifications, see below under the heading “Issues

specific to individual sports”, below p. 110). However, quite apart from its sporting controversies, the League, because of its very location, also carries the risk of corruption, given that Asian gambling operators have been at the root of at least some of the scandals which have rocked the sport since the mid-1990s. Officially, gambling is illegal in India but a murky underworld of bookmakers thrives on the basis of the billions of pounds wagered on cricket – with a good deal of this been staked on the outcome of IPL matches. Even before the first ball had been bowled, Lord Condon, the chairman of cricket’s Anti-Corruption Unit (ACU), had warned a board meeting of the International Cricket Council (ICC) that the IPL raised the greatest fear of corruption within the game since the scandals referred to above. The Indian cricket board, however, stressed that they were taking adequate measures to root out match fixing, with players being barred from using mobile telephones during matches and the flow of visitors to dressing rooms being closely monitored. (*The Daily Telegraph of 19/7/2008, p. S8*).

Shortly afterwards, however, some ominous developments started to take place. In mid-July 2008, police in Calcutta busted a betting ring with links to London. Five people were arrested for allegedly operating an inter-state betting racket on the results of IPL matches. According to Deputy Police Commissioner Jawed Shamim:

***“The gang started operating from the very first Twenty20 match at Bangalore. The match at Eden gardens here was also highly bet upon. The gang had its partners in Mumbai and London. The balance sheets will help us find out the exact amount of money staked” (Ibid).***

There was no suggestion that the men had any official links to the IPL. However, there was major concern at the fact that the IPL, being a domestic tournament, falls outside the remit of the ACU and that therefore there were no ICC anti-corruption officials present at its matches. Dave Richardson, the former South African Test wicketkeeper/batsman who is currently the general manager of the ICC, expressed his concern, describing it as almost “inevitable” that a competition which attracted such a huge public attention would arouse the interest of match-fixers and the like. He added his worry that the Board of Control for Cricket in India (BCCI) may have “neglected that part of the game” and failed to make sure that corruption did not take a foothold in the league. Mr. Richardson’s comments prompted an angry reaction from the BCCI, with secretary Niranjan Shah writing to the ICC to complain (*The Daily Telegraph of 25/7/2008, p. S1*).

In the meantime, the IPL’s rival outfit, the Indian Cricket

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League, was fighting corruption battles of its own. In late October, it was announced that the ICL was to call in ACU inspectors after launching a match-fixing inquiry. More particularly tournament organizers reacted to complaints about unidentified players, and acted fast in order to counter questions over the integrity of its Twenty20 competition. A disciplinary committee was convened, and it was announced that the ACU Chief Investigator would be Ravindra Sawani, a former joint-director of special crimes for India's Central Bureau of Investigation who had 30 years' experience (*The Guardian of 29/10/2008, p. S2*).

It then emerged that there had, in fact, been allegations of corruption, with unconfirmed reports that Chris Cairns, the New Zealand international all-rounder, who was suspended from the ICL a few days before Mr. Sawani was appointed, had been connected with match-fixing. A statement from the ICL announced that Mr. Cairns, who captained the Chandigarh Lions, and team-mate Dinesh Mongia had been suspended on disciplinary grounds. The Indian Express newspaper quoted an unnamed official who stated that underperformance was a "serious threat" to the ICL. Mr. Cairns's lawyer, Andrew Fitch-Holland, firmly denied that his client had been involved in match-fixing. He said that he agreed with a statement on the internet website Cricinfo that alleged Mr. Cairns had been suspended for arriving in India with an undeclared ankle injury, which infringed the terms of his contract (*The Daily Telegraph of 29/10/2008, p. S20*). Obviously more will be learned about this affair by the time the next issue of this Journal goes to press.

### ***Mushtaq appointment causes controversy***

The announcement that Mushtaq Ahmed, the former Pakistan Test player, had been appointed as England's spin bowling coach raised hopes that this would be of considerable assistance to the side in its quest to recover the Ashes in 2009. However, there was a less salubrious side to the appointment because of Mushtaq's former association with illegal gamblers. Both Mushtaq and former pace bowler Waqar Younis had been fined and censured by the Quayyum Commission in Pakistan, which published its report into match-fixing in 2000. At the time, Quayyum J had said of Mr. Mushtaq that he had "brought the name of the Pakistan team into disrepute" through, inter alia, his associations with gamblers. Mushtaq had received the heavier censure and fine (£2,370 to Waqar's £790). The Commission also recommended that Mushtaq should be kept under close watch and not be given any responsibility (selection or captaincy) in the team or on the (Pakistan cricket) board. Since the reports by the Quayyum Commission, as well as

that of India's Central Bureau of Investigation into match fixing, the world governing body, the ICC, have expressed their belief that there is an obligation on the part of member states not to employ any players implicated in these reports. On legal grounds, there is no outright ban, but the ICC feels that there is a "moral responsibility" on the part of affiliated countries not to employ anyone thus tainted. When the Pakistan Cricket Board (PCB) appointed Mushtaq as the national side's assistant coach two years ago, Malcolm Speed, then the ICC's Chief Executive, wrote to the PCB reminding them of their responsibilities. Mushtaq was relieved of his duties hours before the team's departure for the ICC Champions' Trophy in India. He was, however, reappointed for the 2007 World Cup on the recommendation of Pakistan captain Imzamam-ul-Haq – who had himself been fined by the Quayyum Commission. Mushtaq resigned shortly after the tournament (*The Sunday Telegraph of 26/10/2008, p. S1*).

Predictably, Mushtaq's England appointment aroused the displeasure of the ICC, which issued a letter to the England and Wales Cricket Board (ECB) asking whether the latter were aware of the various accusations made against Mushtaq eight years previously. Mr. Mushtaq, for his part, issued a statement saying:

***"I am not concerned by this because I was assistant coach with the Pakistan team twice in recent years. I have no issue to explain and I am satisfied with what I am doing. Hopefully everything is sorted out now with the ECB"***  
(*The Daily Telegraph of 28/10/2008, p. S19*).

Whether Mr. Mushtaq's optimism is justified by subsequent developments remains to be seen. This column pledges to monitor this affair with the keenest of interest.

### ***Cronje corruption scandal also carried racial overtones (South Africa)***

South African cricket has been featured prominently in these columns for two main reasons: the corruption scandal in which some of its players were involved, and the racial tensions which continue to bedevil not only the leather-on-willow game, but the major sports in that country in general. What has not hitherto been widely known, however, is the link between these two aspects. This came to light in a television documentary screened on British television in early June 2008, and called *The Captain and the Bookmaker*. It takes as its primary subject the disgraced late South African captain of the national cricket team. However, it goes further than examining his appalling decision to take money in order to fix matches. It also analyses his deliberate and sometimes successful attempts at luring team-mates

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into his web, not least non-white players, and speculates as to what, apart from naked greed, may have prompted him to do so (*The Independent of 2/6/2008, p. 46*).

In so doing, the film also attempts to place in context what Cronje's behaviour meant for the country as a whole, and where it has led his team now. The link with the racial issues confronting South African cricket becomes even more intriguing when one considers Cronje's position as captain of the team which was finding its way back into the mainstream of international cricket. The producer of the film, Paul Yule, comments in this regard that, even eight years after it resumed its place in international fixtures, it was still possible for South Africa to face the West Indies with a squad consisting entirely of white players. The captain accordingly came under increasing pressure to transform the nature of the South African team so that it reflected the full ethnic composition of the country. The implication is that not only did Mr. Cronje attempt to resist such pressure, but that he especially tried to involve non-white players in his web of corruption because their place was less secure. Mr. Yule added that there was a "marked pattern" in this respect, and that the corruption became greater (if indeed it did not begin) after non-white players became a more regular part of the team (*Ibid*).

The makers of the film use a single fixture as the centre piece of their investigation. The match in question was the bizarre "one-innings Test" at Centurion in 2000. The first four days of the game had been blighted by rain. Suddenly, on the fifth, the sun dawned and Mr. Cronje offered to make a game of it. It later transpired that he had been compelled to do so by the bookmaker with whom he was in league, i.e. Marlon Aronstam, who bribed the South African captain to fix the outcome with a bundle of cash.

Interestingly, the outcome of this episode is as significant for the corruption aspect of cricket as for the ethnic complexities of South African cricket. On the one hand, the various changes which have been brought about in the fight against cricket corruption – including the Anti-Corruption Unit referred to above – were largely the outcome of the scandal in which Cronje was implicated. On the other hand, South African selection policy remains in turmoil – as has been amply demonstrated under a different heading of this Journal in almost every successive issue. Producer Yule comments:

***"There may be a quota policy but there are still very few black players in South Africa's team. White players are given more chance to make a go of it. Look at A. B. de Villiers in the present team, obviously a vastly gifted***

***sportsman but he was given his chance, and then look at Hashim Amla, who is in the team but who for a long time was in and out, not trusted with a sequence of games"*** (*Ibid*).

It is also a disturbing fact that Hansie Cronje continues to be revered by the white population of South Africa. As was recorded in this Journal (*[2002] 2 Sport and the Law Journal p. 29*), he died in an aeroplane crash in 2002, but this provides only a partial explanation for his enduring popularity. To an outsider, the hold he continues to exert over his white compatriots is as odd as it is disturbing (*Ibid*).

### Tennis corruption scandal – an update

#### ***Report declares tennis to be largely "clean", but makes anti-corruption recommendations***

The attentive reader will not have been compelled to rely on this Journal to divine that the noble sport of tennis has for some time now been operating under the cloud of suspicious betting-inspired corruption. Various suspicious betting patterns in tennis fixtures have been reported, and already some players have been banned because of their involvement in gambling on the outcome of matches. Individual tournaments and federations have taken a number of preventative measures, but hitherto, the piecemeal nature of their response, although well-intentioned, has not appeared to be entirely up to the challenge set by the opportunities for corruption currently available. The fragmented nature of the manner in which the sport is controlled scarcely helped either. What was needed was a co-ordinated response from the various authorities concerned, and it now seems that at last, something along those lines may be emerging.

In mid-May 2008, it was learned that the world of tennis was not only attempting to "put its house in order", but also seeking to lead the way in co-ordinating a global anti-corruption organization for sport which would be operated long the lines of the World Anti-Doping Agency (WADA). The sport's professional governing bodies – the Association of Tennis Professionals (ATP), the International Tennis Federation (ITF), the Women's Tennis Association (WTA) and the Grand Slam Committee (GSC) – announced that they intended to address their fellow sports administrators, as well as national governments and even United Nations bodies, to obtain a mandate for action in the fight against corruption. The news emerged as part of the soul-searching at all levels of the sport over its integrity. In a joint statement, they declared the following:

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***“In order to enhance and expand the anti-corruption programme the governing bodies will turn to public bodies and authorities for help in combating the threat of corruption. To this end, the governing bodies will create a working group [of] representatives from each stakeholder to develop an effective global approach to the integrity issue”***  
(*The Guardian of 20/5/2008, p. 31*).

This move came in response to an independent review of the sport, the authors of which examined the sport in great detail, which had found that tennis was “neither systematically nor institutionally corrupt” but that it had to work harder than ever in order to keep its integrity intact. In fact, there remained, according to the report, 45 matches on the various circuits in the past five years which should be investigated further. The governing bodies mentioned above have agreed to implement the 15 recommendations contained in the report, including the creation of a global integrity unit and co-ordinated anti-corruption programme. The remit of the review, undertaken by two former policemen, Ben Gunn (formerly of the British Horseracing Authority) and Jeff Rees, who oversaw the security unit of the International Cricket Council (ICC), was to identify potential threats to integrity and consider the regulatory resources and policies necessary to combat any threats (*The Times of 20/5/2008, p. 59*).

The review was not without its intriguing revelations. Thus the report related that, during the consultations held by Gunn and Rees with senior representatives of the four international tennis bodies, they found a wide disparity of views on the question whether betting should be allowed at all in the sport of tennis. At one end of the spectrum was that betting was a scourge, the fount of all evil and the main reason why the sport had developed a growing integrity problem. At the other end was the view that tennis betting was “here to stay” and that the sport needed to take a responsible and measured approach towards managing the challenge. However, although they did not rule out that criminal elements may be involved in seeking to corrupt players or their support staff, and that this may even involve criminal gangs, they considered it “a distortion of the facts” to elevate that suspicion to claims of Mafia involvement (*Ibid*).

One important recommendation made by the report is that only players and essential tournament personnel be given access to the locker rooms at tournaments, since it is widely believed that insider knowledge such as a player’s injury or illness that is not widely known, is passed onto punters from people inside the locker rooms concerned (*The Independent of 20/5/2008, p.*

49). The report also recommends that any players caught cheating should face a life ban (*The Daily Telegraph of 20/5/2008, p. B22*).

By way of postscript, Betfair had settled the markets relating to all but one of the 45 matches highlighted in the Gunn/Rees report. Where matches are found to have been won illegally, this might expose the bookmaker to claims from cheated punters. However, despite Betfair making provision in its regulations for the reversal of settled bets, senior sources at the company said that it was likely to do so ex post facto. There is a precedent for this stance. Betfair adhered to the podium result of the 2003 Brazilian Grand Prix (Formula One) when Kimi Raikkonen was mistakenly handed victory, even though Giancarlo Fisichella was later named as the race winner (*The Guardian of 13/6/2008, p. S2*).

### ***Wimbledon matches come under suspicion***

Many in the media have attempted to put into some perspective the “45 matches requiring further investigation” mentioned in the Gunn/Rees report cited above. They have pointed out that, when it is considered that around 100,000 ranking matches took place during the period over which these 45 fixtures took place, suspect games only represent a tiny fraction of this number, prompting the conclusion that tennis is a relatively “clean” sport (*The Times of 20/5/2008, p. 59*). However, this may prove to be too glib and optimistic a line to take, given that there may be deeper undercurrents to tennis corruption than allowed for in the Gunn/Rees report – without detracting in any way from the integrity and thoroughness of its authors’ investigation. Any such complacency was badly shaken on the eve of this year’s Wimbledon tournament, at which once again doubts began to arise over the wider integrity of the sport.

The day before the first ball was hit in anger in South London, a leading British Sunday newspaper alleged that eight matches had been reported to the tennis authorities on suspicion that their results may have been fixed by professional gambling syndicates. The matches in question were said to have been named in a dossier compiled by leading bookmakers who monitor suspect betting patterns and players thought to be willing to fix the outcome of games. Four of these matches were from the previous year’s men’s singles at the tournament and involved overseas players who each lost by three sets. The dossier reportedly identified sudden spikes in the sums bet. Over £450 million was wagered on Wimbledon fixtures in 2007 through just one British internet site, Betfair. Many of

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the suspect matches allegedly showed vast increases in the sums pledged compared with similar games. These suspicions chimed in with reports that one player claimed to have declined a £70,000 bribe to lose in the first round at Wimbledon – a tempting prospect, since the prize for losing in the first round at the tournament is £10,250 (*The Sunday Times of 22/6/2008, p. 1*).

The newspaper report also claimed that Russian and East European gamblers were behind much of this illegal betting, although the dossier also named a gang of Austrian gamblers. An official with detailed knowledge of the dossier – which altogether identified 140 suspect matches from tournaments around the world – claimed that the monies bet on the outcome of tournament matches can vary from £23,000 to £4.5 million, which is suspicious in itself. In addition, all the first-round Wimbledon losers specified above were also alleged to have been involved in suspect fixtures at other tournaments. One, who is ranked among the top 150 players, was the loser in eight games on the full list. The players concerned were alleged to be of Argentinian, Russian, Italian, Spanish and Austrian nationality (*Ibid*).

For the 2008 tournament, the All-England Club (which organises Wimbledon) had tightened security in order to prevent the players' entourages from gaining access to insider information which could be used for gambling purposes. In line with other tournaments (see above), it ensured that only the player and their coach would be granted entry to the changing rooms (*Ibid*).

### **Japanese doubles player claims match-fixing approach**

The first major tournament to follow the publication of the Gunn/Rees report was a Grand Slam event, to wit the French open at Roland Garros – and it almost immediately provided the first test for the governing bodies to put its recommendations into practice. The tournament was halfway through to completion when a Japanese player alleged that she was asked to “throw” a match. Akiko Morigami claimed that a coach training her national team had asked her to lose a doubles match so that her playing partner, Aiko Nakamura, could play elsewhere that week and attempt to earn the rankings points which could earn a place at the Beijing Olympics. The doubles pair in question ultimately did lose 6-0 6-1 to Yung-jan and Chuang Chia-jung. The ITF immediately announced that the tournament referee and Grand Slam supervisors would investigate the claim and insisted that it took the allegation “very seriously” (*The Independent of 2/6/2008, p. 44*).

It has to be admitted that, whilst the players might not admit to it in the current climate. There are a number of circumstances in which it is not necessarily in their best interest to give of their best – even without any money changing hands. The ranking system, for instance, means that players might not forfeit any points for making an early exit from a minor tournament, at a time when they might prefer to rest or to practise. In other circumstances players might “tank” (i.e. deliberately lose) after making a poor start in order to save themselves for more important events. Betting might not be a motive here, but corruption can enter the arena as soon as any information that a player is less than fully committed is communicated to a gambler (*Ibid*).

### **Davydenko finally cleared**

From previous items posted under this heading in this Journal, the reader will recall that it was a match at the Poland Open tournament in August 2007 which triggered the concerns about possible match-fixing in professional tennis. More particularly suspicion centred on suspicious betting patterns, causing the internet betting site Betfair to void all wagers, which accompanied the retirement from the match of Nikolay Davydenko, the Russian No. 1 player, because of a foot injury. The betting patterns had aroused suspicion because most of the stakes had backed his Argentinian opponent, Vassallo Arguello, even after the latter had lost the first set.

Various legal issues, other than the accusation of cheating, have surfaced in the course of the investigation launched into this affair, including the question whether the ATP had any right to access telephone records belonging to Mr. Davydenko's wife and brother. The Russian player's lawyer, Frank Immenga, has vehemently disputed that the organisation has any such rights. He has also threatened legal action over the tennis authorities' failure to expedite a verdict, claiming that this delay caused his client to suffer financial losses. (On the other hand, “sources close to the investigation” spoke of “frustration” at such claims, and insist that the very reason for the protracted nature of the inquiry was the series of manoeuvres by the player's legal team) (*The Guardian of 20/5/2008, p. S2*).

Whatever the merits and demerits of such claims and counter-claims, in mid-September 2008 the ATP announced that the investigation had reached its conclusion, and that it found no evidence of wrongdoing by Mr. Davydenko, his Argentinian adversary on the day, or anyone else associated with the match, played at Sopot. In the accompanying statement, the ATP announced that it had interviewed “a number of individuals” involved in the fixture, and had reviewed

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betting account details of those who placed the bets. It had also accessed telephone records – not only of Davydenko (as was noted above) but also of Arguello and members of the players' support staff. In the case of "certain individuals" continued the statement, some records were eventually handed over, but they had already been "destroyed" by telephone companies in line with data protection laws (*The Guardian of 13/9/2008, p. 35*).

There is, apparently, an explanation for the unorthodox betting patterns which aroused suspicion in the first place. Speaking during the Wimbledon tournament earlier this year, Mr. Davydenko claimed that some Russian spectators may have overheard him talking to his wife and entourage in the stands during the Sopot tournament, in the course of which conversation the possibility of his retirement from the match may have arisen. Thus he may inadvertently have tipped off a number of bettors (*Ibid*).

### **Doubles pair banned**

In mid-July 2008, it was learned that the ATP had fined and banned two doubles specialists, Frantisek Cermak of the Czech Republic and Michal Martinek of Slovakia, for betting on tennis matches. Mr. Cermak, who does not have a singles ranking, was banned for 10 weeks and fined \$15,000, whereas Mertinak, the world No. 616, received a two-week suspension and a \$3,000 penalty. The organisation made it clear that neither player had bet on the outcome of his own match and that there was no evidence of any intent to influence the result of the matches on which the bets were placed. However, Gayle David Bradshaw, the ATP Executive Vice-President, pointed out that the organisation clearly prohibited gambling on any form of tennis fixture (*The Guardian of 22/7/2008, p. S5*).

### **Snooker faces sponsor withdrawal amidst accusations of corruption**

Another sport which appears to have been caught in the tentacles of betting-inspired corruption is snooker. In fact, the Chairman of the sport's world governing body, Sir Rodney Walker has admitted that the World Professional Billiards and Snooker Association (WPBSA) risks the loss of sponsors if it continues to be associated with suspicious betting patterns. Sir Rodney made this statement after the Gambling Commission opened an investigation into a match involving the former world champion Peter Ebdon, a WPBSA board member, as revealed by a leading British newspaper in mid-September 2008 (*The Guardian of 22/9/2008, p. S6*).

Suspicious betting patterns before Ebdon's 5-0 defeat on August 26 to the world No40 Liang Wenbo led the Commission to open its second inquiry into the sport in seven months. The other arose after bookmakers raised similar concerns with the Commission over a fixture in the Malta Cup competition in February 2008. Mr. Ebdon, after being informed of heavy betting on his match against Liang, said in a post-match interview, that this was not something that interested him, and that he always went out there "to do my best" (*Ibid*).

However, the previous month both Saga Insurance and 888.com relied upon early-cancellation clauses in their respective sponsorships of the Masters and the world championship, the sport's two biggest tournaments. The WPBSA stated that the sponsors had withdrawn because of the difficult economic climate. However, the suspicious betting patterns referred to earlier cannot have helped. In an effort to reassure sponsors Sir Rodney pledged to establish what lessons could be learned from the anti-corruption review completed by tennis (referred to above, see p. 45), adding:

***"If there's information available that is interesting from another sport I'd be more than happy to have a look, particularly as we are looking for two new sponsors. In this very difficult marketplace no one would get involved if they considered the product damaged in any way."*** (*Ibid*)

Hitherto, snooker's anti-corruption regulations, detailed under "general obligations of members", have appeared to be somewhat flimsy. They state that all players must perform to the best of their ability, that no player shall not bet or lay bets on the result score or any other aspect in any match in which they plays, or cause any such bet to be laid on his behalf, and that players shall not directly or indirectly solicit or accept any payment in exchange for influencing the outcome of any game. Players must also now report any approach to influence matches to the WPBSA, but that is about the strength of it.

The tennis anti-corruption review referred to above actually stated that, unlike tennis, which is mainly an individual sport, team games were not so easy to corrupt although none was entirely immune from cheating at betting. Clearly the same threats apply to snooker, another "individual sport". However, the WPBSA failed to conclude an information-sharing agreement with Betfair in 2004 despite opening a dialogue. Instead the ruling body has satisfied itself with an agreement with the Association of British Bookmakers, but it is only through Betfair – which unlike the high-street bookies can identify every account-holder – that a proper audit trail can be followed.

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Dialogue with Betfair was reopened in May after the Guardian newspaper contacted Walker about the image problem his sport faces. The chairman replied that he expected the WPBSA to sign its memorandum of understanding with Betfair in near future (*Ibid*).

### Porto refereeing scandal leads to Champions League ban – and subsequent reinstatement (Portugal)

Under the former Chelsea manager José Mourinho, Portuguese club Oporto achieved the momentous feat of winning both the domestic championship and the European Champions League during the 2003-4 season. However, there appears to have been more to this achievement than meets the proverbial oculus, since European governing body UEFA initially banned the Portuguese side from participation in the 2008-9 Champions' League for having bribed referees in the course of that season (*Daily Mail of 5/6/2008, p. 84*).

More particularly the allegations relate to Porto's 2-0 win against Estreia da Amadora and their 0-0 draw with Beira Mar. Disciplinary action had already been taken against Porto by the domestic football authorities over the case. They were penalised by six domestic championship points and fined €150,000 after a lengthy investigation which became known as "Golden Whistle". The club president, Jorge Nuno Pinto da Costa, was suspended for two years by the Portuguese disciplinary commission and fined €10,000. It should be added that Mr Mourinho was never mentioned in the investigation (*Ibid*).

However, the Portuguese club successfully sought to have the ban overturned by the UEFA Appeals Committee, whilst a more in-depth investigation into the affair was to take place (*International Herald Tribune of 13/6/2008, p. 1*).

### Cycling chief denies UCI accepted money for including keirin in Olympics

Unfortunately there appears to be no area of sporting endeavour which is immune from accusations of sharp practice. In October 2008, the head of cycling's governing body had to confirm reports that the International Cycling Union had received payments from Japanese national cycling groups. However, he firmly denied accusations that the money was related to the acceptance of the Japanese event, the keirin, into the Olympic Games. Pat McQuaid, the President of the world governing body in cycling UCI, dismissed the accusation as "a matter of interpretation, not of

incorrect facts". Nevertheless, he did confirm that the Japanese paid for the development of track cycling. However, any inference being read into the fact that the payments came six months after the IOC accepted keirin was "wrong".

In keirin, cyclists are paced around the track by a motorbike before sprinting for the line. The event draws millions of pounds' worth of gambling money in Japan; on the international stage, Britain's Chris Hoy is the world champion and favourite for the Olympic gold medal. McQuaid was also keen to scotch rumours that interested parties within this year's new Olympic event, BMX, might also have given money to the ICU. "On the contrary, it is the ICU that is investing in BMX," he told a leading British newspaper.

Concerning the payments from Japan, rumoured to total £1.5m, the UCI President commented:

***"The payments were made in the 1990s when the UCI did not have huge reserves and didn't have the money to put behind certain disciplines. Track cycling needed to be addressed, the Japanese were concerned as well, so we sat down and considered various projects."***

(*Associated Press, www.findlaw.com of 15/10/2008*)

McQuaid said yesterday that an agreement between the UCI and the Japanese had been signed in May 1997 – "if my memory serves me right" – and the keirin had already been accepted by the IOC in December 1996.

## Hooliganism and related issues

### Euro 2008 tournament arrests (Switzerland/Austria)

Generally speaking, it can be said that the Euro 2008 tournament passed off without any major hooliganism alerts (the absence of a certain country which the present author is too polite to mention may conceivably have been germane to this development). However, there were a number of disturbances. During the first week of the tournament, 12 people had to be taken to a special temporary jail in Basle, which hosted Switzerland's 1-0 defeat to the Czech Republic, either for vandalism or aggression towards officers. The police stated that "massive alcohol consumption" had led to a series of incidents and some fighting, but that these did not have any serious consequences (*The Independent of 9/6/2008, p. 59*).

There were further incidents two weeks later in Vienna, and police announced that they made 12 arrests

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following Turkey's tense quarter-final win over Croatia. Around 4,600 police officers had been on duty – Vienna's largest security operation of the tournament thus far. The match also appears to have sparked off violence in the Bosnian city of Mostar, where dozens of people were admitted to hospital after clashes between Bosnian-Muslim and Bosnian-Croat fans. Around 1,000 police cordoned off the city centre and used tear gas to separate rival fans (*The Observer of 22/6/2008, p. S5*).

### Riot halts Barcelona derby (Spain)

The derbies that pit against each other the two top football teams in the city of Barcelona – "Barça" and Espanyol – are normally intense affairs, but this year, violence was allowed to intrude on the proceedings in the match that took place at the home of the city's less fancied team. The home side having scored in the first half, their opponents were hard at work trying to make amends when flares started raining down on Espanyol fans, thrown by Barcelona hooligans seated above them. With the supporters fleeing for cover, several home fans at the other end of the stadium broke through the perimeter fence and a rather weak police response stumbled into action. The referee halted the game for eight minutes. Barcelona went on to equalize and then win thanks to a last-minute penalty scored by Lionel Messi (*The Independent of 29/9/2008, p. 59*).

### Suspended prison sentence for hooligans was correct, rules Danish court of appeal

Before a match between Danish League sides Brøndby and FCK, played in December 2005, a number of FCK "supporters" descended onto the platform of the Enghave station, where an underground train full of Brøndby supporters arrived shortly afterwards, and a riot ensued. Several hooligans were arrested and then issued with a suspended sentence of 30 days' imprisonment by the district court (Byretten). Two of those thus sentenced applied to the Appeal Court (Landsretten) in order to have the sentence set aside or, in the alternative, reduced. They claimed that, at the moment when the train arrived at the station, they had already left the platform and therefore could not have taken part in the disturbances.

However, the Appeal Court confirmed the first-instance ruling. The fact that the two accused had not been present when the train arrived and the subsequent disturbances (uroligheter) did not detract from the fact that the accused had joined the larger group who invaded the station platform with a view to start a fight (slagsmål) with the Brøndby supporters who arrived by

that train. For that very reason, they had infringed Article 134a of the Criminal Code (Straffeloven) and had therefore been justly sentenced. This was particularly the case since the sentence had been suspended in view of the protracted period which had elapsed since the events giving rise to the prosecution took place (*Decision of 10/6/2008, case S-3486-07, (2008) Ugeskrift for Retsvaesen p. 2342 et seq.*)

### Other cases (all months quoted refer to 2008 unless stated otherwise)

**Perpignan, France.** In mid-August, at a Rugby League fixture between French side Catalan Dragons and English side Wigan, at least one plastic bottle was hurled at referee Steve Ganson as he left the field following the 16-16 drawn game. An official of the home side later confirmed that a spectator had been chased and caught by stewards (*Daily Mail of 11/8/2008, p. 77*). It was not known at the time of writing what penalties, if any, were visited upon the French club by the relevant sporting authorities.

**Baghdad, Iraq.** In mid-June, at least 39 people were injured by stray bullets as jubilant football fans fired into the air after their national team had won 2-1 in China to reach the final stage of the Asian World Cup. At least 25 others were injured on the same night when a female suicide bomber blew herself up amid a crowd of fans at a café in Baghdad minutes after the final whistle (*The Daily Telegraph of 16/6/2008, p. S11*).

**Parma, Italy.** In mid-May, a policeman was taken to hospital in a serious condition with injuries to his spleen as Inter Milan fans rioted on the day when their team won the coveted Serie A title. Inter fans had been banned from what was a title decider, but somehow approximately 1,000 fans still succeeded in gaining access to the ground to see Swedish international Zlatan Ibrahimovic score both goals in Inter's 2-0 win (*Daily Mail of 19/5/2008, p. 83*).

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### "On-field" crime

#### Ferrari and McLaren feud ends, but Stepney remains under pressure

The reader will recall from the previous issue ([2007] 3 Sport and the Law Journal p. 32) 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.

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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. In the meantime, the Italian prosecuting authorities pursued their investigation, with prosecutors questioning various individuals and even arriving in Britain to search the homes of several McLaren executives ([2008] 1 *Sport and the Law Journal* p. 33).

During the period under review in this issue, little progress appears to have been made in the criminal investigation. Under Italian law, the prosecutor must stipulate the offences which he/she suspects have been committed, even before bringing charges. [In this case, the suspected crimes are industrial espionage, unlawful possession, copyright violation and sporting fraud.] This does not appear to have happened as yet (*The Guardian* of 12/7/2008, p. S9). However, Ferrari announced, in mid-July 2008, that it was calling off its legal action against McLaren in return for a donation to charity. The latter also announced that it had agreed to settle Ferrari's legal costs. Nevertheless, this does not mean that the "spygate" scandal is at an end. At the same time as announcing this truce, Ferrari also stressed that it was continuing its legal action against suspected informant Nigel Stepney (*Daily Mail* of 12/7/2008, p. 120).

Ferrari's willingness to reach a conclusion on this controversial matter is seen as a reflection of the conciliatory approach adopted by Stefano Domenicali, the new team principal who took over from the more hard-line Jean Todt earlier this year. Although he is convinced that his team had been badly wronged by their F1 rivals, his desire that the matter be concluded reflected a desire that the team's efforts on the racing track should remain unaffected by the emotional baggage left by previous disputes (*The Guardian*, loc. cit.).

### "Off-field" crime

#### **Controversy as Australian rugby league side includes players investigated over assault**

Australia's preparations for the 2008 Rugby League World Cup were badly disrupted by a spate of injuries to top players, including Brett Stewart and Justin Hodges. This prompted the selectors to bring in two Brisbane Broncos players who were the subject of an investigation into allegations of sexual assault. This naturally gave rise to a storm of criticism in the media, which Geoff Carr, the Chief Executive of the Australian Rugby League, countered in the following terms:

**"We asked the selectors to pick the two best available players and the names they gave us are under investigation by the police but have not been charged. Do we then deny these players the opportunity to earn income from playing in the World Cup because they are under investigation, and what happens if they are not charged?"**

(*The Guardian* of 17/10/2008, p. S7).

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

#### **US coach relative murdered in Beijing during Olympics**

Unprovoked murders are nothing new in large cities all over the world. Nevertheless, it came as a massive shock to learn that, during the opening days of the Beijing Olympics, Todd Bachman, the father-in-law of US volleyball coach Hugh McCutcheon and a familiar face to many of the team, had been stabbed to death at one of Beijing's leading tourist attractions. Mr. Bachman and his wife Barbara, the parents of McCutcheon's wife, the former US Olympian Elisabeth Bachman, were attacked while visiting the Drum Tower in the city. Bachman died at the scene, and his wife was in a critical condition yesterday after undergoing eight hours of surgery. Their attacker, a Chinese national named Tang Yongming, killed himself by leaping from the second floor of the tower after the attack (*The Guardian* of 11/8/2008, p. S8).

The killing prompted a security clampdown at tourist attractions across the city, and in a sign of the seriousness with which the situation is viewed, China's foreign and health ministers visited the family in hospital to offer support. The US players were ordered not to go sightseeing in the wake of the attack, which has overshadowed the first weekend of the Games and deeply affected the volleyball squad. The Bachmans were regular spectators at international matches, and were particularly well known to the women's squad (*Ibid*).

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### **Pele robbed at gunpoint (Brazil)**

In late June 2008, it was reported that Brazilian soccer legend Pele had been held at gunpoint by a gang of youths, who then robbed him of his gold necklace, telephone and watch. The robbery took place near the city of Santos. The former striker had apparently been in the passenger seat of a car when it was halted near a slum area by at least 10 young men armed with pistols and knives. When they approached his car, Pele lowered the window and told them who he was, but they robbed him nevertheless. It was later revealed that the robbers returned some of the items after learning their victim's identity. Unfortunately, Mr. Pele's ordeal was far from unusual in this country. Armed gangs from poor neighbourhoods frequently set up makeshift road blocks, halting traffic and robbing motorists before disappearing back into the neighbourhood where they can evade the police (*The Guardian of 23/6/2008, p. 17*).

### **Eto'o "sorry" for butting journalist (Cameroon)**

Samuel Eto'o is a fine player, both for his country Cameroon and for his club side Barcelona. However, he appears to have lost control of his temper in a bad way during a press conference in late May 2008. At a certain point Mr. Eto'o headbutted one of the journalists after tempers flared between media representatives and Cameroon players. The Barcelona striker later apologised and offered to pay the medical expenses of radio reporter Philippe Bonney, whose nose was apparently broken in the altercation which took place in the Cameroonian capital, Yaoundé. The fracas took place when Cameroonian journalists decided to walk out of a news conference ahead of the World Cup qualifying game against Cape Verde islands in order to protest at the team's refusal to grant interviews to local reporters (*The Guardian of 6/6/2008, p. S2*).

### **American footballer faces fresh assault charges (US)**

The Kansas City Chiefs' running back Larry Johnson appears to have a problem with handling members of the opposite gender, judging by the number of charges he is currently facing. In mid-September 2008, he was involved in an incident at the Grand Emporium Saloon nightclub, in which he allegedly pushed the side of her head with an open hand telling her "don't touch me" as he made his way through the club, as a result of which he was charged with simple assault (*Associated Press at www.findlaw.com of 14/10/008*). The following month he was in trouble again, this time being charged with simple assault for spitting his drink in a woman's face –

once again in a Kansas nightclub. The victim claimed that Johnson had threatened to kill her boyfriend before committing the act for which he was charged (*Associated Press, at www.findlaw.com of 27/10/2008*).

In 2003, Mr. Johnson had been charged with the felony of aggravated assault and the misdemeanour of domestic battery for allegedly waving a gun during an argument with a former girlfriend at his home. The charges were later dropped when he agreed to undergo a domestic violence diversion programme. Charges against him were once again dropped in 2005 after a woman who had accused him of pushing her to the ground at a Kansas City bar decided not to press charges and failed to appear at three court hearings (*Associated Press, www.findlaw.com of 14/10/2008, loc. cit.*).

### **Baseball pitcher Chamberlain arrested (US)**

In mid-October 2008 the New York Yankees pitcher Joba Chamberlain was arrested in Nebraska on suspicion of driving under the influence, speeding and having an open container of alcohol in his vehicle (*Associated Press, www.findlaw.com of 20/10/2008*). No further details are available at the time of writing.

### **England Rugby players investigated over hotel incident – but no charges follow (New Zealand)**

Over-enthusiastic celebrations or commiserations following rugby international fixtures are nothing new, and occasionally they involve the long arm of the law. However, matters looked decidedly more serious in mid-June 2008 when, following the England team's 37-20 defeat in the First Test against the All Blacks in Auckland. Early reports related that New Zealand police had started an investigation into "serious allegations" made against four members of the England squad over an incident which occurred in a private room at the team's Hilton hotel (*The Daily Telegraph of 18/6/2008, p. S1*). A complaint had been made to the police by an alleged victim, and the England team management confirmed that they were co-operating with the inquiries (*Daily Mail of 18/6/2008, p. 77*). The next day it transpired that the complaint in question had been made by a "third party", and not by someone who had claimed to have been with the players at the time of the alleged incident. At the same time, new Zealand television for the first time reported that the incident was allegedly of a sexual nature (*The Guardian of 19/6/2008, p. S1*).

Naturally, the rumours started flying thick and fast – that an 18-year-old had consented to have sex with two

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players, that several other women returned to the hotel having met up with team members in a nearby bar, and that journalists from some British Sunday tabloids were flying out to New Zealand in order to interview the women who claimed to be involved. More trustworthy was the statement by the police that the players, via their legal representatives, had declined to answer questions relating to the alleged incident – a decision which was later defended by the English Rugby Football Union (RFU), saying that they had been advised to do so in the absence of a formal complaint (*The Guardian of 20/6/2008, p. S5*).

In the continued absence of any complaint, the England players were allowed to return home after their ill-fated tour (both on and off the field). As the players dispersed to all quarters, the focus switched to the RFU in order to ascertain how they would handle this imbroglio. Initially, although RFU disciplinary officer Jeff Blackett had suggested in strong terms over the previous weekend that the allegations would be the subject of a disciplinary investigation, it was decided to allow the dust to settle first (*The Daily Telegraph of 24/6/2008, p. S20*). The next day, however, it was learned that Mr. Blackett would definitely start an investigation on his return from South Africa (*The Guardian of 25/6/2008, p. S9*). As the investigation drew to a close, Blackett was said to be prepared to announce his verdict, but as he was poised to do so he received a letter from a firm of solicitors in Auckland representing the woman involved in the alleged incident which detailed her account of what happened that night (*The Guardian of 5/7/2008, p. 11*).

In that letter, the woman, who insisted on remaining anonymous, did not name the players concerned and, through her solicitor Jack Hodder, stated that she wished to correct various inaccuracies reported since the police announced that they were investigating the incident. She claimed that she had been invited back to the England hotel by one player in the early hours following the First Test, only to be joined soon afterwards by three others. She alleged that she had been “sexually violated” by the four and that, when she visited a hospital later that day, the medical professional treating her referred her to the police. Earlier reports had suggested that the woman’s boyfriend had approached the police, but the woman stated that she did not have a boyfriend, adding that she was not, as had also be claimed, a lap dancer. She outlined her reasons for not taking the matter further with the police, wishing to protect her privacy and being apprehensive about going through the criminal process. This letter effectively required Mr. Blackett to act as judge and jury on what happened in the hotel bedroom.

Two days later, it was reported that the woman in question had made an offer to answer questions indirectly from Mr. Blackett, through her lawyer. It is not known whether this offer was ever taken up – in fact, at the time Mr. Blackett said that he had not received any such offer, although he was at all times prepared to talk to the woman in question (*Daily Mail of 7/7/2008, p. 67*). Finally the Blackett report emerged, and concluded that there had been no evidence that conflicted with the players’ denials that sexual assault had taken place. However, there were disciplinary consequences. Mike Brown, the Harlequins full back, and Topsy Ojo, the London Irish wing, were reprimanded and fined – the former £1,000 for staying out all night and then missing a physiotherapy appointment, the latter £500 for staying out all night. He also concluded that, although some expression of high spirits had always been a feature of rugby tours, present-day players had to remind themselves that they now had “high public profiles” (*The Independent of 11/7/2008, p. 61*). The next day, the woman concerned formally confirmed that she would take no further action over the matter (*The Times of 12/7/2008, p. 97*).

One positive aspect to emerge from the entire episode was the announcement that a new code of conduct would be introduced for touring English sides, restricting post-match behaviour. Martin Johnson, the new England manager who had not been present in New Zealand for the Test series, announced that this would be “top of the agenda” when the elite squad met for a training camp the following month. Previously, there had been no rules about drinking or prohibitions on inviting people back to rooms, and there was no curfew (*The Independent, loc. cit.*).

### O J Simpson found guilty (US)

In an earlier issue of this Journal (*[2007] 3 Sport and the Law Journal*) it was related that the former American footballer had been accused, along with five others, of breaking into a Las Vegas hotel room and robbing two dealers of sports collectors’ items. Four of the five had struck plea bargains with the prosecutors in return for a lesser sentence. Mr. Simpson subsequently pleaded not guilty to all charges, which include burglary, coercion and assault with a deadly weapon. His defence rested mainly on the claim that he was simply attempting to recover the goods which had been stolen from him.

During the initial stages of the trial, the composition of the jury was always going to be an important issue. The selection process began in a courtroom in Nevada from a pool of 250 potential jurors. This group had already

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been reduced from 500 using a 26-page questionnaire aimed at filtering out anyone holding any bias towards the defendant (*The Guardian* of 9/9/2008, p. 19). The judge, Jackie Glass, warned prospective jurors to disregard Mr. Simpson's well-known acquittal in the 1995 double-murder trial in which he was accused of murdering his wife and her lover. However, she had already rebuffed a request from Simpson's defence lawyer to ask the jurors if they believed his client was a murderer (*The Independent* of 9/9/2008, p. 27).

Once the jurors had been selected, the trial got under way. The prosecution's presentation relied heavily on indistinct recordings of conversations between Mr. Simpson and a group of men allegedly plotting to seize the property in question. Although the vendors alleged that Simpson and his associates stole their property at gunpoint, the former footballer claimed that he was unaware of any weapons being used (*The Guardian* of 16/9/2008, p. 19). However, one of the alleged accomplices who entered plea bargains, Walter Alexander, testified that Simpson actually requested his associates to bring guns to the confrontation. He claimed that Simpson informed the men that these guns were for their own protection and advised them to have them visible in their waistbands when they walked into the room. He told the court that Michael McClinton, another member of the entourage, also carried a gun (*The Daily Telegraph* of 26/9/2008, p. 12).

Simpson, along with Clarence Stewart, was eventually found guilty on all 12 charges, although at the time of writing he had not yet been sentenced. However, since the verdict was announced the disturbing fact has emerged that five out of the 12 jurors admitted that they disagreed with Mr. Simpson's double murder acquittal in 1995. The five admitted their feelings in the aforementioned questionnaires which they completed prior to the trial. However, they deny that this influenced their judgment – a claim which has since been challenged by defence lawyers, who insist that Simpson's conviction represented a "payback" for the outcome of the murder trial. Yale Galanter, Mr. Simpson's lawyer, announced that the jury selection would form the cornerstone of an appeal (*The Daily Telegraph* of 6/10/2008, p. 19).

### **Yobo relative taken hostage in Nigeria**

In earlier editions of this Journal, attention has been drawn to a disturbing trend in Southern America whereby relatives of celebrated sports stars have been kidnapped and held to ransom. It would appear that this trend has now spread to Africa. In early July 2008, it

was learned that Norum, the brother of Joseph Yobo, who plays for English Premier League side Everton, had been abducted as he made his way home from a nightclub in Port Harcourt, Rivers State (Nigeria). Details of the kidnap were confirmed by Cyril Dumite. He was one of three men taken from their cars at gunpoint, but the other two were later released.

Initially, the kidnappers demanded a ransom of £5,500 for the release of Mr. Yobo. However, it was later learned that the latter had been freed (*The Guardian* of 17/7/2008, p. 7). Whether the ransom money was paid in the process is not as yet known.

### **Australian rugby league international charged with assault**

The Australian side's problems in preparing for the 2008 World Cup have already been highlighted earlier (p. 48). They received an additional setback when their stand-off, Greg Bird, was charged by a court with assaulting his American girlfriend with a glass. Katie Milligan was allegedly hit in the face with a glass at Mr. Bird's apartment in Sydney and sustained facial injuries which included a fractured eye socket. He was detained in custody overnight and subsequently granted bail at a local court in Sutherland, a suburb of Sydney (*The Guardian* of 26/8/2008, p. S2). No further details are available at the time of writing.

### **Karate champion fights off mugger**

In mid-September 2008, a mugger in Italy got more than he bargained for when the woman he attempted to rob turned out to be a national karate champion. Lara Liotta, a four-times Italian women's champion, was on a street in central Rome when a man, a Romanian immigrant, approached her and asked her for a cigarette. When she told him she did not smoke he allegedly made a lunge at her and grabbed her around the neck. Ms Liotta, who works for the prison service, delivered two swift jabs to the man's face which sent him crashing to the ground. Although the attack happened in broad daylight, no passers-by apparently came to her assistance. After punching the man to the ground, she ran to the nearby railway station and alerted the police, who caught the Romanian before he could abscond. He was later arrested and detained on charges of assault (*The Daily Telegraph* of 11/9/2008, p. 20).

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### Ganguly reveals kidnap threat (India)

Sourav Ganguly, the former Indian cricket captain, announced in early October that he had received a kidnap threat against his daughter. He disclosed the news as he announced that he was to retire from Test cricket following the four-match series against Australia, which was about to begin in Bangalore. He did not provide details of the threat, but police in Kolkata stated that security around the ganguly residence had been increased (*The Guardian of 8/10/2008, p. S2*).

### Drug dealer arrested at Brazil footballer's home

In late September 2008, it was learned that a notorious alleged drug dealer had been arrested at the Brazilian home of Anderson, the Manchester United midfielder. Richard Alex da Silva Martins, a.k.a. Gigi, was at the Brazil international's abode in Porto Alegre when he was seized by police, who had been monitoring his activities for one year. Ricardo Herbstrich, from the local Public Prosecutor's Department, emphasised that Mr. Anderson had nothing whatsoever to do with the case. According to the information at the authorities' disposal, he said, Gigi was just a friend and Mr. Anderson maybe "doesn't know even know that he is a criminal" (*The Daily Telegraph of 24/9/2008, p. S8*).

### Former Belgium international footballer admits to counterfeiting currency

Gilbert Bodart is a famous ex-international footballer who regularly represented his country in the international arena, but recently he has followed the less celebrated route of those former sporting stars who subsequently fall foul of the criminal law. In late August 2008, he had already admitted to the criminal authorities his involvement in an aggravated robbery in the Ardennes. However, this did not represent the sum total of his self-confessed criminal activity, since he also admitted to having taken part in a major counterfeiting operation.

The investigation into the circulation of forged money had already started in early June in Liège, when investigators raided the farm of former jockey and potato merchant Johan Leyn in Izegem (West Flanders). There, they found an industrial printer and machines geared towards the manufacture of currency notes. They also found printing plates for €50 notes, a USB stick, four screeds of special paper suitable for the printing of forged currency, as well as a large amount of aluminium rolls, the latter serving to affix the safety thread to the notes. Mr. Bodart admitted having been a

party to the preparation and financing of this counterfeit operation (*Het Laatste Nieuws of 29/8/2008, p. S11*).

### Italian World Cup star relative gunned down

In mid-August 2008, it was learned that Italian World Cup winner Daniele de Rossi was in mourning after his father-in-law had been shot and killed in a suspected mafia attack. Massimo Pisoni was found with a gunshot wound to his face and back, with investigators confirming that this was a classic "mob" murder" (*The Daily Telegraph of 15/8/2008, p. S17*).

### Various US cases (all months quoted refer to 2008 unless stated otherwise)

**Newport Beach.** In late October, Leigh Steinberg, a prominent sports agent who helped to inspire the film "Jerry Maguire", was arrested on suspicion of public drunkenness. Police Lt. Bill Hartford stated that Mr. Steinberg had been taken into custody by police who had received a report about a man screaming and attempting to climb a hill (*Associated Press, www.findlaw.com of 31/10/2008*).

**State College, Pa.** In mid-July, police brought charges against 14 people in connection with an unruly celebration after the Penn State (American) Football side beat Ohio State. At the time of writing, four people were facing one count of riot (felony) and other charges (misdemeanour) following a confrontation with the police. Eight other faced lesser charges. The authorities claimed around \$7,000 had been caused by way of damage, including two uprooted light poles, torn street signs and damaged cars. There were no serious injuries (*Associated Press, www.findlaw.com of 7/11/2008*).

**Michael Vick dog-fighting case continues.** The American football star's trials and tribulations with the long arm of the law have been well documented in previous issues of this Journal – more particularly in relation to charges brought against him for organising dogfights. At the time of writing, Mr. Vick was being held at a federal prison in Kansas, serving a 23-month sentence after pleading guilty to the federal charge. He is still awaiting proceedings at the state level and has asked the relevant Virginia court to enter a guilty plea (*Associated Press at www.findlaw.com of 30/10/2008*).

**Darrent Williams suspect faces trial.** In mid-October, a man accused of killing the Denver Broncos footballer in a drive-by shooting has appeared in court. A judge formally advised the accused, Willie Clark, of the

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charges and scheduled the arraignment, when he will enter a plea (*Associated Press at www.findlaw.com of 17/10/1008*).

**West Virginia footballers arrested.** In mid-November, it was learned that Maxwell Anderson, a running back, and special teams holder Jeremy Kash, had been arrested on battery charges. They were scheduled to be arraigned in early December, and have in the meantime been indefinitely suspended from the team (*Associated Press at www.findlaw.com of 14/11/2008*).

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### Security issues

#### **Cricket Champions League Trophy postponed on security grounds (Pakistan)**

The current tense political situation in Pakistan has led to increasing levels of violence, including several suicide bomb attacks. In addition, Westerners are often targeted for terrorist assaults. It was against this background that the Champions League Trophy was due to take place in that country in mid-September 2008. Naturally, these developments caused serious concern to the game's authorities, both at the domestic and at the international level. As early as mid-June 2008, Sean Morris, the Chief Executive of the England and Wales Cricket Board (ECB) had voiced doubts as to whether the tournament could go ahead. Initially, however, it looked as though the ECB would accept the findings of a confidential safety and security report commissioned by the International Cricket Council, the world governing body for this sport, which had advised that the eight-team tournament could go ahead after a meeting of its executive in Dubai. ICC acting Chief Executive Dave Richardson confirmed that the ICC was "comfortable" with the security to be provided (*The Guardian of 20/6/2008, p. S8*). However, these assurances failed to quell the doubts held by others, including Tim May, the Chief Executive of the players' union FICA – an organisation heavily dominated by Australians, whose country was making no secret of its reluctance to tour Pakistan (*The Guardian of 20/6/2008, p. S8*).

At an ICC Board meeting held the following month, the decision that the tournament should go ahead was confirmed. It appeared that the voting had been along the now-familiar battle lines – the Asian block versus England, Australia, New Zealand and South Africa (*Daily Mail of 25/7/2008, p. 90*). Giles Clarke, the ECB Chairman, continued to express grave doubts, and explained that no player would be compelled to take part in the tournament – raising the possibility that

England might not be able to raise a team – particularly as Haroon Lorgat, the ICC Chief Executive, announced that no Board would be penalised if individual players withdrew. Mr. Clarke was supported in his reservations by Australia and New Zealand. Unsurprisingly, Nasim Ashraf, the Chairman of the Pakistan Cricket Board (PCB) welcomed the decision. He reminded the critics that the ICC security firm had given Pakistan A grade for the arrangements made during the recent Asia Cup. The ICC was also keen to emphasise that a task force comprising ICC officials, representatives from ESPN Star Sports (the tournament's official broadcaster) and FICA had been assembled to monitor security arrangements in the cities where the events were to take place (*The Guardian of 25/7/2008, p. S1*).

However, all the while the momentum for a player boycott had been building, with players such as Kevin Pietersen (England), Ricky Ponting and Andrew Symonds (Australia) and Jacob Oram (New Zealand) exhibiting doubts over their participation (*The Times of 26/6/2008, p. 55*). Nor did it help that, barely two weeks before the ICC meeting referred to above, yet another suicide bombing took place in Pakistan (*The Guardian of 7/7/2008, p. S15*). It also emerged that the ICC consultants' security report, referred to by Mr. Lorgat (see above), had some limitations (*The Guardian of 21/7/2008, p. S7*). In mid-August, the ICC, through Mr. Lorgat, made a last-ditch attempt to persuade England to send a team to the tournament at the MCC headquarters at Lord's, delivering a presentation to an ECB meeting attempting to prove that the players' safety could be guaranteed (*The Daily Telegraph of 19/8/2008, p. S13*). The next day, however, it was announced that Australia's cricketers would officially withdraw from the tournament (*The Independent of 20/8/2008, p. 54*). Three days later, it was South Africa's turn to pull out (*The Guardian of 23/8/2008, p. S15*).

It was clear from that point onwards that the tournament was doomed – at least during the period in which it had been scheduled to take place. Almost inevitably, the ICC cancelled the event – or at least postponed it, with the tournament being provisionally rescheduled for October 2009. The ICC reached its decision during a teleconference call, in which five of the eight competing teams announced that they would not be sending a team. There was, of course, another option, which was to move the event to another country. But Pakistan had already stated that it would refuse to send a team if this happened (*The Independent of 25/8/2008, p. 47*). The delay of the tournament will automatically commit the ICC to a further round of security delegations and political

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manoeuvres next year. Naturally, Pakistan will be keen to prove the efficiency of its security arrangements during their coming home tests with India (*The Guardian of 25/8/2008, p. S12*).

Inevitably, this decision was not without its critics or recriminations. When it was learned that Australia was to press ahead with its tour of India, despite the five bomb blasts which struck New Delhi the previous week, there were inevitable accusations of hypocrisy from certain quarters – more particularly from Shafqat Naghmi, Chief Operating Officer of the PCB. In fact, other critics pointed in the same direction, in that the Indian Premier League (see elsewhere in this Journal) which was about to start did not appear to be surrounded by such controversy and strife as to the safety of its location given the number of murderous incidents which were gripping that particular country. Could it therefore be that cricketers – like insurance companies – have a sliding scale when it comes to assessing risk, and that the more cash is on offer the more emboldened they become? (*The Daily Telegraph of 28/7/2008, p. S6*).

### Tim Montgomery jailed for five years (US)

The former sprinter Tim Montgomery has had more than one brush with the public authorities – even if one leaves aside his tainted record as an athlete, in view of his involvement with doping which deprived him of two Olympic medals. He subsequently fell foul of the criminal law, and was issued with a four-year sentence for cheque fraud conspiracy in New York. Whilst still serving this sentence, he entered a guilty plea on a charge of conspiracy to possess with intent to distribute, and distribution of, more than 100 grammes of heroin. For this offence he was jailed for a further five years (*The Guardian of 11/10/2008, p. S13*).

## Other issues

### Sportingbet staff detained in Turkey

In late May 2008, it was learned that two London-based employees of Sportingbet have been detained by Turkish police as part of the country's crackdown on internet gambling in the latest blow to the online sports betting group.

The middle-management staff, who Sportingbet declined to name, were of Turkish nationality. Being in Turkey on holiday, they were detained by police in Istanbul in a raid which is believed to have led to about 30 people being detained. The pair were not together when detained. The company stated that the detentions were linked to Superbahis, its Turkish facing business, and that it was aware that individuals connected with Maslin Properties Ltd, the group's ex-marketing partner in the region, had also been detained. The company spokesman added that they had received no formal clarification of events from the Turkish authorities.

It will be recalled from a previous issue (*[2006] 2 Sport and the Law Journal p. 35*) that this company was at the centre of a US clampdown on internet gambling when its chairman Peter Dicks was arrested in New York in September 2006. No charges were ever brought against Mr Dicks. Its Turkish operations accounted for 26 per cent of Sportingbet's net gaming revenues in the second quarter, but 14 per cent in the third quarter to end April. The shares fell by 2¼ to 36p. Its major rival PartyGaming pulled out of the Turkish market last year citing newly-enacted legislation which prohibits certain forms of online gaming from being offered by any unauthorised domestic or foreign company to citizens in Turkey (*The Daily Telegraph of 30/5/2008, p. B2*).

Sportingbet's chief executive Andrew McIver said the group's interpretation of the new laws was that it could continue taking bets as long as it had no assets or operations in Turkey. The group's computer processing is in Guernsey and customer support in Dublin. He added:

***“Turkish law seeks to make it illegal to be based anywhere in the world. Our interpretation is that Turkish law ends at the Turkish border” (Ibid)***

Later, Sportingbet confirmed that it had no immediate plans to pull out of Turkey, despite struggling to discover why its two employees had been jailed. Mr. McIver said that the two had been “moved from a police station to a prison” but that they had yet to be charged with anything. They have been allowed a visit from their families.

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Meanwhile, reports in the Turkish press alleged that the police were investigating allegations of organised crime, money laundering and tax evasion, rather than any crackdown on internet gambling, though Mr McIver stressed that such reports focused on Maslin. He added that he was relying on Turkish lawyers whom the company had appointed to represent them for information, but admitted to being “vague” on this because the information was not readily available. Despite the setback, Mr McIver said he had no immediate plans to pull out of Turkey – as rival Bwin has done – despite the detentions overshadowing yesterday’s third-quarter results, which showed underlying operating profits jumped from £3m to £7.3m. Turkey accounted for 13.9 per cent of net gaming revenues, down from 25.8 per cent in the second quarter. However, Mr McIver reiterated his view that Sportingbet was breaking no laws taking bets from Turkish nationals as it had “no physical operations” there (*The Daily Telegraph of 6/6/2008, p. B4*).

Several weeks later, the two detained employees completed separate appeals. As a result of these one of them was released without charge and returned to the UK. The other appeal, however, resulted in bail being refused at this time and at the time of writing the employee in question continued to be held in custody awaiting formal charges. The company continued to offer him support and was still seeking clarification about when and what charges, if any, will be bought. It was also learned in the meantime that a number of non-Sportingbet employees remain in custody in connection with this matter, some of whom are understood to be connected to the aforementioned Maslin group. (Sportingbet’s relationship with Maslin ended on 1st March 2007.) (*see www.Sportingbetplc.com of 28/7*).  
Nazi war crimes suspect at Euro 2008

During World War Two, many war crimes were committed against ordinary Croatians whilst the country was under a puppet Nazi regime. One of those suspected of taking part in them is Milivoj Asner, who was a police chief during that period. He is currently 95 and lives in Klagenfurt, Austria, and is Number Four on the most wanted list of Nazis. Croatia has for some time now wanted his extradition, but the Austrian authorities have refused to accede to this request on the grounds that he is unfit to stand trial because of his advanced age and onset of dementia. However, he appears to have been sufficiently able-bodied to socialise with the Croatian football fans during the Euro 2008 tournament, which took place in Austria and Switzerland.

This prompted Efraim Zuroff, the head of the Simon Wiesenthal Centre, which tracks down Nazis around the world, to assert that this proved his fitness for a trial, claiming more generally that the Austrian authorities tended to be lenient in such cases. He added that there was no statute of limitations relating to the crimes of which he stands accused, and that Austria needed to act if it was to dispel the notion that it was a paradise for Nazi criminals. Mr. Asner was allegedly the chief of the fascist Ustasha police in the Croatian town of Pozega, when he is accused of having deported hundreds of Jews and Serbs to concentration camps. He is also accused of other atrocities against Jews. He strongly denies having been involved in such crimes, and described himself as a non officer with the Justice Department – “a mere lawyer” (*The Daily Telegraph of 17/6/2008, p. S15*).

It was not yet known at the time of writing whether any further action had been taken in relation to this accusation.

### **Fraudsters “posing as scouts” to cheat African youngsters**

In mid-July 2008, an undercover investigation by the BBC revealed that fraudsters posing as talent scouts from major English football teams were engaged in inducing unsuspecting African youngsters into paying thousands of pounds. These young players are misled by promises of an opportunity to play for Manchester United or Chelsea in return for registration fees. These shady operators prey on the many amateur players who publish their details on networking websites in the hope of attracting an agent who can assist them in their quest to join the African stars of the English Premier league such as Didier Drogba and Jon Obi Mikel (*The Daily Telegraph of 15/7/2008, p. S9*).

The investigators in question, Gavin Lee and Edward Main, spent many months tracking crooks who dupe victims into sending them cash for “trials”. World Service reporter Ibrahim Sannie posed as the father of a young Ghanaian striker keen to make the grade in England. As part of the operation, he contacted Paul Jones, who falsely claimed to represent Manchester United and to work closely with manager Sir Alex Ferguson. In various emails and secretly recorded telephone conversations, Jones alleged that Sir Alex was so impressed by the player that he wanted him to spend a two-year trial with the club – which would include coaching, food and board – in return for a registration fee of £3,700. Mr. Jones also sent fake documentation, supposedly headed by the club’s logo.

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However, the instructions stated that the form should be addressed to Sir Matt Busby, who died 15 years ago. (*Ibid*).

Thereupon, Mr. Jones sent his accomplice, Dr. Frank Johnson, to collect the money from a hotel in Lagos, Nigeria. The BBC team confronted then him, and after initially denying that he was a fake, he confessed that this was not his real name and that he was ashamed of his actions. He was later removed by the police (*Ibid*). His later fate is not known at the time of writing.

### **Statements concerning well-known football manager not punishable. Danish Supreme Court decision**

Under Article 264d of the Danish Criminal Code (Straffeloven) anyone who broadcasts or publishes information concerning another person's private circumstances faces prosecution and a possible prison sentence. This looked initially like being the fate of Mr. B, a director of a top Danish football club, and various broadcasters. T, a famous football manager, had published a book on which he made negative comments about B. The latter was subsequently interviewed on television, and in the course of the relevant broadcast claimed that, during the team's training camps, T had "had women in his room" and "frequently drank much alcohol". T responded by suing B and the various broadcasters involved under the said Article 264d. The District Court (Byretten) awarded the action to the claimant and ordered the accused to pay him the sum of 20,000 kr. The Court of Appeal (Landsretten) confirmed this decision.

The Supreme Court (Højesteretten), however, overturned it. It confirmed that the statements made by B had concerned T's private circumstances. However, the motive for his statements could be found in T's book, where the author had explained the circumstances of his departure from the club and in that connection had made a number of negative observations about the club's players as well as B. Under these circumstances these statements could not be regarded as the unlawful broadcasting or publishing of T's private circumstances (Case 2/2007 of 3/4/2008, (2008) 4 Ugeskrift for Retsvaesen 1565).

# 3. Contracts

## Media rights agreements

### Is UEFA censoring television broadcasts? (Switzerland)

Earlier in this issue, we reported on the relative paucity of crowd trouble during the Euro 2008 tournament (see above, p. 46). However, some of the roseate hue may disappear from this euphoria in the light of a complaint of UEFA censorship addressed by the Head of Switzerland's national broadcasting authority. During the first week of the tournament, Armin Walpen, the director-general of broadcaster SRG, informed the Swiss weekly newspaper *Sonntagszeitung* that he would address a letter of protest to Europe's governing body in football because pictures of crowd disturbances during the Austria v Croatia fixture in Vienna were not shown on television. However, UEFA spokesman Wolfgang Eichler responded by stating that his organisation did not wish to "give troublemakers publicity" (*The Guardian of 16/6/2008, p. S2*).

### Major Asian TV operator threatens to sue ICC over Twenty20 (India)

The world of cricket has recently been revolutionised by the new types of competition, in particular the Twenty20 limited overs events. It is obvious that the media rights to such competitions will command vast sums of money, and therefore almost automatically give rise to legal action. Thus in early August 2008, ESPN-Star, the famous broadcaster, served notice on the International Cricket Council (ICC) (the world governing body in cricket) that it intended to prepare a lawsuit worth £42 million against it if the latter authorised the Champions Twenty20 league, which was being launched in the Indian city of Mumbai around that time.

The Asian television operator is the ICC's broadcasting partner, and was committed to paying \$1.2 billion for an eight-year deal to cover all ICC events. However, in an email circulated to all 10 member boards, the ICC Chief Executive, Haroon Lorgat, expressed the ESPN-Star's opinion that the Twenty20 League was a threat to its interests. Although Cricket South Africa and Cricket Australia are its founder members and shareholders, the Champion league's equity arrangement is believed to be weighted so much in favour of the Indian cricket authority BCCI as to have effectively made it a subsidiary of the Indian Premier League. The IPL has a separate broadcasting partner in Sony, leaving ESPN-Star holding a contract to broadcast tournaments in which there is diminishing public interest. More particularly, the widely acknowledged failure of the 2007

World Cup, the expensive logistics of broadcasting the 2011 tournament from India, Pakistan, Sri Lanka and Bangladesh have combined with the success of the Twenty20 League to erode the value of ESPN-Star's contract with the ICC (*The Guardian of 1/8/2008, p. S2*).

At a certain point, it became a certainty that the Champions League would not be included in the ICC's portfolio. When the CL proposal was made public in September 2007, the ICC President, Ray Mali, was a key figure in the announcement. However, when the revised competition was launched, there was no mention of the ICC. Indeed, Gerald Majola, the Chief Executive of Cricket South Africa, informed a leading British newspaper that the ICC was unable to declare the new League unofficial because, unlike the rebel Indian Cricket league, it was a club competition organised by ICC member boards. It is this interpretation which, at the time of writing, was set to be tested in court. It was precisely this threatened litigation which caused the England and Wales Cricket Board (ECB) to be cautious over committing itself to the new competition – even though the invitation to send the Middlesex county club was accepted (*Ibid*).

### Free availability of Croatia v England match in Germany shows up British legislation

In mid-September, there took place a World Cup qualifying match between Croatia and England. Interestingly, this match could be followed live on free-to-air television in Germany, whereas in England the private broadcaster Setanta had acquired exclusive rights to broadcast the fixture to its subscribers, thus preventing the public at large from witnessing it. This has drawn condemnatory comparisons from some commentators, who have contrasted German legislation requiring all games involving its national teams to be shown free of charge, with its British counterpart which enables the Football Association simply to sell off internationals to the highest bidder (*The Sunday Telegraph of 14/9/2008, p. S11*).

## Legal issues arising from transfer deals

### Legal battle launched over Mikel transfer (Norway/UK)

The legal and extra-legal battle for ownership of the footballing talents of Nigerian international Mikel John Obi, has been extensively documented in previous issues of this Journal. It will be recalled that the player became an employee of Chelsea FC in the course of

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2006 under a complex transfer deal which saw some £4 million paid to Norwegian club Lyn Oslo and £12 million to Manchester United, who claimed that they had already signed the player on professional terms. However, earlier this year the Norwegian side's Chief Executive, Morgan Andersen, was convicted in an Oslo court for having forged contracts relating to Chelsea and Obi, which had enabled Lyn to obtain part of the relevant transfer fee.

Since then, Chelsea have informed the Oslo club that, since the transfer deal was based on a fraudulent misrepresentation that the player had a contract of employment with the Norwegian club, they would be demanding a refund of the £16 million transfer fee. Although Chelsea stressed that they were not attempting to put the Norwegian club out of business, it is highly unlikely that the latter would be in a position to finance such a sum. That is why the two clubs are currently involved in talks aimed at bringing about a compromise. A Chelsea spokesman stressed that the legal action was "against Lyn and Morgan Andersen", which reflects the reality that Manchester United are not involved in any way in the action launched by their London rivals (*The Guardian of 11/10/2008, p. S6*).

However, this should be the final twist in this long-running saga which infuriated the Manchester club, who had been convinced that Mikel was bound for Old Trafford rather than Stamford Bridge two years ago. Mikel claimed to have signed a youth contract with Lyn in 2005 but, within a week, United announced that they had agreed to sign him on professional terms. He was even photographed wearing United shirt, only for Chelsea also to allege that they had reached agreement to acquire the player. This prompted both United and Lyn to report the London team and the player's agents, John Shittu and Rune Hauge, to world governing body FIFA. It was not until June 2006, some 14 months after the saga began, that Chelsea agreed a compromise deal to pay both Lyn and United for the player's services (*Ibid*).

The present writer hopes to inform his readership of the outcome in a future issue of this Journal.

#### Uefa welcome move to prevent transfers for under-18s

Attempts to prevent cross-border transfers of under-18 footballers look set to reach a "milestone" shortly with European governments being invited to endorse a formula that would allow sport to derogate from EU law and halt the process whereby the cream of teenage talent abandons its roots.

If adopted, the joint French-Dutch initiative, which relates to six team sports and was first revealed in a leading British newspaper in July 2008, would dramatically change home-grown player rules, preserving youth development and mandating young players across the Continent to sign their first professional contract with the club that trains them. It is understood sports ministers across Europe were briefed about the radical proposals in order to get a consensus ahead of their meeting in Biarritz in late November 2008. This will be followed by the European Council summit in December at which heads of state are expected to be requested to sign a resolution instructing the European Commission to draw up a new framework for sport. This will naturally give football and other sports the legal freedom to formulate their own rules and put a stop to what an insider to the talks referred to as "virtually child labour."

This development was welcomed by William Gaillard, spokesman for the European governing body UEFA, in the following terms:

***"We have said many times that sport should be specific but the European Commission has always been reluctant to define how far this should go. This is not a political issue. Ask any educator or coach and they will tell you it isn't good to take a young player away from his roots."***  
(*The Sunday Telegraph of 9/11/2008, p. S9*)

This development occurred as it was learned that, earlier that month, Chelsea signed 12-year-old Jeremy Boga, whose father has reportedly been living in London for two years, from ASPTT Marseille. The French club were reported to be unhappy with the move and the new EU rules, if adopted, would close the family reunion loophole – a transfer described by Mr. Gaillard as "absolutely ridiculous"

The British newspaper in question also acquired a list of complaints from Italy stretching back many years about young players being picked off by clubs such as Arsenal, Chelsea and Manchester United. Thus Giuseppe Rossi and Arturo Lupoli used to play for Parma before joining Manchester United and Arsenal, respectively. Thus the Italian side were deprived of two

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of its top talents which Parma president Tommaso Ghirardi described as "gravely damaging". Reggina president Pasquale Foti was equally scathing about Vincenzo Camilleri's move to Chelsea when he was under 16, as were Roma over Davide Petrucci's transfer to Manchester United (*Ibid*).

**(On the subject of the "specific nature of sport", see below under the heading "EU Law", p. 91)**

#### **FIFA backs electronic transfers**

As the dust settled over the 2008 Champions League Final, there came the opening of summer transfer trading. It has been learned that the world governing body in football, FIFA, is developing a system of monitoring player transfers. FIFA considers that the pilot "transfer-matching" system which it started in January 2008 to have been a success, and now it will seek to widen the scheme to every national association and club in the world. Under present rules, the football association governing the purchasing club must approach, by fax, that of the selling club in order (a) to request an international transfer certificate, providing the name, date, place of birth of the player, the name of the selling club, and (b) to have it confirmed that one of its clubs wants to register the player. This then has to be registered with FIFA, which results in its Zurich headquarters being regularly inundated with paperwork from clubs the world over (The Guardian of 22/5/2008, p. 38).

Instead, the football world governing body now intends to make the system electronic, allowing data input to occur online, thus expediting the process and making oversight easier. It is hoped that, over time, the system will reduce potential corruption through "bungs" since FIFA will be able to keep track of monies paid and received by clubs in transfers. As a result of the FIFA Executive Committee meeting held in October 2007, a company entitled FIFA Transfer Matching System GmbH was established in order to perform the task. FIFA's General Secretary, Jérôme Valcke, pronounced the experiment "a success" (*Ibid*).

#### **Platini seeks abolition of "winter transfer window"**

The various compromises which have been reached over the years in order that professional football could meet various legal requirements at the national and at the European level as regards movements of players between clubs have resulted in a system of "transfer windows", i.e. two periods per year in which transfers of players may take place. Thus for the 2008-9 season, all transfers needed to be completed between 22 May and 1 September (summer window) and between 1 and 31 January (winter window). Although players cannot appear for a second club in the Champions League or Uefa Cup during the same season, they are free to take part in domestic football for such a second club. There are many in the game who are opposed to this system, more particularly because they feel that players should not be able to play for two clubs over the same season. One such "football grandee" is known to be Michel Platini, the president of the European governing body UEFA. In late August 2008, he once again hinted that he would use his influence to restrict these windows to one period in the summer. In addition, he wishes to restrict the summer window in such a way that all transfers need to be completed by early August (*Daily Mail of 29/8/2008, p. 94*). It remains to be seen whether the UEFA chief can bring about such changes in time for the next football season.

#### **Deal reached in Sonny Bill Williams case after threatened court action (Australia/New Zealand/France)**

In July 2008, it was learned that the New Zealand Rugby League international Sonny Bill Williams planned to switch codes in order to represent French Rugby Union club Toulon. However, he had four years left to complete of his contract of employment with Canterbury Bulldogs in the Australian National Rugby League (NRL). Both the club and the NRL sought to prevent this move by issuing Mr. Williams with a subpoena to face the Supreme Court of New South Wales in early August (*The Daily Telegraph of 29/7/2008, p. S9*). An initial attempt to serve the injunction on Mr. Williams was considered to be invalid, and the New Zealander played rugby for Toulon a few days later, probably without breaching any court orders. A few days later, Sonny Bill Williams was successfully served with the injunction. Recognising its importance, he did not play for Toulon in the next game, on 14 August.

However, a few days later a settlement was reached between the Bulldogs and the player. It was reported that Williams himself (and not his new employer) was

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due to pay \$750,000 to the club. It was a further condition of the settlement that Williams agree not to play in the NRL before 2013. His contract with the Bulldogs would have expired at the end of 2012. Had the matter not been settled, Williams would probably have faced contempt of court charges had he continued to play for Toulon in defiance of the court order. However, enforcing the NSW Supreme Court injunction would only have been practically possible if Williams ever returned to Australia, on which occasion he could have faced arrest. It would be highly improbable that the Federal police would seek to arrest Williams in France and extradite him to Australia on what is essentially a civil matter.

In addition, as Sonny Bill Williams had assets in New South Wales, Canterbury could have sought to freeze those assets, and have them used to satisfy any potential judgment against him for damages for breach of contract, were Canterbury Bulldogs to succeed in that claim. Of broader significance is the principle of the sanctity of the contract and the need for contracts to be enforced and abided by. Otherwise, chaos would reign, and richer leagues would offer big money for contracted Australian players to leave their clubs and move overseas, with no consequence (*Horvath, P., "The Sonny Bill Williams Case" at www.goarticles.com.*)

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#### Employment law

##### **Platini once again campaigns for salary cap in football...**

One charge that cannot be levelled against Michel Platini, the former European Footballer of the Year who currently is the President of governing body UEFA, is that of complacency. His plans for the transfer market have already been outlined above; however, he also intends to bring about change in the players' remuneration levels in the form of a salary cap. The idea behind such a scheme is to prevent the top sides from attracting the best players and thus monopolising the competition. The informed reader will be aware that such restrictions already apply in other sports – more particularly in baseball and Rugby Union, where its application has, however, given rise to problems (*Journals passim*). Undeterred, Mr. Platini has recently once again served notice of his intention to introduce this scheme into European football.

In early July 2008, he met the EU Council (of Ministers) in Brest, France, in order to outline his vision for a strengthened UEFA licensing system which would

ostensibly impart a greater degree of legal certainty to the sport by reducing cases of football clubs challenging associations through the courts. In practice, this would enable UEFA to become a central regulator which could see the introduction of a salary cap. He believes that his project has a strong chance of success despite the fact that the independent sports review which was set up by his predecessor, Lennart Johansson, was frustrated by the European Commission. Mr. Platini also used an inaugural meeting of the European Club Association to call upon Europe's most successful sides to approve the scheme. Needless to say, Platini's "pan-European licensing system" is strongly opposed by the English Premier League (*The Guardian of 8/7/2008, p. S2*).

##### **...and is the same needed in European rugby?**

As is stated in the previous section, salary caps exist at various levels of rugby football – more particularly in the English Guinness Premiership, where the current maximum which every club may spend on remunerating its players is £4 million. The main criticism which has been levelled at this system is that it fails to take account of the absence of such restrictions in rival nations – more particularly France. The Northampton chief executive, Allan Robson, explained the difficulty in the following terms:

***"I believe it is inevitable the cap will go. We have agreed there will be no change this season or next but expenditure is growing and we are competing with overseas sides. Northampton and Leicester are two big clubs in terms of finance and structure, but if you look at the budget of big French clubs, it is nothing. Competitive balance on the pitch is important to our domestic game but I am raising the issue about competition outside that which demands higher budgets"*** (*The Guardian of 17/9/2008, p. S6*).

This is in spite of the fact that the cap rose significantly during the summer of 2008, and that not every club was actually spending its "quota" of £4 million. However, the moral of the story appears to be that salary caps only work if they are applied on the widest possible level. Given that the most prestigious competitions in the sport are international or European, it seems that it is only at this level that such schemes can be successful. In this respect, Mr. Platini's endeavours seem highly appropriate.

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#### **Application to prevent ice hockey coach from utilising training system fails. Canadian court decision**

In the case under review, the claimant operated (ice) hockey schools in Alberta and elsewhere in Canada and the world. The defendant was employed by the claimant for 20 months and had signed a restrictive covenant lasting three years. Ten months after resigning, the defendant incorporated a company for the purpose of operating a business of goaltender training programmes in the Edmonton area. Thereupon the claimants applied to the Alberta Court of the Queen's Bench for an interlocutory injunction in order to restrain the operation of these hockey schools.

The judge, Thomas J, dismissed the application on the grounds that the claimants had failed to establish a prima facie case. The restrictive covenant was unreasonable as it was designed to restrict competition, and not to protect the claimant's legitimate business interests. In addition, three years was an excessively long period, there had been no geographical limitation, and the restriction applied to teaching activities which might not compete with the claimant's business. The defendant's fiduciary duties had ended when he signed a release of interest agreement. Also, the claimant's copyright did not extend to its system nor was the system itself a trade secret. Information about the system had not been conveyed to the defendant in confidence, and was in the public domain. The application also failed the tests of irreparable harm and balance of convenience (*Gold In the Net Hockey School Inc. v Netpower Inc. (2007) ABQB 520*).

#### **Accidental football injury during company event not industrial injury. Danish court decision**

In the case before us, the claimant worked for a firm which had invited its employees to take part in a regatta, followed by a dinner, at the managing director's summer abode. After this event, some participants took part in a game of football, in the course of which the claimant sustained a knee injury. The latter applied for compensation on the basis that this was an industrial injury, but this application was refused by the Workers' Injuries Compensation Board (Arbejdsskadestyrelsen) and the Workers Injuries Appeals Board (Ankestyrelsen) on the grounds that the game in question had been a private one which had taken place after the company event.

The Supreme Court (Højesteretten) confirmed this decision. The company had decided to support the participation by the staff in the regatta, which took place

on a Saturday outside working hours, in order to comply with a request by the staff to that effect and to strengthen the bonds in the workplace. All those having a link with the workplace wore a company shirt during the regatta. The subsequent event in the summer house had been organised so as to ensure that the staff would be together during the entire day. There was no precise time at which the event was due to end, and those who so wished were able to stay the night. The event had to a large extent been financed by the firm. Under these circumstances, not only the regatta, but also the gathering in the summer house which belonged to the firm's managing director could be regarded as a company event.

However, the accident in question had occurred during a football game for which some of the participants had themselves taken the initiative. At a certain point during the game, the claimant had, as a joke, poured beer into a colleague's back pocket, and as the latter pursued him, he slipped on the wet grass and his knee against a parked car. Under these circumstances, there was no natural link between the accident, for which the firm was liable, and the company event in such a way that the accident could be caught by Article 9 of the Law on Industrial Accident Insurance (*Arbejdsskadesikringslov*) (*Decision of 3/7/2008 in Case No. 541/2006, [2008] Ugeskrift for Retsvaesen p. 2406*).

### Sporting agencies

#### **Agents facing EU law restrictions**

It looks as though the full force of EU law will soon be brought to bear on sporting agents as the European Union seeks to remove the risks of child trafficking and money-laundering which continue to taint the football transfer market. In mid-September 2008, the European Commission invited tenders for what will be the most influential information-gathering exercise on the sporting middlemen's activities. The winning bid will have the opportunity to shape the future of the approach adopted by the European Commission towards rogue agents. The possibility of new EU legislation to govern their activities is a distinct possibility (*The Guardian of 26/9/2008, p. 38*).

The study into the sporting agents' activities, one of the key objectives of the European Commission's White Paper on Sport (see also under the item headed "EU law" below, p. 92), comes as the Commission and the EU member states recognise the inefficacy of the rules governing player agents at present adopted by the

### 3. Contracts

world governing body in football, FIFA. According to the terms of reference of the invitation to tender,

“The study must, without fail, determine whether there are problems with the application of the existing rules. If so, explain what these problems are, how significant they are (e.g. number of cases), which member states are concerned and what sports are concerned.” (*Ibid*)

This will inevitably lead to a specific investigation of the approach of football’s governing bodies. One man who is certain to offer his opinions on the issue is Michel Platini. The President of the European governing body, UEFA, has been outspoken about the risks sport faces and the perception is that rogue agents facilitate much of football’s vices (*Ibid*).

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#### Sponsorship agreements

[None]

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#### Other issues

##### **Car racing stable made liable for unsatisfactory performance. French court decision**

In the case under review, the contract in question was one whereby a car racing stable undertook to make available to the driver, for all his races, a vehicle which was ready and properly equipped, and to ensure its required maintenance and state of repair. The court decided that the stable had failed to meet its obligations, since the vehicle which it had provided did not enable the driver to defend his chances in each competition in which he took part, having even been prevented from taking part in certain races. As a result, the stable was ordered to repay the amounts which had been remitted to it by the driver, i.e. €50,816. The stable was also ordered to compensate the economic, moral and professional loss which the driver had sustained, since he was unable to achieve a result in the competitions in which he due to take part, having incurred a good deal of expense in order to take part in these races (*JCP-La Semaine Juridique of 18/6/2008, p. 54*).

##### **Injunction application for inclusion in Olympic team dismissed. German court decision**

In the case under review, the applicant sought an injunction against the German Athletics Federation (DLV) in order to compel the latter to include him in the team for the Beijing Olympics, competing in the triple jump event. The defendant had set a number of qualifying criteria for selection in this event, which the applicant, according to the DLV, did not fulfil. The matter was put to an arbitration panel, which decided that the applicant had in fact met the conditions, but the Association persisted in its decision not to select the applicant. The latter applied to the Frankfurt Court of Appeal to have this decision overturned, but the Court refused this application (*Decision of 30/7/2008, case 4 W 58/08 [2008] Neue Juristische Wochenschrift p. 2925*).

##### **French bets ruling could provide windfall for sport**

In mid-June 2008, it was learned that a French court ruling paved the way for sports governing bodies to charge betting companies for permission to offer markets on their tournaments. The decision could help sport tap a commercial stream as significant as the multi-million pound broadcast-rights market. As a result of the ruling, all internet bookmakers offering bets in France on sports events will be compelled to pay a premium to the event organiser. The ruling, following a case brought by the Fédération Française de Tennis against the internet firms Unibet and Expekt, follows a similar resolution from the 47-member-state Council of Europe in January. That declared an intention to provide better protection for “the intellectual property of fixture lists for sports events”.

The verdict will be applicable in the UK, as British bookmakers such as Betfair, Ladbrokes and William Hill will have to pay for events such as the Tour de France. It is expected that the issue will be on the agenda at the forthcoming meeting of the Sports Rights Owners Coalition, which will pressure government to introduce a similar system in the UK. According to a high-level source:

**“There will be a very interesting question for the International Olympic Committee when it comes to Europe. If you are betting on London 2012 through an online operator in France you will have to pay the IOC. If Paris had won the right to the 2012 Games everybody would have been charged a premium but not in London. The IOC might like to address that with the government”**

(*The Guardian of 13/6/2008, p. S2*).

This column will naturally monitor any further developments in this field with considerable interest.

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#### **Partners in joint venture to acquire ice hockey team not bound by duty of loyalty and good faith. Canadian court decision**

In the case under review, a number of individuals has agreed to attempt to buy an interest in an ice hockey team from a certain group of companies. The negotiations with this group turned out to be unsuccessful. However, one of the joint venture partners subsequently entered into negotiations with the group, as a result of which that partner acquired on his own behalf the interest originally sought by the joint venture. The other two partners brought an action against their former associate, arguing that the latter had breached his duty towards them as their former partner or joint venturer by acquiring the benefit on his own behalf, and that the group from which the interest was bought knowingly assisted in this breach of duty.

The court dismissed the action. The relationship between the individuals concerned was not one of partnership or joint venture. They had pursued the acquisition without agreement as to their respective rights and obligations during pursuit, or as to the terms of a deal which they were ultimately prepared to accept. None of the individuals owed duties of loyalty and good faith towards the others. Each was free to leave the group and pursue the opportunity on his own. The defendant owed no duty to his other associates to refrain from competing with them for an opportunity to purchase the enterprise, nor did he owe any duty to advise the other associates of his negotiations with the group. The parties had intended to enter into a partnership agreement, but in the interim the agreement between them was simply an informal agreement to work towards formal arrangements. Even if the arrangement had been a partnership, it had ended when the defendant gave notice of his departure. Because the defendant owed no fiduciary duties to the other associates, the group from which the interest was bought did not knowingly assist in any breach of duty (*Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership* in [2008] *Business law reports* p. 84).

# 4. Torts and Insurance

## Sporting injuries

### **Accusations of negligence after Russian ice hockey star dies**

In mid-October 2008, Alexei Cherepanov, a promising young ice hockey player, died during a Continental Hockey League game in the Moscow area at the age of 19. Russian investigators said that Mr. Cherepanov suffered from chronic ischemia, a medical condition in which insufficient food reaches the heart and other organs. However, his death has given rise to a number of recriminations. According to Pavel Krashennikov, a member of the Russian Hockey Federation's supervisory council and a member of the State Duma (Parliament), there was no ambulance on duty at the ground where the victim's team, Avangard Omsk, were playing. He also claimed that emergency workers took too long to respond and did not have a defibrillator, a machine used to jolt the heart. He concluded that there must have been "elements of negligence here". Moscow regional investigator Yulia Zhukova even said that a criminal investigation may be opened (*Associated Press, www.findlaw.com of 14/10/2008*)

According to a spokesman, there was no collision which preceded the collapse. Another said that tests performed on the player did not reveal any heart problems. It appears that members of the Continental Hockey League (KHL) receive regular heart and blood tests. A KHL spokesman later said that it would itself investigate the player/s death, and establish a special commission to that effect (*Associated Press, www.findlaw.com of 16/10/2008*). There are no further details on this case available.

### **Accident in impromptu football game gives rise to shared liability. French court decision**

This case concerned an improvised game of football, in which one of the participants sustained facial injuries and claimed compensation from the alleged author of the accident. The Court of Appeal of Rouen dismissed the application in part. It held that sport is subject to specific rules which every participant must observe at the risk of having his/her liability incurred in the event of an accident. However, by participating in a spontaneous and heedless manner in a football game played by children, both the author and the victim of the accident did not intend to take part in an actual match, and to accept its rules spontaneously. They simply took part in a ball game which was not governed by any specific rules.

Therefore, the rules of sport did not apply to them, and they were merely subject to the ordinary rules of tort liability. The victim, whom the ball had hit in the face causing him to break a number of teeth, had contributed to the accident on the same basis as its author, i.e. by the mere fact of spontaneously taking part in the game. Accordingly, the liability needed to be shared between them on a 50/50 basis (*Decision of the Court of Appeal of Rouen of 5/12/2007, JCP-La Semaine Juridique of 3/9/2008, p. 59*).

### **Psychological trauma incurred by race horse gives rise to compensation. French court decision**

In the course of being transported, a race horse suffered an accident as a result of which it was diagnosed as having incurred a psychological trauma. The court found that this rendered it incapable of being harnessed for competition, and caused a reduction in its value justifying the payment of compensation to its owner (*Decision of the Court of Appeal of Orléans of 2/4/2007, JCP-La Semaine Juridique of 21/5/2008, p. 56*).

### **No risk inherent in school PE game. Irish court decision**

In this case, the claimant incurred personal injuries arising from an accident which had occurred during a physical education session at the defendant's school while the claimant was a minor. The class in question was engaged in a game of "dodgeball" which involved crossing a room whilst attempting to avoid sponge balls being thrown by classmates by dodging and weaving at the appropriate moments. While attempting to avoid a ball, the claimant stumbled over her own legs, fell and suffered severe injuries to her left arm. Whilst the factual description of the accident was not disputed, and there was no issue as to supervision, it was alleged by the claimant that this had been her first experience of this game, and that this particular game was used a warm-up exercise rather than being the main activity of the class. It was also claimed that the variation of "dodgeball" used by the school was unsafe, in that those dodging the ball had a conflict of attention in having to run forward whilst looking sideways to see the ball approaching. Together with the possibility of the runner jerking or moving in order to avoid the ball, the entire situation resulted in a position where there was an obvious risk of a participant losing balance and tripping or falling.

The defendant claimed that this was a simple, straightforward game suitable for 12-year-olds with no

## 4. Torts and Insurance

significant risk of injury above the risk inherent in physical activity. The format was shown to be safe by 20 years of use, with only one accident recorded – that matter being the subject of the present case. The judge, Feeney J, dismissed the action, on the grounds that:

- there was an absence of negligence on the part of the defendant;
- there was no claim that the equipment was defective or the premises unsuitable; instead, the claim was that a particular game was unsuitable and/or inherently dangerous
- the claimant tripping was a type of risk inherent in physical activity, and the defendant had ensured that the activity was suitable and reasonably safe;
- in addition, the theory or risk emanating from the dual risk of running in one direction and looking in another was unreal and contrived;
- all physical activity carries some risk and in this particular case that risk was incidental rather than inherent (Carolan v. Board of Management of St. Ciaran's National School (High Court, Feeney J.) 6/7/2006).

### Is rugby inviting legal trouble with its law variations? Article in Irish professional journal

In the article under review, the author, Tim O'Connor, examines the implications as regards the law of torts of the Experimental Law Variations (ELV) operated by the International Rugby Board (IRB). One of the more significant innovations of these new rules is the fact that, henceforth, it will be permissible to collapse a maul in the course of play, an incident which hitherto caused the player involved to be penalised. Given the amount of litigation for negligence which rugby has recently incurred – the Smoldon and Vowles decisions being inevitably cited in this context – is this change a wise one from the rugby authorities' point of view? This is particularly the case in view of the fact that the new laws will make it permissible for players to collapse a maul, provided that this is done in a certain way, namely pulling it down by the upper body of an opposing player. The author comments that:

***"It is somewhat puzzling as to why this particular method has been chosen as being the means to be permitted: one would have thought that dragging a player down by his upper body ensures that it is the upper body of that player that will hit the ground with all the weight and momentum of the maul behind it, with a consequent risk of injury. It is also somewhat puzzling that it is somehow deemed safe to collapse a maul in one way but not in another; after all, if it was dangerous before it was dangerous afterwards, however it is done. There is no safe way to collapse a***

***scrum, because it is recognised that it is the mere action of sending that mass of moving bodies head-first into the ground that creates the risk, not the precise mechanism of how one goes about sending it into the ground"***

*(O'Connor, T., "Bringing it down on their own heads: negligence and changes to the laws of rugby", in [2008] Irish Law Times p. 191.*

The author concedes that it would not be possible to engage the rugby authorities' liability for failing to amend the laws in order to increase the players' safety, it might be possible to do so where its rule changes actually worsen this aspect of the players' well-being (*Ibid*).

### Libel and defamation issues

[None]

### Insurance

[None]

### Other issues

#### Italian court orders Inter Milan to pay compensation to fans "upset by existential damage"

Anyone who believes that the North/South divide in football fanaticism has reached unacceptable proportions in this country would do well to pay a visit to Italy, and more particularly to a match opposing bitter rivals from each part of the country. Especially Napoli FC have been the butt of cruel slogans and banners, which have bordered on the racist. Until recently, such excesses were dismissed as the by-product of exaggerated football rivalry. However, in this area also the "compensation culture" seems to have taken hold, judging by a recent court decision.

During a match which opposed Internazionale Milan and Napoli at the former's ground, San Siro, a number of banners were on display which read "Ciao cholera sufferers" and "Neapolitans have tuberculosis" – not to mention the offensive chants engaged in by the home "fans". This was apparently too much for one particular Napoli fan, who decided that this matter should go to law – even though the Italian Football League had

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already penalised Inter by closing those sections of the ground where the banners had been on display. The Napoli fan's lawyer, Raffaele Di Monda, claimed that this abuse had made his client feel "indignant and deeply hurt". This convinced the court in question to award the latter £1,190 by way of "existential damage". The Milan club was also ordered to pay his legal expenses (*The Guardian of 6/8/2008, p. S4*).

### Major work on tort liability in sport

This work, by the authors E Montero and Marchetti, is an interesting one in that it has merit from the point of view of legal theory as well as in terms of the practice of law. As to the former, it succeeds in locating the existing law of torts in sport within the general context of the global discourse on legal theory. In practical terms, it explores the entire range of the conditions in which the rules of tort liability are capable of being applied to the practice of sport (*Montero, E. and Marchetti, R, La responsabilité civile dans le domaine du sport [2008] Journal des Tribunaux 565*).

### Residents win appeal in "flying golf balls" case. South African court decision

In the case under review, the facts were as follows. The appellants owned and occupied residential properties which bordered on the Milnerton Golf Course (MGC). It was common cause that the properties had been marketed originally (and purchased by the appellants) on the basis that the houses would be built on a golf course. The appellants' legal action at first instance turned on the fact that an excessive number of golf balls were striking their property, and that several golf balls had caused, and were likely to cause, damage to their homes and possibly also personal injury. In response to their complaint, the respondent (MGC) had taken certain precautionary measures, but without admitting liability to do so – including the planting of trees and causing the sixth hole on the course to be played as a par 4 on all days except Wednesdays and Saturdays. The MGC argued that the appellants had failed to make a case that the conduct complained of, namely golf balls being hit out of bounds and in the direction of the applicants' homes, constituted a nuisance.

The application made by the appellants to the first court for an order prohibiting the MGC from allowing the use of the sixth hole on the golf course for the playing of golf until such time as it introduced effective measures to avoid or reduce the danger of badly-aimed golf balls striking the appellants' property had been dismissed by

that court, which held that the MGC had not unreasonably interfered with the appellant's rights. On appeal, the judge Farlam JA held that the evidence established that the number of golf balls entering the appellants' property was clearly excessive and unreasonable. From the evidence before the first court it appeared that the total of such "badly aimed" balls which found their way onto the property during the period from December 2003 to March 2006 was 875. Whilst the MGC's use of the land as a golf course was reasonable, the nuisance to which the appellants were subjected exceeded the bounds of what was normally expected under the law governing neighbourly conduct. The appeal was therefore upheld with costs (*Allaclas Investment (Pty) Ltd and Another v. Milnerton Golf Club and Others (Stelzner and Others intervening) [2008] 7 De Rebus p. 38*).

### Tort law implications of German refereeing scandal. Article in sports law journal

The refereeing scandal which shook German football to its foundations has been well documented in earlier editions of this Journal. The legal consequences, however, have not been restricted to the penal. In "Match-fixing in Germany: analysis" (*[2007] WSLR 5*), the author, Simon Weiler, comments on the legal action brought by the German football association (DFB) against the referee in question, who was convicted of match-fixing in 2005. He reviews the background to the match-fixing scandal, the criminal penalties imposed on the referee and the owner of the sports bar involved in the fraud, and the basis of the DFB's claim against the referee. He also considers the likely outcome of the action.

# 5. Public Law

## Sports policy, legislation and organisation

### Relief all round as Beijing Olympics come and go...

#### *Background*

The advised and regular reader – not only of this column – will hardly need reminding of the controversies, manoeuvrings and violent incidents which have marred the run-up to the 2008 Olympics thus far. Essentially, the issues of public concern which have exercised world opinion have been fourfold: (a) the light which this episode has thrown onto internal conditions in the host country, and the manner in which the Chinese authorities have attempted to use the Games in order to convey an entirely different impression, especially in regard to its human rights record, (b) the manner in which any attempt to use the Games as a way of highlighting these conditions has been ruthlessly stamped upon, (c) the clampdown on any attempt at securing some kind of autonomy for its annexed territory Tibet, (d) the environmental implications, and (e) the sometimes appalling working conditions affecting those without whose labours the Games would have been impossible to stage. All these issues have continued to make the headlines, as will be highlighted in considerable detail below.

Since then, more issues have joined the list of concerns and issues which have attended this sporting jamboree. More particularly attention has been drawn to the role which the host nation has played in the continuing humanitarian drama of Darfur. In addition, the issue of freedom of expression has taken on an extra dimension with the restrictions which the Chinese authorities threatened to place on internet links with the outside world before and during the Games. Another aspect which has diminished the hosts in the eyes of world opinion has been the manner in which the country treats its disabled – something which was particularly highlighted during the “Paralympics” which were held in Beijing after the “conventional” Games had been completed. All this, as well as the Draconian security measures adopted and applied before and after the event, is also extensively described below.

#### *Ruthless security clampdown stifles dissent (and any other expressions of humanity)...*

For the organisers of any major sporting event, security considerations will quite naturally be a prime concern, particularly in view of previous violent incidents which have been both attempted and put into practice to disrupt the proceedings, mainly for political purposes.

However, even the most compliant of observers have been greatly concerned by the lengths to which the Chinese authorities went in order to enforce law and order during the Games, given that this is ostensibly an occasion on which those involved are supposed to interact in friendly and relaxed endeavour. Thus in early June, it was made clear by the Chinese authorities that any foreigner who carried the slightest suspicion of unorthodox behaviour would be mercilessly banned from entering the country. Such people included not only suspected terrorists, but also subversives of various descriptions and people with sexually transmitted diseases. In addition, visitors residing anywhere other than at a hotel, school or official institution were obliged to register at a police station within 24 hours of arrival. All this was stipulated in an online list of acceptable and unacceptable behaviour for foreigners during the Games (*The Guardian of 4/6/2008, p. 16*).

This 57-point list also included very specific rules on what could be brought into the country. However, it was the vague, “catch-all” rules which most concerned human rights activists who wished to use the Games in order to press their campaigns for religious freedom, free speech and increased rights for the Tibetans. Any publications, CD, computer memory device or recordings which had content deemed harmful to China’s economy, culture, morals and social order were banned. Spectators were also to be forbidden from shouting or displaying slogans of a political, religious or racial nature (*Ibid*). In addition, the authorities started to operate a general “cleansing” operation in the capital. Not only did they expel thousands of foreign prostitutes and outsiders who did not have the proper residence papers; they also restricted visas, threatening to implement entertainment regulations which had previously been indifferently enforced, and slowed delivery of permits and paperwork (*The Daily Telegraph of 19/6/2008, p. 17*).

As the date of the opening ceremony approached, a ring of steel seemed to surround the capital, with the authorities pledging to take no chances with Olympic security, whatever the cost to business, workers and day-to-day lives. Armed police were added to the three concentric rings of checkpoints set up on every access road into the city to screen vehicles for “suspicious” and dangerous items – and people. On some of the busiest roads, tailbacks more than a mile long formed, prompting even government figures to beg officers to be “civilised and convenient” in their approach. Lorries with non-Beijing number plates were banned from the city, halting vital supplies at the municipal borders near the sixth ring road. Many traders complained about their businesses being paralysed (*The Daily Telegraph of 17/7/2008, p. 13*).

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Shortly afterwards, it was reported that Beijing was to confine would-be political demonstrators to three "protest pens" in parks around the city during the Games. The location of the three pens was announced by Liu Shoawu, the head of security for the event. However, there was no indication as to whether Chinese citizens would be allowed to demonstrate inside them or if restrictions would be placed on the causes represented (*The Daily Telegraph* of 24/7/2008, p. 15). In addition, anyone wishing to use these pens would have to apply at least five days in advance (*The Independent* of 4/8/2008, p. 19). Earlier, the authorities had warned human rights activists and lawyers to leave the city while the Olympics were proceeding. This showed that the authorities' fear of political protest was growing. One reason for this was that, despite warnings from the International Olympic Committee (IOC), a number of athletes had made it known that they were considering making their own statements. They received encouragement in this from US President Bush, who told the American team to be "ambassadors for liberty" (*The Daily Telegraph* of 24/7/2008, loc. cit.).

To make the authorities' intentions absolutely clear, yellow signs, 15 ft high, were erected at the turnstiles of all Olympic venues listing nine "dos and don'ts". Prohibitions ranged from the usual bans on smoking, gambling and assaulting athletes to more peculiar restrictions on opening umbrellas and standing up in one's seat. Visitors were, once again, advised in no uncertain terms that protests on any topic, from politics to the environment and animal rights, would not be tolerated. Actions deemed "inappropriate" included any demonstrating or fund-raising activity – including, but not limited to, commercial, religious, political, military, territorial, human rights, and animal and environmental protection activities (*The Daily Telegraph* of 5/8/2008, p. 15). Even the waving of flags was subjected to drastic restrictions. As far as Britain was concerned, only the Union flag would be permitted – the Cross of St George, the Scottish Saltire or the Welsh Dragon were all banned at events. Athletes could even be disqualified from competing if they broke these rules (*The Daily Telegraph* of 6/8/2008, p. 1).

However, once the Olympics began the organisers were compelled to ease these draconian restrictions to some extent after complaints from the Games' sponsors that the millions which they had spent were going to waste in an empty and joyless Olympic park. The empty spaces around the principal Olympic venues, where the majority of sponsors have their "pavilions" to display their wares to the public, came on top of a disappointing build-up to the Games for many

companies. The tight security meant that the zone was virtually closed to the public. Beijing was unusually quiet during the period following the opening ceremony, with the Government encouraging the public to stay at home and watch the Games on television. A delegation of sponsors, led by Johnson & Johnson, the health care company, then complained to the IOC, demanding change. The company had one of the more ambitious pavilions ever staged for a sporting event, costing £10 million and containing 4,000 bamboo plants to provide a water garden effect, as well as five real terracotta warriors from Xi'an (*The Sunday Telegraph* of 17/8/2008, p. 30).

After the Games were over, it was learned that the Chinese authorities had created a list of nine US athletes and one assistant coach whom they thought might cause problems. One leading US newspaper obtained access to an internal US Olympic Committee email in which a Chinese official expressed concern that members of the US team might stage some kind of demonstration. The list was given to the Committee during a meeting held in early July with Shiu Xiao, Minister Counsellor for Cultural Affairs at the Chinese embassy in Washington. Shu was concerned that some of the athletes were affiliated to Team Darfur, an international coalition of athletes committed to raising awareness about the human rights crisis in Sudan's Darfur region (see below, p.000). The athletes included softball players Jennie Finch, Jessica Mendoza, Natasha Watley and assistant softball coach Karen Johns (*Associated Press*, [www.findlaw.com](http://www.findlaw.com) of 30/10/2008).

### ***Torch relay ends peacefully – but will be abandoned for future Olympics***

In the previous issue of this Journal ([2008] *Sport and the Law Journal* p. 43), the long and tortured progress – if that is indeed the operative noun to use – was described in detail, together with the manifold attempts to disrupt and even halt its advance. Matters were thought to have reached a climax when the torch was due to pass through Tibet, the region where the bloody riots and their repression in March earlier this year had given rise to the "torch protests" in the first place. In the event, so tight was the security surrounding the passage of the torch in this area that there was little disruption. The six-mile route in the region's capital, Lhasa, was lined by police and paramilitary troops at 10 ft intervals. Onlookers, who had been carefully screened, waved flags and chanted "Go China". The city had been all but closed for the relay, with streets deserted and most shops closed. A security cordon was thrown around Potala Square, where the run ended (*The Observer* of 22/6/2008, p. 13).

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The relay then had to pass through China itself, where naturally there was to be no relaxation in the security surrounding the event. Poignantly, the relay had been re-routed through Sichuan, the area afflicted by an earthquake three months previously which left 70,000 dead and 400,000 injured, in order to boost morale and instil some national pride among the vast numbers of victims who were still without running water and were facing food shortages. However, once again it appeared that the authorities had been very selective as to the people who were allowed to attend the ceremony. Only a few thousand selected guests, mostly government officials and schoolchildren, were allowed into the stadium. In addition, several stops along the route had been cancelled (*The Daily Telegraph of 4/8/2008, p. 23*).

One palpable and long-term consequence of the various disturbances which marked the relay will probably be that this event will be abandoned for future Olympics. Certainly the IOC seemed to be prepared to make such a move after one of its leading figures in the Olympic movement called the Beijing relay a "disaster". The former Chairman of the World Anti-Doping Agency (WADA), the ubiquitous Dick Pound, lambasted the Chinese organising committee for ignoring advice to cancel the torch relay – which had actually left governments considering boycotting the Games and said that only the earthquake referred to in the previous paragraph had succeeded in diverting attention away from the shambles. Subsequently the IOC president, Jacques Rogge, confirmed that there would be a review of torch relays, and it is expected that, apart from the lighting ceremony in Olympia, Greece, they will in future be confined to the host nation (*The Guardian of 6/8/2008, p. S1*).

### **Internal Islamic terror threatens Games**

Whatever reservations one might have about the Chinese authorities' heavy-handed approach towards security, there was a broad consensus on the proposition that at all times they had to take into account the possibility of Islamic terrorists attempting to use the Games for their own ends – as indeed had already been the case all those decades ago during the 1972 Munich Games. This was particularly the case here, with memories still fresh of the 9/11 attacks and the prospects of peace in the Middle East being as bleak as ever. However, as matters turned out, there was a definite threat from Islamic armed action, but on this occasion it had its origins inside the territory of the host nation. The most serious threat came from the Uighur ethnic minority from Xinjiang province to the West of the country, whose separatist forces are said to be in league with extremist groups such as Al-Qaeda. In

one incident in March 2008, a girl found with a drinks can full of suspicious liquid was said to have been plotting to bring down an aircraft in mid-flight, possibly on Beijing's new airport terminal. At the same time, the police had claimed that they smashed a separate group in Urumqi, the capital of Xinjiang. Apparently a group of plotters were found with guns and home-made explosives. Police also raided the flat of a group of Uighurs. They were said to have resisted arrest and five of the group were shot dead (*The Daily Telegraph of 25/7/2008, p. 12*).

The threat to the Olympics from this quarter became even more real when, with two weeks to go before the opening ceremony, a militant Islamic group specifically threatened to attack the Olympics with suicide bombers and biological weapons, claiming responsibility for a wave of fatal bombings and explosions in China over the previous few weeks. In a video released by IntelCenter, a terrorism monitoring group, a bearded man identified as "Commander Seyfullah" was seen reading a declaration of jihad against the Games and warned athletes and spectators, "especially Muslims", to stay away. It was issued by a group calling itself the Turkestan Islamic Party. It is thought that this group is allied with the East Turkestan Muslim Movement – designated a terrorist organisation by the US, China and several other countries – which seeks independence for the Uighur people. "Commander Seyfullah" claimed that the group had been responsible for three bombs the previous weeks which killed two people, and two bus bombings in Shanghai, which killed three. The group also said it bombed a plastics factory in southern China and claimed involvement in an attack on the city of Wenzhou (*The Daily Telegraph of 27/7/2008, p. 11*).

In an indication that these were no idle threats, China suffered its worst terrorist attack for more than a decade four days before the Games opened, when suspected Islamic separatists killed 16 police in Xinjiang. Police announced that two Uighur men, aged 23 and 28, drove a lorry at police officers out for early morning exercise in the city of Kashgar. After crashing to a halt, they threw grenades or home-made explosive devices, then began slashing at survivors with knives, before being overwhelmed. Fourteen policemen died at the scene, two more died on their way to hospital and 16 others were injured. Debris from five explosive devices were recovered, along with 10 home-made explosives, a home-made gun and four knives. Although no-one claimed responsibility, it was inevitable that connections were made to the group which had threatened mayhem at the Olympics themselves, as reported in the previous paragraph (*The Daily Telegraph of 5/8/2008, p. 15*).

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The Chinese government immediately moved to limit the damage to the country's image and to the prospects of a safe tournament. They insisted that the terrorists would not succeed in disrupting the Olympics, although they admitted that the attack had been "well-planned" at least a month in advance. They also claimed that the East Turkestan Islamic Movement (ETIM) and the east turkestan Liberation Organisation could have been behind the attack, since materials found on the suspects' bodies matched items taken from an ETIM training camp the previous January (*The Daily Telegraph of 6/8/2008, p. 12*). The authorities tightened their grip on the Xinjiang province, as the Turkestan Islamic Party issued a new video calling on the Uighurs to avoid aeroplanes, buses and trains during the Olympics. Meanwhile an anonymous bomb threat to Air China's Tokyo office forced a passenger jet to make an emergency return to Japan. In Turkey, an Uighur doused himself with petrol outside the Chinese embassy in Ankara and set fire to himself, although his injuries were later said not to be life-threatening (*The Daily Telegraph of 9/8/2008, p. 22*). In the event, it must be admitted that the Games passed off without any major terrorist alert. Two months after the Games finished, Beijing issued a wanted list of eight citizens, calling for their extradition for allegedly plotting attacks against the Olympics. The security Minister did not mention their whereabouts, but the suspects were said to be part of ETIM. The list named Memetiming Memeti as the head of the movement (*The Guardian of 22/10/2008, p. 22*).

### *Beijing continues to stand by Sudan*

One of the reasons why many critics had lambasted the nomination of Beijing as the location for this year's Games was the country's seemingly cynical foreign policy, more particularly towards East Africa and the conflict raging in Darfur, a region of Sudan. With three weeks to go before the start of the Games, China launched an attack on preparations being made at the International Criminal Court (ICC) to prosecute President Omar al-Bashir of Sudan for genocide and war crimes. A Government spokesman expressed doubts as to whether this would do more harm than good in its closest African ally and key oil provider. In the words of the Chinese Foreign Minister, Liu Jianchao:

***"China expressed grave concern and misgivings about the International Criminal Court prosecutor's indictment of the Sudanese leader. The ICC's actions must be beneficial to the stability of the Darfur region and the appropriate settlement of the issue, not the contrary"***

(*The Daily Telegraph of 16/7/2008, p. 22*).

Earlier, Luis Moreno-Ocampo, the court's Chief Prosecutor, had announced that he possessed evidence

to prove Mr. Bashir was guilty of genocide, war crimes and crimes against humanity when he called for an arrest warrant to be issued against the President. China is Sudan's principal supporter, even though it claims to have put pressure on Bashir to establish peace in Darfur. It has a vested interest in ensuring that violence does not worsen in the region, since it has contributed a small number of support troops to the UN peacekeeping force operating there. However, it also had to find a path between its desire for positive international publicity during the run-up to the Games and its sizeable investments in the country, particularly in its oil industry (*Ibid*).

China's stance on Darfur was, in fact, one of the reasons why the state leaders of the world were seriously considering a boycott of the opening ceremony, traditionally attended by leaders from all over the world. The French president, Nicolas Sarkozy, had indicated that he would boycott the Games, but later the media announced that he would be in attendance. US President Bush also attended, on the basis that he saw the event as "a sporting competition" and as a way of supporting US athletes. However, it was interesting to note that the White House seemed aware of the sensitivity of the issue, since the announcement was made on the eve of a three-day holiday, when media attention was focused elsewhere. The two Presidential candidates, Barack Obama and John McCain, had called on Mr. Bush to shun the event. Save Darfur, a non-governmental organisation lobbying for China to intervene in the Sudan conflict, called Mr. Bush's decision "disappointing". On the other hand, Reporters without Borders, the Paris-based campaign for freedom of expression, commented that Mr. Sarkozy's presence would be "a stab in the back" for China's dissidents (*The Daily Telegraph of 5/7/2008, p. 30*).

Later, it was learned that Hans-Gert Pöttering, the President of the European Parliament, would boycott the opening ceremony (*The Guardian of 10/7/2008, p. S10*).

### *Air pollution continues to cause controversy*

Although obviously less dramatic in its impact than various human rights abuses and misbegotten foreign policies, the levels of environmental pollution had also been a major concern for participants and spectators alike. Until a few weeks before the show commenced, however, it looked as though none of the teams or athletes would raise any difficulties out of diplomatic considerations, and simply hope for the best. That illusion was shattered in mid-June, when the announcement came that Australia would not send its

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athletes to the opening ceremony because of pollution fears. The Antipodean track and field athletes, who were due to train in Hong Kong, were instructed not to travel to the Chinese capital until the time for their events was nigh during the second week of the Games. Earlier, the British athletes had made the same decision, but the Australians were the first specifically to mention pollution as a reason (*The Daily Telegraph of 18/6/2008, p. 16*).

The Chinese authorities did, however, give every sign of being aware of the damage which was being done to the image of the Games. With three weeks to go before the Games opened, Beijing's largest single source of pollution, the vast Shougang steel complex, was shut down – whereupon the local government invited the world's media to a triumphant "autopsy". Situated in the densely populated West of the city, and very close to the Olympic velodrome, BMX venue and mountain bike course, Shougang was being heralded as an example of the manner in which the Games were helping to "green" China. At its recent peak, the factory employed 134,000 workers and belched out 10 per cent of the particular matter that made Beijing's atmosphere among the foulest throughout the world. Four of its five blast furnaces were shut down in a pre-Olympic environmental clean-up which also saw the temporary closure of hundreds of factories and the removal of more than a million cars from the city's roads (*The Guardian of 19/7/2008, p. 30*).

[The advised reader will not have failed to notice the link between this controversial aspect of the Games and that which was discussed in the previous section. It is indeed a sad irony and commentary on our times that only a society in which the ruling elite enjoyed such untrammelled dictatorial powers could such a massive "clean-up" operation have taken place. In fact, all the measures which the Chinese Government were so keen to display to the world as evidence of their seriousness of intent in dealing with the problem came somewhat too late for the millions of Beijingers, whose health had already been damaged over several decades.]

However, it would seem that the authorities were engaged in a battle to solve the unsolvable, at least in the medium term. With barely a week to go before the Games started, thick pollution was still blanketing the Chinese capital. The authorities accordingly started to consider more stringent measures to control the capital's pollution as the smog continued mercilessly to assail its inhabitants' lungs. Significantly, the area where the Games were to be held failed the Government's own smog targets with only two weeks to go before the

start of the tournament. It must be remembered that these targets are looser than those regarded as "safe" by the World Health Organisation (WHO) (*The Daily Telegraph of 28/7/2008, p. 12*). Still the authorities clung to the belief that it would be "all right on the night". Du Shaozhong, the Deputy Director of the Beijing Municipal Environmental Protection Bureau, blamed the thick haze on a combination of fog and light wind unable to blow away the pollution, but maintained that levels were 20 per cent lower than the previous year in similar weather conditions (*Ibid, p. 54*). Li Xin, a senior engineer with the environmental bureau, pledged the implementation of an "emergency plan 48 hours in advance" if the air quality deteriorated further (*The Independent of 29/7/2008, p. 20*). None of this was ever going to assuage fears that the Chinese authorities' promise of a "Green Games" had become devoid of any serious portent.

As was expected, the smog failed to clear, and serious concern was expressed about the feasibility of certain events in those conditions – in spite of the blithe assurances given by Arne Ljungqvist, the Chairman of the IOC's medical commission, who pronounced himself confident that the pollution would harm neither the athletes nor the spectators, suggesting that media coverage had created a false impression of pollution levels (*The Guardian of 6/8/2008, p. 1*). Organisers gave serious consideration to the prospect of postponing or relocating endurance events, including the marathon and road cycling race, if smog levels reached dangerous limits (*Ibid*). Some athletes, most notably four US cyclists, arrived at Beijing Airport with their faces covered in respiratory masks. They were later compelled to apologise to the Beijing Olympic organising committee by the US Olympic Committee. Images of these masked athletes had been beamed throughout the world on the day on which the IOC, as was mentioned earlier, claimed that the pollution fears had been exaggerated by the media (*The Daily Telegraph of 7/8/2008, p. S4*).

"Man must defeat the heavens" wrote the famous Chinese leader of yesteryear Mao Zedong, and this is precisely what the local authorities did – through China's Weather Modification Office (yes it does exist and employs over 53,000 people) which took the battle to the elements. Readers with well-endowed memories may recall that, in various episodes of Star Trek, most sophisticated planets and colonies which controlled their weather tended to use systems such as weather modification nets. The Chinese tried something completely different (to quote yet another television series of yesteryear). This consisted of a compound located in the West of Beijing, a £50 million annual

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budget, a regular supply of artillery from State-Owned Factory No. 556 in Inner Mongolia and around 37,000 part-time weather modifiers. The latter are peasant farmers. Artillery positions and rocket launchers are erected on the high points of the land which they farm, and they are drilled to load up at the first sign of raindrops and await instructions. The orders emanate from Beijing headquarters, then filter down to sub-bureaus, who in turn mobilise ground operatives by mobile telephone. If Beijing has deemed it the wrong kind of rain, the operatives are stood down (*The Guardian of 8/8/2008, p. 11*).

It would appear that, whatever techniques were deployed, the desired effect was achieved. Some athletes were still troubled by the elements, but that appears to have owed more to the heat than to the smog (*The Guardian of 5/8/2008, p. S9*). It also appears that the measures taken to combat pollution and smog have produced an unexpected but welcome side effect, in the shape of a public debate as to whether the anti-pollution controls imposed for the benefit of the Games should be retained once the event had finished. Official figures showed that these controls were responsible for the air in August being cleaner than in any other month for the past decade. Moreover, they were so popular that citizens have flooded an internet debating site demanding that they remain. The Government, for its part, stated that, whatever happens, it would not allow a return to the conditions seen in recent years, when the air pollution index has literally gone off the charts (*The Daily Telegraph of 7/9/2008, p. 31*).

### **Freedom of expression issues**

Yet another of the misgivings that have been expressed at awarding the Games to Beijing concerned the degree to which athletes, visitors and others would be free to express their opinions about the Games – or China in general. There was bad news on this front barely three weeks before the opening ceremony when it was learned that Olympic athletes who criticised China on the internet faced expulsion from the Games under draconian rules governing the practice of blogging. The IOC for the first time allowed competitors to write cyberspace journals, but drew up stringent guidelines in what was regarded by many as an attack on freedom of speech ahead of the Games. Athletes who departed from these rules risked having their Olympic accreditation removed, which would deny them access to venues and effectively prevent them from competing. This was seen as nothing less than a capitulation by the IOC to the iron grip exercised by the Chinese authorities over their citizens' access to the Internet (*Mail on Sunday of 20/7/2008, p. 84*).

These fears appeared to receive confirmation a week later, when it was learned that Lenovo, the Chinese computer company and sponsor of the 2008 Olympics, had reserved the right to censor the comments made by the eight British athletes who intended to publish blogs during the Games. Interest in the Olympians' thoughts was always likely to be high, since five of them were sailors, two were cyclists and another a rower – these being the three sports in which Britain had high medal hopes (as amply confirmed by subsequent developments). Lenovo owned that the blogs were the "personal pages" of the athletes, but that it would "only take what it chooses to" (*The Guardian of 29/7/2008, p. S2*).

However, the IOC was compelled to act the very next day, when furious reporters complained that their internet access being interfered with. Attempts to gain access to the Amnesty International website, which had just released a damning report on human rights in China, had proved fruitless. There was also an embarrassing moment for the Chinese authorities when one journalist produced his laptop at a news conference to show how sites including the BBC's China service fell foul of the Chinese "firewall". Suggestions that this was due to technical problems were not taken seriously. The IOC Press chief, Kevin Gosper, announced that he would investigate any apparent efforts to interfere with reporters going about their duties. Beijing had earlier pledged to suspend its usual monitoring programme, which slows down the Internet, and call off tens of thousands of spies blocking emails, monitoring websites and reporting back to superiors (*The Independent of 30/7/2008, p. 19*). With disarming honesty, the Chinese authorities confirmed, the next day, that internet facilities at the Games would remain censored. The IOC claimed that there was little it could do about this turn of events as long as sites relating to sport were left open. Giselle Davies, the IOC spokesperson, said that it had been aware of Chinese intentions to censor the Internet, but thought it would apply to pornography sites and other material regularly blocked in other countries (*The Daily Telegraph of 31/7/2008, p. 19*).

However, a few days later saw a relaxation in the Chinese authorities' attitude when they agreed to lift some of the restrictions on the Internet throughout Beijing in response to these various complaints. For the first time, major international websites devoted to human rights, such as those of Amnesty International and Human Rights Watch, became freely accessible on computer screens across the city. A block on the BBC Chinese language news site was also lifted, along with the sites of other foreign media which had previously

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triggered a message saying "Internet Explorer cannot display this webpage" when accessed from inside China. It was not clear whether the change in policy applied to all Chinese internet users, now the largest number in the world, but there were reports that these sites were also visible in other cities (*The Daily Telegraph of 2/8/2008, p. 18*).

Oh yes, those famous "free expression areas", to which anyone, in principle, had access subject to seeking permission five days in advance (see above, p. 72). As the Games drew to a close, it emerged that 77 applications had been made involving 149 people, some of them foreign. However, there was one tiny problem – no demonstration actually took place eventually. According to a Government spokesperson, 74 requests had been withdrawn following an "amicable settlement" with the authorities. Two others were suspended because of "incomplete procedures", and in one case, the applicant wanted to involve children in the demonstration, which was against the law (*The Independent of 20/8/2008, p. 53*). The present writer cannot be the only commentator who would be interested in taking a closer look at some of these "amicable" settlements. However, at least some good seems to have emerged from the pressure under which the Beijing authorities came on this issue, in that, two months after the Olympics finished, China introduced new regulations giving foreign journalists freedom to travel around the country, confirming the belief (or illusion?) that the reform, introduced temporarily for the Games, would be a lasting legacy to the Olympics. However, there was no easing of any restrictions for the domestic press (*The Daily Telegraph, of 18/10/2008, p. 16*).

### **Scandal of the "cancer villages"**

The ruthless pursuit for perfection, in technological, sporting and also public relations terms, has been yet another major reservation which many commentators expressed about the award of the Games to Beijing. The lengths to which the authorities were prepared to go in order to maintain a favourable image of their country during the jamboree was fully highlighted with two months to go before the opening. A reporter with a major British newspaper followed a lead and found the people of Hou Wang Ge Zhung, who believe that their small community, hidden among fields and birch trees an hour's drive from Beijing, has joined the ranks of China's "cancer villages". They blame the chemical factory built in the area five years ago for 25 villagers having had the disease diagnosed and 19 having died since 2002. Like the vast majority of the many communities where 'cancer clusters' have been identified, they have little hard evidence with which to

substantiate their claim – which is denied by the factory owners. In spite of this, they have launched a lawsuit for damages, inspired by the success of other communities which have won money from polluters. Because of the Olympic Games, the villagers of Hou Wang Ge Zhung will have to wait another several months for a decision. They were apparently informed that nothing could be settled either way until after the Olympics – otherwise it could be bad for the image of Beijing and the country (*The Observer of 22/6/2008, p. 36*).

During the immediate run-up to the event, authorities in China went to even more extreme lengths than before to ensure that nothing marred the opportunity to flaunt the nation's new economic, political and cultural power – and its new green credentials – to the world. A vast programme of "beautification" saw 40 million flowers and tens of thousands of trees planted in Beijing alone. Lu Haijun, director of the Beijing 2008 Environmental Construction Office, said that more "aesthetically pleasing" curving roofs had been fitted to 2,615 old blocks of flats and 20,000 more repainted. Other infrastructure projects, such as a vastly expanded and heavily subsidised metro system, would also help to 'green' the capital', it was hoped.

More seriously, however, the stories that regularly exposed pollution and corruption – the two are often interlinked – appeared to disappear from the wires of the state Xinhua news agency. Normally vocal environmental activists lapsed into silence. One said last week that she had been told by the Government not to speak to the foreign press. Some experts were warned off making public statements. Within 30 minutes of arriving in Hou Wang Ge Zhung, the representatives of the British newspaper involved were firmly escorted to the local Communist party office, lectured, shown government reports on tests on the local water that revealed "no problem", detained while more senior officials arrived and then escorted from the village by police. According to Wang Hue, village chairman and local Communist party chief.

***"Until the Olympics are over, things have to be regulated. This is the order we have had from the government. There is no point in interviewing the villagers. I am their representative and I know they agree with the government. Those who launched the lawsuit are troublemakers." (Ibid)***

In Hou Wang Ge Zhung, the villagers appeared to be resigned. One villager opined that if it was bad for the image of the city to have a decision on our court case before the Olympics, they would just wait until afterwards. "We can't do anything else. We are just poor villagers" was his simple but effective conclusion (*Ibid*).

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### Will South Africa make it for the 2010 World Cup deadline?

This is not the first occasion on which this Journal has reported doubts, amounting to more than malevolent gossip, as to whether the infrastructure programme required for the staging of the 2010 football World Cup will be in place by the time the tournament will start. Obviously, as the deadline looms increasingly large, these concerns must be addressed not only in terms of measures taken to expedite the process, but also from the point of view of finding an alternative home for the event should this not prove adequate.

Initially, the signs were very encouraging. The Government seized on the occasion to sink billions into a creaking infrastructure intended for white minority rule. In the townships and ministries there was palpable excitement that the Cup might finally mark the coming of age of a fledgeling democracy. However, it appears that, privately, officials and ordinary South Africans have expressed their fear that the showcase event may yet be overtaken by violence or the inability of this new-built infrastructure to cope. One official has even been known to predict that it could “all collapse around our ears”. In addition, two weeks of xenophobic violence which occurred in early June 2008, during which mobs burnt or hacked to death 62 foreigners and drove thousands from their homes, left some sources wondering whether South Africa is ready to welcome the world. In the words of Bishop Paul Verryn:

**“The fact of the matter is that at the moment the people from other countries are the target of this violence. Wouldn’t you think very carefully if you were a soccer player or thinking of coming here to watch? Wouldn’t you think that you might become a target?”**

*(The Times of 14/6/2008, p. 47).*

However, the violence appears to be only one hurdle to overcome. Some areas have hardly any public transport. In addition, the country has been paralysed by power cuts following decades of under-investment. The construction of five football grounds costing £500 million also gives cause for concern. Soccer City has been held up by the delay in getting girdles from Italy, whilst the stadiums in Cape Town and Port Elizabeth are, to quote government source, “facing the challenges of meeting their deadlines”. In spite of this, Government ministers insist that there is no crisis (*Ibid*). Nevertheless, later that summer it emerged that the world governing body FIFA had entered into talks with Brazil about staging the 2010 tournament should the original choice not be up to the challenge (*The Daily Telegraph of 18/7/2008, p. S8*). Later, it was learned that, although FIFA were closely monitoring developments in South Africa, but that they

were confident that the World Cup would be unaffected by the prevailing uncertainty (*The Daily Telegraph of 22/9/2008*).

### Race hots up for 2016 Olympics

Even before the first spectators started to click through the turnstiles at Beijing, the race to follow London as the host for the 2016 Olympics had started in earnest. In fact, a crucial stage was reached in early June 2008 when the International Olympic Committee met in Athens in order to draw up a shortlist of candidates. Of the seven contenders, however, one in particular was vexing the minds of the “Lords of the Rings”. Normally a country less than half the size of London and with a population lower than 1 million would not stand a chance of making the shortlist alongside such cities as Chicago, Madrid, Rio de Janeiro and Tokyo. However, the oil and gas-rich state of Qatar is not a normal country, and officials in this tiny country peninsula were already dreaming of its capital Doha receiving the Olympic flag at the closing ceremony in London to indicate that they would be the next city. Nor is it solely the Games on which they have pinned their hopes – shortly beforehand FIFA president Sepp Blatter had revealed that it wants to host the 2018 World Cup as well (*The Observer of 1/6/2008, p. S22*). Hassan Ali-bin Ali, the Chairman of Doha’s Bid Committee, explained the state’s optimism in the following terms:

**“Our sports infrastructure is among the best in the world and we’re certain we can build on our previous sporting experience to host the greatest celebration of sport in the world. In Doha, we have world-class sporting infrastructure. We hosted the 2006 Asian games – the world’s second largest multi-discipline event after the Olympics – putting on what has been called the best, biggest, most widely reported and highest standard Asian games ever”** (*Ibid*).

In fact, the facilities are hugely impressive. The 80,000-capacity Khalifa International Stadium built for those Asian Games was part of a £1.4 billion sports building programme. The indoor facilities at the Aspire Academy, which has the largest purpose-built multi-sport arena in the world and whose patrons include Pelé, Diego Maradona and Mark Spitz, are described as “breathtaking”. So there can be little doubt that, in technical terms, this bid was as good as any of its rivals – which is deemed to be the only criterion which the IOC Board applies in its initial evaluation. However, the geo-politics of the issue also played a part. Already the other cities had privately expressed their concern that Qatar’s almost limitless financial resources could give it an unfair advantage in the build-up to the final vote, to

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take place in Copenhagen the next year. There were complaints that Qatar had been spending an unprecedented amount on its bid – a claim angrily denied by Doha officials, who claimed that independent auditors showed that the amount spent thus far was very much in line with the expenditure incurred by Chicago, Rio and Madrid (*Ibid*).

In the event, Doha failed to make it on the shortlist in Athens. Reducing the list of candidates from seven to four, the IOC selected Tokyo, Chicago, Madrid and Rio de Janeiro. Doha joined Prague and Baku as rejects. The all-important report on the basis of which the decision was made rated Doha fourth overall in terms of project and legacy, but IOC members were unhappy with the city's timetable for the Games, which would have been staged in late October in order to avoid the highest temperatures. Even then, many of the events would have been staged indoors in an air-conditioned environment. The IOC-preferred dates are 15 July to 31 August, being an optimum period for television viewers in the US over the summer school holidays and prior to the start of the National Football League (NFL) season. Mr. Bin Ali expressed his disappointment that the IOC had "closed the door on the Middle East", pointing out that there were precedents for the Games extending into as late as November (*The Times of 5/6/2008, p. 71*).

Since then, the bidding cities' campaigns have predictably gone into overdrive. Chicago caused something of a sensation by announcing, in early October 2008, that it had appointed Britain's Lord Coe as new adviser in its bid to succeed. In addition, Pat Ryan, who chairs the city's bid committee, announced that Chicago could re-use a large part of London's partly temporary Olympic stadium by shipping 55,000 seats across the Atlantic. The IOC ruled that such assistance was not against any code of conduct, as long as London was also making its help available to the other candidate cities. The London organising Committee (Locog) subsequently confirmed that they had definitely not favoured Chicago in the advice they had dispensed. Mr. Ryan also revealed that the Midwest city's bid was to follow a similar strategy to that pursued by London for the 2012 Games, i.e. by planning to leave a regenerated urban area once the event was over (*The Guardian of 3/10/2008, p. S10*).

However, the Chicago bid has not been free from controversy over its ties to McDonald's, an IOC sponsor, after a spokesman for the catering company was reported as stating that it would probably renew its sponsorship if Chicago won the bid, the other cities being less important markets. McDonald's later denied

that this was the case, describing the reported announcement as an "unfortunate mis-statement by an ill-informed individual" and hinting that other bidding cities might have attempted to use this as a way of discrediting the Chicago candidacy. He added that the restaurant firm had "chastised and disciplined" the executive who had been responsible for this, and that his employers had informed the IOC of the misunderstanding 2 ½ years previously (*Ibid*). Another factor which was alleged to assist Chicago on grounds other than pure merit was the victory recorded by Barack Obama, whose home city this is, in the US Presidential Election. These fears were certainly expressed in Tokyo, with Japanese Olympic Committee President Tsunekazu Takeda openly wondering "how the IOC would react" when Mr. Obama appeared in a presentation in Chicago (*Associated Press, www.findlaw.com of 5/11/2008*).

### **Germany ready to step in if Ukraine not ready for Euro 2012**

The UEFA football championships have, in principle, been allocated to Poland and the Ukraine on a joint basis. However, here again doubts have been raised as to one of the potential hosts' ability to stage the contest. Such was the degree of concern at this at the offices of the relevant governing body, UEFA, that by the summer of 2008 they were making contingency plans to move the tournament from Ukraine because of concern over the political situation, delays to stadium construction and worries relating to transport infrastructure. One of the complicating factors has been the involvement of controversial oligarchs in the Ukrainian Football Federation's (UFF) organising committee. It has recently emerged that the President of the UFF, Grigory Surkis, was banned from visiting the US in 2004 because of allegations of corruption. He was denied entry under a US Presidential Order which authorises immigration officials to withhold visas from foreigners suspected of corruption (*The Daily Telegraph of 21/7/2008, p. S14*).

It appears that Mr. Surkis was both a successful business and political associate of Viktor Medvedchuk, who at the time was head of the presidential administration. Surkis was also deputy leader of the Social Democratic Party, headed by Mr. Medvedchuk. Both have been business partners since the early 1990s and founded the company that owns successful football side Dynamo Kiev. An equally influential figure is the oligarch Igor Kolomoisky, a vice-president of the UFF who has partly financed one of the main arenas planned for the Euro 2012 tournament, i.e. the Dnipropetrovsk

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Stadium. Opposition groups regard Mr. Kolomisky as the most powerful and controversial oligarch in Ukraine and claim that he has protection at the highest level. It has been learned that, privately, UEFA have admitted that the involvement of these individuals is of some concern (*Ibid*).

### Bidding starts for Rugby World Cup

The International Rugby Board (IRB) will decide in July 2009 who will host the next two World Cups. It is reported that England and Wales may make a joint bid for the 2015 Cup, with Japan also set to bid for the same year. In mid-July 2008, the Italian Rugby Federation announced that it would bid for either the 2015 or the 2019 World Cup (*The Daily Telegraph of 21/7/2008, p. S4*).

### India may lose 2010 Commonwealth Games in legal battle over athletes' village

In mid-November 2008, the threat emerged that New Delhi could lose the right to stage the 2010 Commonwealth Games if organisers are compelled to move the athletes' village from its current location, according to a senior Games administrator. The village being built on the banks of the river Yamuna is the subject-matter of a lawsuit which arose after a petition raised environmental concerns over the project. Shortly before this issue going to press, the Delhi High Court requested an expert to submit a report on the question whether the village, which is to accommodate around 8,500 athletes and officials, should be allowed at the spot. According to Commonwealth Games Federation chairman Austin Sealy, any change to the village arrangements at this late stage would "seriously jeopardise" India's hosting of the Games (*The Daily Telegraph of 12/11/2008, p. S23*).

### International Olympic Committee (IOC) developments

#### *"Official history of the Games and IOC" published*

From Baron de Coubertin, the acknowledged father of the modern Games, to Lindsey Jacobellis, the US snowboarder whose showboating antics in the final stretch of the cross event at the 2006 Turin Winter Games landed her on her backside, losing a certain gold medal in the process – this work by David Miller, entitled *The Official History of the Olympic Games and the IOC* has it all in minute detail. From a legal viewpoint, however, the most interesting part is that

which he devoted to the International Olympic Committee – in particular his insights into the various controversies which surrounded it, especially the 2002 Winter Games corruption scandal. He also deals with doping issues, the media, and the terrorist outrage at the 1972 Olympics. Interestingly, the author has also been the biographer of former IOC Chairman Antonio Samaranch.

#### *Rogge seeks one more term*

When the Belgian sports doctor Jacques Rogge replaced Antonio Samaranch to become the eighth President of the International Olympic Committee in 2001, few insiders expected a dramatic change of tone and/or policy. Nevertheless, Dr. Rogge has, by general consent, proved a competent and popular President, in spite of some of the controversial aspects of his previous career (*Journals passim*). It therefore came as no surprise when Dr. Rogge confirmed that he would be seeking a further term in this capacity when his present mandate expired in 2009. It is widely expected that his candidacy will be unopposed (*Daily Mail of 25/10/2008, p. 112*).

One of the reasons for Dr. Rogge's success appears to have been his strict stance on doping – in fact, Dr. Rogge has pledged to intensify the fight during his next term. This the IOC carried out 5,000 doping tests in Beijing this year – twice the number recorded at Sydney eight years previously. In addition, athletes who receive doping suspensions of six months or more have been made ineligible for the Olympics (*Associated Press, www.findlaw.com of 30/10/2008*).

#### *IOC finances "solid" according to President...*

Another reason why Dr. Rogge's tenure has proved reasonably popular is not only the absence of any suggestion of corruption – after the Salt Lake City scandal one expected nothing less – but also the sound management of the IOC finances under his stewardship. He was therefore able to assert with some confidence that he did not see the Committee's finances as being under any serious threat from the credit crisis currently gripping the world economy. He claimed that the IOC's accounts and reserves were strong, with television contracts and most sponsorship deals secured until at least 2012. As regards negotiations for US television rights for the subsequent Games, these could be comfortably postponed until after the vote on the 2016 host city (due in October 2002), according to Dr. Rogge (*Associated Press, www.findlaw.com of 30/10/2008, loc. cit.*).

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### *...but can the same be said of the organiser of the forthcoming Games?*

It is no secret that Britain has been one of the countries worst affected by the current financial crisis – and the signs are that this is having an impact on preparations for the 2012 Games, allocated to London in 2005. Thus it has recently been revealed that the organisers have had to use contingency funds as they struggle to secure private finance for the Olympic Village, the estimated cost of which is anticipated to be close to £1 billion. Dr. Rogge, however, is apparently unfazed by these developments, reminding sceptics that the Government could advance the money given that it would recover this expense once the accommodation in question is sold on the open market after the next Games.

However, matters also look critical for Russia, which has had to contend not only with the financial crisis, but also with a drop in oil prices, and where a Deputy Prime Minister was recently appointed to oversee the preparations for the 2010 Winter Games in Sochi (where virtually all venues are to be built for the first time). Here, again, Dr. Rogge sounded an optimistic note, saying:

***“Things are moving in the right direction. There are technical challenges and construction challenges, but not a major funding issue today. It’s a priority project for the Russian federation and (Prime Minister Vladimir) Putin, and we are confident the funding will be there (Associated Press, www.findlaw.com of 30/10/2008, loc. cit.)***

One can only hope that the IOC President’s sanguine view will be vindicated by subsequent developments.

### ***Fate of Athens Olympic site a warning to future organisers and candidates***

It has been stated before on many occasions – and not only by those who are opposed in principle to the quadrennial sporting jamboree presided over by the IOC – that it is not only the sheer cost of staging the tournament, but also the fate of the Olympic site afterwards that should prompt us at least to consider having one permanent venue for the Olympics. Only rarely do these buildings and stadiums experience a fruitful aftermath, and, according to a number of newspapers which have investigated this aspect thoroughly, Athens 2004 seems to have followed this depressing trend.

One glance at the current state of the 2004 Olympic site confirms that all is not well in this department. The various buildings concerned are fly blown, closed to the general public and covered in graffiti. Of the 22 venues in the city, 21 are in a state of disrepair and under guard

to prevent vandalism. Athens spent over £9 billion on organising the Games, slightly less than the estimate for the London Olympics in 2012. It therefore appears that the “hangover” from the 2004 event has been considerable. Greece itself was left with a budget deficit of 6.1 per cent, more than twice the maximum allowed under the rules of the European Union (*The Daily Telegraph of 2/6/2008, p. 16*).

The infrastructure, which was installed in such haste, has proved to be much too extravagant for the city. It is hard to imagine that there was ever a great deal of local interest in continuing to use the facilities for baseball, kayaking, fencing and handball down the coast at Hellenikon. A few miles outside the city centre, the sprawling Faliron complex which hosted the beach volleyball and taekwondo competitions, is deserted and a lone security guard has been unable to deter youths from spraying the walls with slogans. Inside one building, puddles of water mark the marble floor. The baseball stadium was briefly used for football matches, until the organisers came to the realisation that the shape of the baseball diamond resulted in all the television cameras standing at the corner flag (*Ibid*).

True, the Greek authorities and population continue to put a positive gloss on the aftermath of the Games, and insist that the sad picture presented by the a tour of the desolate venues is misleading. Officials at the Hellenic Olympic Properties agency, the state-owned company which acts as landlord for the venues, claim that the situation is not as bad as it looks – and indeed, confidential papers shown to a leading British newspaper appear to support their view. These indicate that the sailing venue is currently operated by a Greek company under a 45-year lease signed along with payment of a €5million deposit and a €14 million annual rent. The plan is to convert it into a marina and entertainment complex for up to 2,000 yachts. Similarly, four companies tendered an interest in transforming the taekwondo venue into a convention centre. In addition, contracts have been signed to turn the Galatsi Olympic Hall, which hosted the table tennis and rhythmic gymnastics, into a shopping centre and the kayak/canoe venue into a water park (*The Times of 26/7/2008, p. 86*).

However, judging by reports from more dispassionate observers, the overall impression is that the 2004 Games have given rise to a herd of white elephants, and even the politicians cannot deny that only one venue – the badminton hall – is operational in its new guise, to wit a 2,500-seat theatre which has hosted Swan Lake On ice and Jesus Christ Superstar. They blame democracy, which means that “one cannot

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operate projects immediately”, according to Sofoklis Psilianos, the General Secretary for Olympic Utilisation at the Ministry of Culture. It is true that unfortunate political circumstances have interfered with post-Games planning. The Greek Government changed a few months before the 2004 Games took place, which caused some delay to the actual building of the sites. However, commentators have, with some justification, contended that a post-Games business plan, backed by legislation, should have been in place long before the election. Here again, political factors seem to have interfered, with claims that a blueprint had been worked out, but that the new Government changed it (*Ibid*).

However, beyond the political buck-passing over the long-term use of venues, there lies the fundamental acceptance that, for Athens, the 2004 Olympics were not really about sporting prowess. Athens was the smallest city to host a modern Olympics, an event which had become a logistical monster after the 9/11 attacks on New York in 2001 (even though the 1972 Munich Olympics had already amply demonstrated the scope for terrorism inherent in the event). Greece spent nearly €2 billion on security alone, an unprecedented amount for what may have been a kneejerk measure – security sources contend that the flash command-and-control room did not operate properly because it had not been tested prior to the opening day. However, according to Spyros Capralos, a former water-polo player and Secretary of State for the Olympics:

***“The security cost was too much, but we could not afford not to have a secure Games. There was a lot of money thrown out of the window, but overall the Games were successful. Cities bid for different reasons. For Athens, it was an issue of history and it was a good excuse to modernise our infrastructure” (Ibid).***

It is true that the Games provided a 21st-century transport system (road, rail and air) and telecommunications networks. It also cleared the air of the worst pollution and cut unemployment. Not for the first time, however, one might reasonably ask the question why, if there is infrastructure to renovate, one needs the “excuse” of organising an event which will ultimately give rise to billions of unrecoverable expenses....

### Paris cycle scheme “a success” in spite of massive thefts (France)

Just over a year ago, the municipal authorities of the French capital decided that, with a view to relieving the heaving Parisian traffic and to encourage greater sporting participation, a self-service facility would be available throughout the city making bicycles available for hire from racks at almost every street corner. Not unexpectedly, this scheme has attracted the unwelcome attention of the criminal fraternity, and during the relatively short time of its existence, over 3,000 of the sturdy grey bikes have gone missing. Some have materialised as far away as Romania and, according to one report, Australia. A further 3,000 have been deliberately destroyed or damaged.

Nevertheless, the 16,000 vehicles in circulation have proved to be extremely popular, and the idea is expected to be exported to other countries across the world, including Austria and Spain, with plans for a similar system for Finland, Australia and the US. In fact, the Parisian service will soon be expanded into the French capital’s suburbs. The Mayor, Bertrand Delanoë, also hopes to extend the concept within a few years to self-service electric cars, which will encourage commuters and Parisians to abandon their own exhaust-emitting contraptions. In fact the scheme, popularly referred to as the *vélib*, has become a city institution, giving the streets and boulevards of the capital a vague air of Amsterdam or even Cambridge. Mr. Delanoë even plans to celebrate his success by inviting 365 *vélib* users to take part in an older two-wheeled French institution – to wit, the Tour de France (*The Independent of 16/7/2008, p. 26*).

### Decline of bullfighting accelerated by death and child labour scandals (Spain)

It has been repeated ad nauseam in this Journal that this column does not recognise bullfighting – or any other activity which features the suffering of animals for dubious entertainment purposes – as a sport, and will only report on those developments which will expedite and facilitate the timely demise of this barbarous practice. The period under review seems to have considerably hastened this prospect in view of some of the dramatic episodes which have occurred.

In early June 2008, two spectators in Spain were killed in separate bullfighting festivals. At an event in Betera, to the East of the country, a 23-year-old man was gored by a bull and suffered serious head-and-neck injuries. He was taken to hospital but died on arrival. He had been taking part in a local fiesta in which the horns of a

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bull are set on fire, to celebrate the start of the summer. In a different location, a 76-year-old man was similarly attacked during a street bullfighting festival. He had been cornered by a bull during a festival called Colonia San Antonio. Spain's most famous "street" festival, the Running of the Bull at San Fermin, Pamplona, has claimed a number of victims over the years (*The Guardian of 6/6/2008, p. 15*).

In fact, it was this year's Pamplona run that provided the occasion for a major effort by campaigners against bullfighting to mobilise the majority of Spaniards who – as has been reported in earlier issues of this Journal – have no interest in this pastime. The more radical wing of the anti-bullfighting movement have started to stage more confrontational demonstrations than the now-almost traditional nude protests. Two groups, called Equanimal and Igualdad Animal, have invaded Spanish bullrings in a new tactic which they intend to repeat throughout the bullfighting season. (Previous protests had been largely confined to placard-waving outside bullrings.) Thus demonstrators succeeded in invading the ring at Madrid's prestigious Las Ventas during the Festival of San Isidro, the most important date on the bullfighting calendar. At the El Monumental ring in Barcelona the previous month, four protestors carrying signs saying "Abolition" jumped over a perimeter wall to gain access to the ring after a bull was killed. Igualdad supporters claimed that they were attacked by workers at the ring before police and security could intervene (*The Observer of 6/7/2008, p. 34*). The Pamplona run itself produced yet another victim when a pack of running bulls gored one person and injured four others (*The Observer of 13/7/2008, p. 36*).

Bullfighting has been hit by other scandals as well – the first concerning a 10-year-old who has fought dozens of bulls to the death and has the scars by way of evidence. However, Michelito, the celebrity from Mexico – a minor sensation in every sense of the word – has been banned from entering the ring in France after animal rights activists claimed that this would be illegal and irresponsible. The precocious torero, who has been fighting since the age of six, was meant to have taken part in an international youth competition in French Provence. Bullfighting is, in principle, illegal in France under laws banning cruelty to animals. However, in areas deemed to have a tradition for this activity it is still allowed as an inherent part of the local culture. For the event in question, apprentices from schools in France, Spain and Latin America were to have faced very young bulls, none of whom would, admittedly, have been put to death (*The Guardian of 4/8/2008, p. 16*).

However, after the Anti-Corrída Alliance (ACA) argued that Michelito's appearance would be dangerous and possibly an infringement of child labour laws, local officials called off the events. The mayor of Fontvieille, where the event was originally planned, said that he was acting in order to guarantee the safety of the minor. Thereupon the fight was moved to Arles, but was again cancelled, just hours before it was due to start. Greeted at the exit of the bullring at Arles by a crowd of aficionados, the young star was comforted by a fellow-pupil and treated as a martyr to the cause. The ACA stated that it had targeted Michelito because of his history of fighting bulls to the death in Mexico (*Ibid*). In spite of the ACA's success in effecting these cancellations, the real scandal must surely be that this young lad was ever allowed to enter a bullring in the first place.

The other controversies attending this activity have actually led to criminal prosecutions. The central theme in this affair is the matador on horseback, which is one of the more extraordinary sights in Spain. The dramatic face-off between man and beast becomes even more theatrical when the bullfighter confronts his prey from the saddle of a high-stepping thoroughbred, and the figure of the mounted matador – the rejoneador – has even been immortalised in vivid ringside sketches by the painter Goya. Anything that concerns bulls or horses arouses fierce passions in Spain, but neither the taurine nor the equine world can ever have witnessed anything to match the extraordinary offences currently being tried in a Toledo court. Three rejoneadores have been accused of hiring Colombian hitmen to firebomb a dozen horses belonging to the aristocratic Domecq dynasty.

A long-established Andalusian horse-and-cattle-breeding family, as well as the founders of the famous sherry empire, the Domecqs are doyens of the "gentlemanly" art of the rejoneo. The three men currently on trial are accused of setting fire to 12 of their horses seven years ago. Six died instantly and the others took many years to recover from their serious burns. The arson attack meant that the Domecqs' hugely expensive horses, trained for years to perfect the intricate footwork and intricate footwork and elaborate curvetting movements of rejoneo, were unable to participate in 60 mounted bullfights during the 2001 season, resulting in enormous financial losses for the owners and the bullfighters who would have mounted them. However – to complicate the intrigue even further – it now appears that the Domecq horses were not the intended target (*The Independent of 21/10/2008, p. 23*).

By a bizarre twist of fate, the Colombians – who vanished after the act had been perpetrated and whose

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whereabouts remain unknown – attacked the wrong horses. On the day of the crime, the owner of the intended target, rejoneador Sergio Galan, and the Domecq brothers, Luis and Antonio, had all taken part in a horseback bullfight at Las Ventas bullring in Madrid. As each party set off for home with their horses in trailers, the Colombian hitmen chose the wrong lorry by mistake and followed the Domecq convoy instead of that of Mr. Galan. On their way home to the family estate in Jerez, the Domecqs stopped for dinner at a roadside inn at Ocana, near Toledo. According to the prosecutors, the hired hitmen (sicarios) pushed two petrol bombs through the vents in the horseboxes, which exploded to immediate and deadly effect. Alerted by the explosions, the lorry driver and stable lads jumped from their dinner table and rushed outside to see the horse-box trailer in flames. Police described the crime as unprecedented in the history of Spanish horseback bullfighting (*Ibid*).

Prosecutors allege that they tapped telephone conversations incriminating two of the accused of hiring the hitmen. It is also alleged that the Colombians chose a 17-year-old to throw the firebomb, apparently to protect themselves since Spanish law is deemed to be lenient towards minors who commit violent crimes. However, the young man in question burned his hand and had to be taken to hospital to have the wound treated. His presence in hospital was the first tip-off in a case where the details were eventually pieced together by detectives. The Domecq family have demanded a sentence of three years for the culprits as well as compensation for their loss (*Ibid*).

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

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### Public health and safety issues

#### **Alpine climbers continue to suffer fatalities (France)**

Mountain-climbing has always been a hazardous sport, and the dangers obviously increase in line with adverse climactic conditions. August 2008 was a particularly dramatic period in this respect. During the first week, it was reported that a British teenager fell 160 ft to his death from a climbing crag. The 18-year-old was on his way down a rock face in Chamonix-Mont-Blanc when he fell (*The Daily Telegraph of 8/8/2008*). However, the most tragic day came the following week, when emergency services urged climbers to take extra care after a series of accidents claimed the lives of six

people in the course of one day. The extraordinary aspect of this episode was that these accidents took place in spite of the relatively calm weather which had prevailed on the day in question.

The first accidents took place on the Mont Blanc Massif, a mountain range in the Western stretch of the Alps which is popular with Alpine climbers. Two men, a 23-year-old from Lyon and a 53-year-old from Paris, were killed when they fell to their deaths from the Bosses ridge. Later, in the afternoon, two mountaineers aged 21 and 22 died whilst descending the Col des Courtes. Witnesses reported that one of the men slipped and that the other was unable to prevent him from falling. The fifth victim of the day was a female hiker who lost her balance and fell to her death while coming down the Dent d'Oche near Bernex, whilst the last person to be killed was a local trekker aged 65 who stumbled and fell onto a patch of rocky ground (*The Guardian of 16/8/2008, p. 27*).

#### **Half of French pools “unsafe for children”**

As France prepared for its two-month summer break in late June 2008, the nation's consumer safety commission issued a stark warning for those intending to flex their muscles in the chlorinated water, warning as it did that 40 per cent of France's 1 million private swimming pools had yet to be provided with certifiably reliable safety systems – even though these have been compulsory since 2006. Under the new rules, pools should be equipped with an alarm or an automatic cover or protective roof, or be surrounded by a fence meeting specific safety criteria. Owners who fail to do so risk a £35,000 fine (*The Daily Telegraph of 28/6/2008, p. 12*).

Drowning in swimming pools is the No 1 cause of accidental child mortality in France, with 21 children under the age of six dying after falling into unwatched pools in the course of 2006 – the most recently available official figures. Despite the new rules, the Commission issued a warning that most alarms, designed to be activated where a child falls into the water, are unreliable and often faulty. After conducting tests on six of the most popular alarms, the Commission concluded that only one, Sensor Espio, met safety requirements. It held that most of the systems in question did not detect a falling mass of six kilogrammes – the weight of a child a few months old. Alarm companies, however, dismissed the Commission's findings as “dogmatic” (*Ibid*).

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### Stadium workers die (Spain)

In late May 2008, it was reported that four workers were killed in an accident during the construction of the new football ground of the First Division team Valencia, when scaffolding collapsed and fell eight metres. Two Spaniards, an Ecuadorean and a Bolivian died in the accident (*The Times of 27/5/2008, p. 4*).

### Narrow escape for South African tour rider... but the show goes on (France)

In late July 2008, the cycle race which is reputed to be the showcase event in the sport's calendar – the Tour de France – ascended Europe's highest mountain pass for only the fourth time in its century-old history. The 2,802-metre climb on the Col de la Bonette-Restefond nearly proved to be very costly for a young South African rider. John-Lee Augustyn was the first to the summit of the Bonette, but appears to have misjudged a hairpin bend on his descent and slid off his bicycle and down the mountain. He allowed his vehicle to tumble down the slope as he clambered to safety, and was compelled to wait for a replacement, ultimately finishing 35th in the stage (although that will have been the least of his worries). The honour of reaching the Bonnet summit had previously only been held by two riders: the Spanish "Mountain King" Federico Bahamontes (also known as the "Eagle of Toledo") in 1962 and 1963, and, 30 years later, by Britain's Robert Millar (*The Daily Telegraph of 23/7/2008, p. S11*).

### New bathing water standards enacted in Ireland

In August 2008, new Irish regulations were enacted in implementation of the EU bathing Water Directive (2006/7/EC). The objects of the directive are:

- to provide health protection for bathers
- to establish a more pro-active approach to management of bathing waters, and
- to promote increased public involvement and dissemination of information to the public.

The Regulations have established a new classification system for bathing water quality based on four classifications: "poor", "sufficient", "good" and "excellent". In general terms, they require that a classification of at least "sufficient" be achieved by 2015 for all bathing waters. Local authorities are required to take appropriate measures with a view to improving waters which are classified as "poor" and increasing the numbers of bathing waters classified as "good" or "excellent". A permanent advice against bathing must be issued where a bathing water has been classified as "poor" for five

consecutive years. Local authorities are required annually to identify bathing waters, establish a monitoring timetable, implement the specified monitoring, report the results to the Environment Protection Agency (EPA), carry out appropriate management measures where necessary and provide appropriate information to the general public.

In addition, the directive requires that there be public participation in the identification of waters and the general implementation of the relevant regulations. The EPA is required by the Regulations to classify bathing waters, generally on the basis of the monitoring results for the four preceding bathing seasons, and to publish an annual report in relation to bathing water quality. Monitoring by local authorities is to start no later than 2011, with a view to ensuring that a classification is assigned to bathing waters no later than 2015. Private controllers of access lands may be required to contribute towards the costs incurred by a local authority or the EPA (*[2008] 9 Irish Law Times p. 130*).

## Nationality, visas, immigration issues

### Dubai jockey deported from Britain

In late July 2008, it was reported that Ahmed Ajtebi, the royal award-winning jockey, had been deported from Britain. Mr. Ajetbi, a promising apprentice attached to Clive Brittain's stable in Newmarket, was taken into custody in late July 2008. It is believed that visa irregularities prompted the decision to send the jockey back to Dubai (*Daily Express of 26/7/2008, p. 90*).

### Irish academic examines Darron Gibson case

Jack Anderson is probably Ireland's most renowned sports law academic. In a recent edition of an Irish academic journal (*[2008] 8 Irish Current Law 105*) he has examined the case of Darron Gibson – more particularly the controversy surrounding the eligibility of players born in Northern Ireland to play for the Irish national football team. He considers the historical context and the implications presented by the "shared birthright clause" contained in the 1998 Belfast Agreement. In this context, he comments on Northern Ireland-born Darron Gibson's senior debut for the Republic of Ireland team during the Euro 2008 tournament, and the subsequent complaint made to the world governing body in football, FIFA, by Northern Ireland's Irish Football Association on the grounds that this was an infringement of FIFA eligibility rules. He suggests that a sporting compromise, rather than a legal decision, would be the best solution to the dispute.

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### **Messi business? Compromise achieved in Argentinian footballer's Olympic trials**

Club v. country disputes are nothing new in international football (as well as in many other sporting disciplines). Far from diminishing, they look likely to increase in intensity if the last Olympic Games are anything to go by. This was certainly the case in relation to Lionel Messi, the Argentinian striker who currently plays for top Spanish side Barcelona. Mr. Messi was always going to be a priority selection for the country of his birth at the Beijing Games, and the rules applied by the sport's world governing body FIFA are clear: players must be released for service with their home countries for international fixtures. In case there was any remaining doubt, FIFA, with barely two weeks to go before the 2008 tournament, clearly decreed that club sides had to release their players for the Games. However, the main clubs concerned appealed to the Court of Arbitration for Sport, which overturned the FIFA ruling, stating that there was no legal imperative for such players to participate in the Olympics (*The Independent of 7/8/2008, p. 52*).

In its ruling the CAS held that FIFA's position was based on custom rather than law, meaning that clubs could no longer be compelled to release players. The most noteworthy case was that of Mr. Messi, whose club Barcelona had complained to the CAS because they had a Champions League qualifier to play before the Olympics ended, and did not wish to be deprived of the Argentinian's services. Rafinha, the Brazilian defender who plays for top German side Schalke 04, was also due to play at the Olympics against his employers' will. However, the club sides eventually relented. Schalke were the first to relax their stance, stating that Rafinha could remain in China even though the Bundesliga season commenced before the Games ended. Fellow-German side Werder Bremen had applied to the CAS for the same reason as Schalke, but they too relented (*Ibid*). Eventually, a compromise was found between Barcelona and the Argentinian authorities, enabling Mr. Messi to play a crucial role in his country's trophy-winning efforts.

### **Xenophobia can even hit footballer's spouses (Italy)**

The aversion expressed towards people because of their national origins is never an attractive feature, and it has frequently found expression in the sporting arena. This phenomenon has been particularly marked in Italy ever since there has appeared a growing hostility towards illegal immigrants, and some of the country's celebrities and their relatives have started to feel the full impact. Thus it was with Czech-born Alena Seredova,

who in addition to carving out a successful career as a model, television presenter and actress has also become the partner of Gigi Buffon, the goalkeeper serving Italy's national football team, with whom she recently had a child. On the face of it, life was quite agreeable for the lady in question, since her partner had attracted national adulation for saving a penalty against the Romanian national side during the qualifying rounds for the Euro 2008 tournament. Fans subsequently queued up to request her autograph.

However, in an interview with the influential Italian newspaper *Corriere della Sera*, she has claimed to be living in constant fear of arrest and deportation as a clandestino (illegal immigrant). During this exchange, she revealed that she was unlawfully resident in Italy in view of her arrival from the Czech Republic before that country became a member state of the European Union. As a result of her experience, she claimed to be acutely aware of the dangers of stigmatising immigrants. Her fears were exacerbated by the fact that, with the support of the anti-immigrant Northern League party, the government of Silvio Berlusconi plans to make it a criminal offence – punishable by imprisonment – to enter Italy illegally. If adopted, this legislation would rank amongst the strictest in the European Union, and it has already drawn a good deal of criticism from Italian centre-left parties, the Vatican and the United Nations. However, recent opinion polls have suggested strong support for Berlusconi from voters apparently vexed at a perceived crime wave for which foreigners are said to be responsible (*The Observer of 22/6/2008, p. 31*).

Despite obtaining employment immediately in 2000 as a co-host for an Italian television show, Ms. Sedova said that she was scared to walk the streets because of her irregular status, to the point of being afraid of every policeman in the street whom she encountered. This was particularly the case after her temporary residence permit expired. She found herself at the police station on Christmas Day with a medical certificate, and later explained that inventing the need for medical treatment allowed her to remain in Italy on a temporary basis. Once the "treatment" had ended, she spent a further six months in Italy on an illegal basis, continuing to appear on television. She then returned to the police in order to obtain a permit to remain in Italy, this time as a cleaning lady (*Ibid*).

Ms. Seredova's comments have been warmly received by Italian campaigners fighting for the rights of the country's immigrant population.

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### Concern expressed at sporting figures changing nationality for Olympics

Disloyalty comes in many forms, but at the 2008 Olympic Games in Beijing it appears to have been 6ft tall, been possessed of prodigious ball-handling skills and wearing a white and red basketball vest. According to some, the player in question, J.R. Holden, should have been doing what 275 million other US citizens were doing in August 2008, and that is watching the Games on television. Except that Mr. Holden was doing no such thing – instead, the Pittsburgh-born point guard was standing in the bowels of the Olympic basketball arena after guiding Russia to an easy victory over Iran. The CSKA Moscow player, who received his Russian passport in 2005 at the behest of the country's leader Vladimir Putin, explains his decision to turn his back on his native land in the following terms:

***"I am a basketball player and this was a basketball opportunity. The United States weren't knocking at my door. No one in America was giving me a \$1m (£523,000) contract. We chatted on the phone, through an interpreter, and he (Putin) told me to go out there and make Russia proud. I told him I would do my very best"***

*(The Guardian of 12/8/2008, p. S5).*

If Mr. Putin, a CSKA Moscow supporter, was delighted to have Holden on his side, he might be less pleased to discover the American would never contemplate using his Russian passport, as it continues to nestle in a suitcase, unstamped. Unfazed, Mr Holden describes himself as "an American in everything I do except playing basketball". He added that seeing people crying because they have the chance to play for their country made him realise that it was an honour to represent Russia, not just as a player but also as a person.

It is, however, not only US basketball supporters who might reasonably contend that, whereas nationality in the 21st century is an ever more moveable feast, in the context of recent Olympics it has become almost meaningless, not to mention an embarrassment to the International Olympic Committee (IOC), which might explain why the Games' organisers have no statistics on how many athletes were born in one country, yet have materialised in Beijing to represent another. Suffice to say, for every JR Holden (or rather Dzhon-Robert Kholden, as he is named on the official IOC website) there is a Liezel Huber, the South African-born tennis player who almost burst into tears this week when she was asked how much it meant to her to represent the US in the women's doubles tournament. In addition, Lopez Lomong, the Sudanese-born "lost boy", became an American national hero after he carried the flag at the Games' opening ceremony. This

formed quite a contrast with Becky Hammon, the US-born basketball player, who agreed to play for the Russian national side after being overlooked by the US selectors, a decision for which she has been vilified in the US (*Ibid*).

In fairness, the US does not have the monopoly on hypocrisy when it comes to criticising home-born "traitors", just as Russia is nowhere near the most bare-faced when it comes to signing up foreign talent to improve its medal chances. Famously, or possibly infamously, the former world steeplechase champion Stephen Cherono agreed to run for Qatar, and changed his name, in exchange for \$1,000 a month for the rest of his life. He made his Olympic debut in Beijing as Saif Saaeed Shaheen. Levan Akhvediani, head of the Georgian volleyball federation, is happy to have two Brazilians playing for his team in Beijing.

Meanwhile the International Table Tennis Federation is so concerned about the number of Chinese-born players representing other countries (nine of the 95 entrants in the men's event fall into this category) that it has decided to change its rules on nationality. Henceforth no-one over 21 will be allowed to switch countries. Other sports are believed to contemplating similar changes, basketball included (*Ibid*).

## Sporting figures in politics

### Iran's poolside politics

One of the more tedious clichés is that "sport and politics do not mix", but it is a fact that for those who dare combine them it is a complicated affair to manage. Thus at the Beijing Olympics, Iran's National Olympic Committee (NOC) had envisaged "no face-to-face situation" between its swimmer Mohammed Alirezaei and the Israeli Tom Be'eri in their 100m breaststroke heat, meaning that he was not expected to withdraw. Normally, Iran fêtes athletes who pull out of events against anyone from, as the NOC president terms it, "the Zionist regime". But when Mr. Alirezaei did withdraw anyway this was apparently due to appendicitis; thus was a potentially tense meeting averted. However, when Russia met Iran in basketball, it was handshakes all round, even for the Russia coach, David Blatt, an Israeli citizen. According to Iran's NOC this is acceptable since the coach did not have any importance and he was not representing Israel. In addition, quoth Hussain Choandini, director of public relations at Iran's NOC "Russia is a friend of Iran." (*The Guardian of 12/8/2008, p. S2*).

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### US sporting figures successful on Election Day

November 4 of this year was not only the date on which the future US president was chosen. Elections at various levels also took place throughout the country, which saw a host of sporting figures elevated to political office. They include (*Associated Press, www.findlaw.com of 5/11/2008*):

Basketball player **Kevin Johnson** became mayor of Sacramento, California. Johnson, a former All-Star point guard for the Phoenix Suns, is the first black mayor of Sacramento. The 42-year-old Democrat with conservative social views defeated two-term incumbent Heather Fargo in a run-off election. Johnson put some flash into his campaign with the backing of basketball royalty Shaquille O'Neal, Magic Johnson and Charles Barkley. He wants to raise the profile of his home town and bemoans his city's image beside that of Los Angeles and San Francisco.

**Heath Shuler**, a Heisman Trophy runner-up at Tennessee who played quarterback for the Washington Redskins and New Orleans Saints, won in his first bid for re-election to Congress. Shuler is a North Carolina Democrat whose district is in the state's western mountains. He defeated Carl Mumpower, who had irritated local Republican officials by saying he would support efforts to impeach President Bush.

**Sam Wyche** coached in the National (American) Football League (NFL) with Cincinnati and Tampa Bay, making it to the Super Bowl with the Bengals after the 1988 season. He stood for election as a Republican and commandingly won a seat on the Pickens County Council in South Carolina, an area that includes Clemson University. Mr. Wyche, once a quarterback at nearby Furman, promised better roads and schools and more jobs.

Joining Shuler in re-election to the House was Republican **Baron Hill** of Indiana, a former Furman basketball player. He defeated former Rep. Mike Sodrel, a Republican and trucking company owner. The two have "faced off" in four consecutive elections.

**Norm Dicks**, an ex-linebacker at the University of Washington, also was successful in his House re-election bid.

**Jason Chaffetz**, a former BYU kicker who once had 10 extra points in a game, won a congressional seat in Utah after beating the incumbent in the Republican primary.

Two ex-college football players were re-elected in the Oklahoma Legislature – **Todd Thomsen**, a former punter and kicker for Oklahoma, and **Tad Jones**, a former backup quarterback at Tulsa.

In Hawaii, **Mufi Hannemann**, a 6 ft 7 former Harvard basketball player, won a second term as Honolulu mayor.

As regards balloting measures tied to the realm of sport, Massachusetts voted to ban greyhound racing, and Maryland authorized slot-machine gambling, which could be key in bolstering thoroughbred racing in the state (*Ibid*).

### Regional legislation on "sporting masseur" status declared unconstitutional by Italian court

Article 34 of the Ligurian Regional Law of 5/2/2002 stipulated the conditions required for obtaining the qualification of "sporting masseur" (massaggiatore sportivo). More particularly it decreed that the relevant certification would be awarded by the President of the Regional Committee to those who had successfully followed the appropriate courses to be organised by the provincial authorities, and specified that further detailed provisions as to professional profile and as to conditions for access to the profession should be adopted by means of administrative rules. This measure was held to be unconstitutional by the Constitutional Court (Corte Costituzionale). In so doing, the Court recalled its earlier case law which reserved such matters to the central state authorities (*Decision of 30/5/2008, No.179, in [2008] II Foro Italiano 2079*).

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### Other issues

[None]

## 6. Administrative Law

### Planning law

#### **Expatriate Brits clash in France over racetrack plans**

Cultural clashes between expatriate Britons and the inhabitants of the French towns and villages to which the former emigrate are not uncommon. However, in the case under review it appears that the British and French have joined forces to protest against plans submitted by a wealthy Oxbridge graduate to build a vintage car-racing circuit in the grounds of his mansion in the Dordogne. In mid-May 2008, around 500 British and French demonstrators crowded into the fillage of Nontron to denounce a “monstrous” project which they claim threatens to shatter their idyllic corner of Southern France.

French administrative authorities were set to make a ruling on the proposal by David Brooker-Carey, a British businessman, for a vintage car centre to be built on his 85-hectare estate in Périgord Limousin regional park. More particularly Mr. Brooker-Carey and his wife wish to construct a 4.6-kilometre circuit with 24 pit garages and 675 loudspeakers. The scheme also includes a luxury hotel, a spa, a restaurant, a 30-metre swimming pool, an equestrian centre and what is described as the Living Museum of the History of the Automobile. The couple claim that this centre will attract up to 40,000 visitors each year and create 35 full-time jobs in an area where the unemployment rate is over 10 per cent (*The Times of 19/5/2008, p. 5*).

Their opponents include many British residents who crossed the Channel in order to enjoy the peace and beauty of the Dordogne area. According to Crispin Hill, a Londoner who bought a house about one mile from the planned circuit, the noiseless French countryside would be destroyed by the sound of racing Ferraris, Bugattis, Porsches and Bentleys. Desmond Kime, a retired biologist, also claimed that the scheme would threaten an extremely biodiverse area which is home to 46 endangered species, including the rare European mink. He stated that the pollution, the noise and the felling of 40 hectares of woods to create the racetrack were incompatible with the park in which Mr. and Mrs. Brooker-Carey live. The Préfet (local Government representative) for the Dordogne area had, at the time of writing, not yet decided whether to approve the circuit. However, in April 2004, a public inquiry, which is merely consultative under French planning law, found in favour of the British couple, who claim that the racetrack will resemble nothing more sinister than a country road (*Ibid*).

### Judicial review (other than planning decisions)

#### **Irish football club application for injunction against refusal to compete in league dismissed**

In the case under review, the claimant sought an interlocutory judgment allowing Limerick Football Club to compete in the League of Ireland in 2007. The application arose from the failure on the part of the defendant to issue a licence to the club. The claimant, acting as representative for his club, alleged that the latter did not have adequate prior knowledge of the difficulty in which the club found itself concerning the risk of not being licensed by the defendant, and that they were taken aback by the defendant’s decision. The claimant asserted that an important report relied upon by the defendant organisation’s appeal body had been emailed to Limerick Football Club on the day before the hearing of their appeal after the club’s officers had left to travel to Dublin for the said hearing. It was submitted that they neither received nor saw the report until after the hearing had concluded, and that they were therefore prejudiced in their right to fair process.

The Irish High Court refused the injunction. It held that the decision by the licensing committee and by the appeal board was well supported by the documented failure on the part of the Limerick Football Club to comply with the rules of the defendant organisation. The refusal of the club licence was, therefore, a decision which the defendant was entitled to make. Anyone who read the correspondence received by the club would have been clear that they were in difficulty as regards the granting of the licence and that there was at least a risk that the licence would be refused. Furthermore, in applications for an interim injunction pending the hearing of the case, because the applications were *ex parte*, the applicants had an obligation of candour or to inform the court fully of all relevant facts.

In this case, the court was entitled to refuse the reliefs sought on the grounds that the claimant had misled the court in its initial application for an interim injunction in failing to disclose all the relevant facts, not just those which were beneficial to its application. As regards the fact that the claimant did not have sight of the report used in the appeal, there was no doubt that Limerick FC was entitled to the report and that the report had been sent to the club. If they had read the rules of the organisation, the officers of the club ought to have known of their entitlement to the report and therefore could have asked for it or for an adjournment of their hearing pending its arrival. Accordingly, the fact that the

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club had not seen the report was due to its own failure to ask for time to consider it. In any event, the report could not have added anything to the ability of the club to present its case at the appeal as it did not contain any new material information (*JRM Sports Ltd v. FAI (Application 359P/2007) High Court, [2007] 11 Irish Current Law p. 50*).

### **Football club held liable for disorder committed by its supporters at away ground. French court decision**

During a French First (Football) Division game between Metz and Lille, supporters of the latter had caused a public disturbance and were fined €5,000 by the French Football Federation (FFF). The Lille club appealed against this decision to the administrative courts, claiming that the regulations under which it was imposed infringed the constitutional principle of the personal nature of judicial penalties.

The matter ended before the Supreme Administrative Court (Conseil d'Etat) which dismissed the application. The relevant provision of the FFF regulations imposes on football clubs, both home and away, a result-conditioned obligation (obligation de résultat) as regards the security which should govern the match in question. It was for the disciplinary bodies of the relevant Federation, having taken account of the various measures taken by the club to prevent public disorder, to assess the seriousness of the faults committed and to determine the penalties which were appropriate for such shortcomings. The regulations under review did not infringe the principle of the personal nature of judicial penalties, which applied not only in criminal matters, but also to administrative and disciplinary penalties (*Decision of 29/10/2007, [2008] Recueil Dalloz 1381*).

### **Supreme Administrative Court confirms dissolution of hooligan association (France)**

The "Boulogne Boys" is the name of a club whose members claimed to be supporters of top French football club Paris St. Germain. Their activities have been far from peaceful, given that, on the basis of various police reports drawn up during the past two years, it emerges clearly that this "support" often took the form of repeated acts of vandalism, assaults on third parties and incitement to hatred and discrimination. This prompted the French authorities at a certain point to decide that the club in question, which took the form of a non-profit making association, be dissolved. Prior to this decision, the club's chairman had been informed of the objections submitted against his organisation and invited to present his written or, if necessary, oral observations. The club's representatives submitted their written observations four days later and made verbal submissions after a further two days. The club in question appealed this decision before the Supreme French Administrative Court (Conseil d'Etat).

The Court dismissed their appeal. The applicants had claimed that the time allowed for it to make its representations was inadequate, and that they had not seen all the evidence against it. The Court dismissed this argument. The association in question had not alleged that it had been impossible for its representatives to produce evidence which would have been beneficial to it in its defence. Accordingly, it had received sufficient time to make its observations. In addition, there was no law or regulation, or indeed any general principle of law (more particularly the right of the defence) which required prior communication of all the evidence at the disposal of the administrative authorities to the association, which had been made aware of all the complaints which had been made against it. Therefore, the club in question could not to any legal effect rely on Article 6 of the European Convention on Human Rights (ECHR) which stipulates the right to a fair trial, and was wrong to claim that the procedure followed had infringed Article R332-12 of the Sporting Code (Code du Sport) or the rights of the defence. Moreover, given the police records referred to above, the administrative authority which had decided to disband the club had not based its decision on facts which were materially incorrect, and was not bound to identify those individual members of the club who had been responsible for the incidents mentioned above (*Decision of 25/7/2008, case No. 315723 JCP-La Semaine Juridique of 24/9/2008, p. 44*).

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### Other issues

#### **Expulsion of sporting club member confirmed by court (Canada)**

In the case under review, the claimant was a member of the defendant club. The latter provided boat storage and recreational facilities for its members. The claimant had been involved in repeated confrontations with executives of the defendant regarding proposed expenditures by the club. The claimant had failed to pay his portion of his membership fees and dues. Thereupon the defendant called a meeting to consider disciplinary action against the claimant – a meeting which the claimant failed to attend, whereupon he was promptly expelled from the club in his absence. The claimant submitted various statements of claim for various damages related to his expulsion, all of which were dismissed.

The defendant alleged that the claimant then continued to attend at the club despite his expulsion. The defendant was then granted a temporary injunction restraining the claimant from attending the club. The defendant brought an application for a permanent injunction banning the claimant from the premises. This application was granted, as the termination of the claimant's membership was valid. The Superior Court of Justice of Ontario ruled that the decision by the defendant to expel the claimant had been carried out in accordance with the rules of natural justice. The defendant had continued to express a willingness for reconciliation with the claimant until the date of expulsion. Uncontradicted evidence had indicated that the claimant had ample time and adequate notice of the meeting. The defendant and its members were entitled to enjoyment of the premises without tension and conflict caused by the claimant's presence (*Decision of 28/8/2008 [2008] Business Law Reports p. 36*).

# 7. Property Law

## Land law

[None]

## Intellectual property law

### Protection of Olympic and Paralympic mark. Article in Canadian academic journal

In the piece under review, the author Teresa Scassa ("Faster, higher stronger: the protection of Olympic and Paralympic marks leading up to Vancouver 2010 in [2008] University of British Columbia Law Review p/31 et seq.) examines several issues of sporting-related intellectual property law. With Vancouver due to host the 2010 Winter Games, the Canadian authorities are naturally anxious that everything should be done to ensure that the various intellectual property rights in question should be adequately protected – hence the enactment of the Olympic and Paralympic Marks Act (OPMA) which received the Royal Assent in June 2007, which is the focal point of the author's analysis. This Act creates a kind of super trade-mark status for a series of Olympic and Paralympic marks, notwithstanding the fact that Olympic and Paralympic marks already enjoyed protection under existing Canadian law.

The paper concentrates more particularly on the extraordinary level of protection given to Olympic and Paralympic trade marks, the pressures brought to bear on the Canadian Government to provide such protection, the poverty of the Parliamentary input on the issues raised by the legislation, and the consequences of its enactment. It starts with a brief overview of the protection for Olympic and Paralympic marks before the adoption of OPMA, then surveys the enhanced protection given by OPMA in the context of the demands made by the International Olympic Committee (IOC) for the protection of its marks. Given that one of the most significant activities which the IOC is seeking to constrain is ambush marketing, this paper also explores the nature of ambush marketing, and the amount of protection available against such practices under the existing law, as well as the level of protection offered by OPMA.

The author concludes that, although it is a significant piece of legislation in that it creates a separate and powerful regime for a series of marks which gives the latter an unprecedented level of protection, OPMA is also a disturbing piece of legislation for a number of reasons. Not only were its terms largely dictated to the

Government as a condition of being awarded the 2010 Winter Olympics, it was passed by parliamentarians who apparently had little grasp of what was already illegal under Canadian law, the extent to which Olympic marks were already protected, the meaning of ambush marketing, and the scope and potential impact of the legislation. As a result, there was no real articulation of the reason why it was necessary or desirable to legislate against such conduct. because of all this OPMA appears to set a bad precedent, both for the power of outside organisations to dictate the terms of legislation and for the regulation of ambush marketing.

### Canadian decision on sporting-related trademarks

In the case under review, the applicant had filed an application to register the trade mark BOOGITY BOOGITY BOOGITY on the basis of its proposed use in Canada in association with clothing, toys, sporting goods and related items, as well as the retail sale of such goods. The opponent alleged, inter alia, that (a) the trade mark was unregistrable under S. 12(1)(e) of the Trade Marks Act 1985, and prohibited by S. 9(1)(k) thereof, in that the mark falsely suggested a connection with the opponent who was a famous race car driver and sports announcer (2) that the applicant was not entitled to registration of the mark applied for because of the confusion with the trade mark BOOGITY BOOGITY BOOGITY previously used and/or made known in Canada in association with entertainment services and various promotional wares, and (3) the trade mark was not distinctive of the applicant.

With regard to Ground (1), the opponent's evidence established that NASCAR races were widely viewed in Canada and enjoying a growing popularity. Whilst it could be assumed from the evidence that many fans had heard the signature phrase BOOGITY BOOGITY BOOGITY at the start of the race, the evidence did not show that a significant number of Canadians would associate the phrase with the opponent or even be familiar with the opponent by name. Ground (1) was therefore unsuccessful.

As regards Ground (2), there was evidence that merchandise bearing the opponent's mark had been offered for sale in the US through the opponent's online store since the spring of 2002. There was no evidence that the merchandise had been advertised in any print publication circulated in Canada or that the opponent's mark had otherwise been made known in association with wares in Canada prior to the material date. The references to the phrase in the course of sports

## 7. Property Law

broadcasts on a website or in magazine articles did not qualify as advertising. There was also evidence showing use of the phrase BOOGITY BOOGITY BOOGITY at the start of NASCAR races broadcast in Canada, references to the opponent and references to his signature phrase in website articles describing NASCAR's growing popularity in Canada. From this evidence it could be inferred that some Canadians would associate the phrase BOOGITY BOOGITY BOOGITY with entertainment services namely the provision of sports broadcast commentary via television. However, the evidence fell short of establishing that the applicant's mark had become made known in Canada within the meaning of S. 5 of the Trade-marks Act as of the relevant date.

On the question of non-distinctiveness, all the relevant evidence which tends to establish non-distinctiveness of the mark applied for may be considered. The opponent's mark had become known in Canada by the material date to the extent necessary to support the ground of opposition alleging non-distinctiveness. The onus, therefore, reverted to the applicant to satisfy the Registrar that its mark was adapted to distinguish its wares and services throughout Canada. The applicant failed to establish on a balance of probabilities that confusion between the mark applied for and the opponent's mark was unlikely. Accordingly, the applicant's mark was not adapted to distinguish the wares and services of the applicant from those of the opponent, and ground (3) was successful (*Waltrip v. Boogiddy Boogiddy Racing Inc; Decision of 25/10/2007 [2008] Canadian Patent Reporter p. 357 et seq.*).

### Article on New Zealand law on ambush marketing

The regular reader of this and other similar publications will be now be familiar with the meaning of the term "ambush marketing" – and some of its more fanciful applications and consequences. Increasingly, the legislatures of this words are adopting legislation aimed at preventing and/or penalising such practices, and New Zealand is no exception. The author of the piece under review analyses in this connection the Major Events Management Act 2007, which is designed to regulate and control such practices. The author, although supporting restrictions on ambush marketing; essentially believes that this legislation goes too far. It may well provide a clear and predictable system, but he questions whether it achieves the correct balance between the interests of event organisers, the sponsors and the wider New Zealand public, including fans and local businesses. He takes the view that New Zealand

should not implement legislation which is so broad that a range of decent people are likely to be caught up in its wake and ultimately fall foul of its civil or criminal penalties, which are relatively severe. This is particularly the case when other viable, and arguably less extreme, options are available (*Elliott, C., "Ambush marketing: a wide new sponsorship right" [2008] 6 New Zealand Law Journal p. 207 et seq.*

### Other issues

**[None]**

# 8. Competition Law

## National competition law

### Using sports club email address for advertising purposes breaches competition law (Germany)

In the case under review, a company offering online football matches sent an email to a low-ranking German football club advertising its services in the sense of offering the club to display a “banner” on the latter’s website (in consideration for commission payments). It had obtained the club’s email by visiting the latter’s website. The German competition authorities considered this to constitute an infringement of the Law on Unfair Competition (UWG) and accordingly brought legal proceedings against the company. The case reached the Supreme Court (Bundesgerichtshof) which decided in the applicant’s favour. It ruled that, where a sporting club, which takes the form of a friendly association (eingetragener Verein) includes its email address in its website, this does not amount to a conclusive authorisation to invite from the club itself requests to use the club’s services – in this case the placing of banner advertisements (*Case I ZR 197/05, decision dated 17/7/2008, ([2008] Neue Juristische Wochenschrift p. 2999)*).

Belgian court seeking an injunction that ASO be required to allow its cyclists to compete, and ordering other entities involved in the race not to prevent their participation. For its part, G offered, inter alia, to remove references to its betting sponsor.

The Court ruled that ASO, being in a dominant position in the organisation of cycling races, had not adopted the objective, transparent, fair and non-discriminatory manner which was required of it in relation to its partners. Moreover, there was no evidence that ASO would, under Belgian law, be liable for any illegal activities carried out by U. For U’s activity to be declared illegal under Belgian law, it had to be proven, which was not certain, that the Belgian law complied with EC law and, more specifically, Article 49 of the EC Treaty containing the principle of the freedom to provide services and embodying the supremacy of EC law over national law. Prima facie, the Belgian legislation relied upon by ASO constituted a restriction on the freedom to provide services, and the mere invocation of that legislation could not be accepted as a justification of ASO’s position as ASO had not explained, in its letters, in a specific and justified manner, the conditions under which the restrictions under Belgian law should be applied with respect to the overriding grounds of public interest. Nothing more could be concluded from the mere reference to the Belgian regulation regarding the lawfulness of the services offered by U (*Green Cycle Associates AB and others [2008] European Commercial Cases p. 1*).

## EU competition law

### Refusal to allow Swedish cycling team to compete breaches EC competition law. Belgian court decision

In the case under review, a Swedish professional cycling team, G, participated in professional cycle races in Europe. It had been issued with a pro-tour licence by the International Cyclists Union (UCI). Two races were scheduled for 25 and 29 April 2007 in Belgium. Those races, and other major European competitions, were organised by ASO, which held a dominant position in that market. On 3/4/2007, ASO sent a letter to G stating that it had decided not to allow G’s cyclists to compete in the two races in question, on the grounds that one of the team’s sponsors, U, was an online sports betting company which pursued an activity which was unlawful under Belgian law. The letter failed to explain in what way this activity was illegal, but did state that ASO would be liable as an organiser of the event. G sought an urgent meeting to resolve the issue, but received no response from ASO. Concerned that it would be refused entry to the races, as had occurred on previous occasions, G made an ex parte application to the

# 9. EU Law

## EU law (excluding competition law)

### EU law hinders plans for limits on overseas footballers

This Journal is not the only forum which has featured discussions on the extent to which the fact of overseas footballers being available to the highest bidder has distorted the sport at every professional level. It will be recalled from previous issues of this Journal that the various bodies governing the sport at the multinational level have of late become seriously disturbed about the implications of these developments, and have attempted to find a solution to the problem which, whilst respecting elementary freedoms, goes some way towards meeting the concerns raised by this particular issue.

Particular determination to see this issue resolved was displayed at the level of FIFA, the world governing body in the sport. More particularly its president, Sepp Blatter, had taken an interest in this issue, to the point of proposing to his organisation's annual congress a "six plus five" formula under which all clubs would be required to start a game with at least six home-grown players. However, it became clear that Mr. Blatter did not restrict his ambitions to the world of football, but sought to extend this formula to the other sports federations, if the following words are anything to judge by:

**"The congress shall request the FIFA and UEFA Presidents together with the world of sport, including the IOC (International Olympic Committee) to explose all means within the limits of law to implement this rule" (The Independent of 28/5/2008, p. 55).**

The aim of the proposal was clear. It was to restore "national identity" to club teams whilst reducing the drain of players from other continents, particularly Africa. It was clear from the outset that this proposal would arouse considerable opposition from the major clubs regularly engaged in the UEFA Champions League. These are teams which have large number of foreign players in their employment and sought to have free-market rules to be applicable to the sport. However honourable the thrust of this argument might be, it was dealt a severe blow the very next day when Vladimir Spidla, the EU Commissioner for employment, declared that any EU member state in which this formula was applied would face legal action based on Community law. This statement followed a vote by the European Parliament in which the latter voted down Mr. Blatter's plan by a 10-1 majority. Mr. Spidla specified that the EU's rules on free movement of labour and non-discrimination needed to be observed (*The Guardian of 29/5/2008, p. 36*).

Mr. Spidla did not show himself to be entirely unsympathetic to the demands that all-powerful European clubs should not be allowed to rule the entire roost by voicing his support for an alternative plan put forward by the European governing body UEFA. This scheme proposes that the teams competing in its competitions should include a quota which had spent three years between the ages of 15 and 21 at that club, or another in the same country (but who do not need to be nationals of that country) (*ibid*). The scene was therefore set for a major confrontation on this issue, particularly since, the day after Mr. Spidla made the observations referred to above, the FIFA Congress approved the Blatter plan by an overwhelming majority (*The Times of 31/5/2008, p. 90*). Legal experts appeared to agree with the Spidla standpoint, with Amanda Jones, a specialist in employment, sport and discrimination at leading law firm Maclay Murray & Spens, confirming that to adopt a rule on the basis of nationality was, under existing EU law, unjustifiable however noble the intention behind it (*ibid*).

Since then, there have been several development, none of which have, however, provided a permanent solution to this apparent stand-off. In mid-July, French head of state Nicolas Sarkozy began his presidency of the European Union with a plea for exemption of sport from EU law. France has been one of the main countries to suffer an exodus of its more talented footballers, particularly to the English Premier League, which is facilitated by a discrepancy between UK employment law, under which 16-year-olds may conclude full-time professional contracts, and that which applies elsewhere in Europe. Mr. Sarkozy attempted to impress on the European Parliament that an exemption which states that sport does not merely obey market economy rules "should unite all MEPs" (*The Guardian of 11/7/2008, p. S2*). In Britain, meanwhile, this very issue was considered by the all-party parliamentary football group, at which Alex Philips, UEFA's head of professional football services, was questioned by former Conservative leader Iain Duncan-Smith. The latter claimed that current UEFA rules on home-grown players were ineffectual since they enabled clubs simply to leave their "quota players" in the stands or on the substitutes' bench. Mr. Philips replied that, although his organisation would welcome quotas on starting line-ups, this was prohibited under the EU laws referred to above (*The Guardian of 6/11/2008, p. S2*).

Shortly before this issue going to press, Hans Klaus, FIFA's director of communications, revealed that Mr. Blatter had been meeting world leaders or their representatives in an attempt to persuade them to

## 9. EU Law

approve his plan – in the face of EU law. He claimed that meetings had taken place with the offices of the German Chancellor, Angela Merkel, the Spanish Prime Minister, Jose-Luis Zapatero, French President Nicolas Sarkozy and Britain's Premier, Gordon Brown, and asserted that FIFA had found a good deal of support for this plan (*The Guardian of 14/11/2008, p. S2*) (In the case of the French president, this was already clear in the light of his observations referred to above.) All this, of course, is narrowly linked to the proposal that a "specificity of sport" clause be included in the fundamental treaties governing the EU – a topic which forms the subject-matter of the next feature,

### Should sport enjoy a specific status under EU law? Various academic works analysing this issue

Ever since the celebrated Bosman decision, the question has arisen as to whether sporting activity should be exempt from EC law – and if so, to what extent. Unfortunately, the current position is far from clear – and not only from the viewpoint of the attempts made by the governing bodies in football to place certain restrictions on foreign players employed by the leading clubs. This crucial issue has spawned a number of academic works during the period under review, some of which are summarised and reviewed below.

The first work under review is authored by a senior academic at the Paris Nanterre University (*Latty, F., "L'arrêt, le livre blanc et le traité" in [2008] 1 Revue du Marché Commun et de l'Union européenne p. 43 et seq.*). He assesses this question in the light of three major recent developments in this field: the Meca-Medina decision, the Commission White Paper on sport, and the proposed Article 149 in the Lisbon Treaty. The first, which was extensively covered in this issue (*[2006] Sport and the Law Journal p. 54*) concerned an appeal by two swimmers who had incurred a two-year ban imposed by the world governing body FINA for their involvement in doping. Although the Court of Arbitration for Sport (CAS) halved the original four-year ban, the swimmers in question brought an action against their international body on the basis that their rulings on doping cases infringed EU competition law. Although the Commission, the Court of First Instance (CFI) and the Court of Justice (ECJ) dismissed their application, there was an important difference between the CFI and ECJ decisions, in that the former had stated that the specific nature of sport, recognised by the Bosman decision in relation to the free movement of persons, should be extended to EC competition law, the ECJ subsequently dismissing this ruling.

The Commission White paper (*[2007] 2 Sport and the Law Journal p. 44*), which was issued a year after the aforementioned Meca-Medina ruling, sought to give a strategic orientation regarding the role played by sport in Europe. However, by specific reference to the Meca-Medina decision, the White Paper dismissed any notion that sporting regulation could form the exception to the EU's laws on competition. In fact, it goes further than the said ECJ ruling in that it appears to extend the non-applicability of "sporting specificity" to the free movement of persons – something which may, or may not, be deduced from the ECJ's ruling. As regards the proposed Article 149 of the Lisbon Treaty, this is an extremely general – some would say anodyne – statement of principle, under which the EU undertakes to contribute towards the development of sport in Europe, whilst taking into account its specificity, its structures which are based on voluntary participation, as well as its social and educational function.

The author opines that these three instruments have failed to clarify the status of sport under EU law. The Medina Meca ruling and the White Paper have confirmed the place of sport in EU law, i.e. conformity in principle subject only to highly conditioned derogations, and the proposed Lisbon Treaty article cannot be said to make any fundamental change in this position. However, there remain a number of uncertainties as regards the applicability of the "sporting exception" under the freedom of movement provisions enshrined in EC law. Even the principle that the "sporting exception" does not apply in the case of EC competition law does not remove a number of difficulties, more particularly the adoption of the World Anti-Doping Code which, in the author's opinion, would be better served by decreeing certain exceptions to EU law rather than instituting a rule of "sporting specificity" under EC law.

Closely related to this contribution is an article which specifically examines the applicability of EC competition rules to sport (*Kienapfel, P. and Stain, A., "The application of Articles 81 and 82 EC in the sports sector" [2007] 3 EC CPN p. 6 et seq.*). Here, the authors concentrate on Annex I to the Staff Working Document, entitled "The EU and Sport: Background and Context" and provide an overview of the relevant ECJ case law and Commission decisions. More particularly they discuss the application of Article 81 and 82 to (a) the rules governing the organisation of sport, and (b) the sale of sporting rights. More particularly in the field of motor sport, the author Adam Cygan (*"Are all sports special? Legal issues in the regulation of Formula One motor racing" [2007] EBLRev p. 1327*) discusses the question whether EC competition law and its rules on

## 9. EU Law

free movement should apply to Formula One racing as a commercial enterprise rather than as a sport with special status. He reports on certain allegations that the world governing body in the sport, the FIA., made it impossible to start new motor racing events, as well as complaints about its broadcasting contracts. He also reviews ECJ rulings on the question whether special principles should apply to the regulation of sport.

In another article (*Gardiner, S. and Welch, R., "The contractual dynamics of team stability versus player mobility: who rules "The Beautiful Game"?* [2007] 5 *E&SLJ* p. 1) the authors discuss the contractual relations between professional footballers and their clubs. They consider the question whether players should have the right unilaterally to terminate contracts, providing compensation is paid to the clubs concerned. They discuss some major issues regarding the retention of players, including the FIFA rules which permit players to terminate their contracts for "sporting just cause", whether transfer windows should be abolished, and the lawfulness of approaches by clubs requiring their services. In addition, they explore the governance of sport at the national, European and world level, both at present and in the future.

The author Borja Garcia ("*From regulation to governance and representation: agenda-setting and the EU's involvement in sport*" in [2007] 5 *E&SLJ* p. 1) examines the politicisation of sport and its rise in importance on the agenda of the EU. He reviews the court decisions which have shaped policy on sport, including the inevitable Bosman decision. He considers the role of the EU institutions in the governance of sport and the level of self-regulation of sporting governing bodies. He describes the recommendations of the Independent European Sport Review and speculates on the effect on sporting policy of the (then pending) litigation between the Belgian football club Sporting Charleroi and the world governing body in football, FIFA.

Yet another angle from which the "sporting exception" can be viewed is examined by the authors Simon Thorp and Shenal Shah ("*Breakaway leagues: justifying restrictions under EU law*" [2008] 6 *WSLR* p. 3). Here, the authors examine the contractual relations between professional footballers and their clubs. They consider whether sporting bodies can justify restrictions placed on sporting performers wishing to compete in unauthorised competitions. They highlight the launch of the Indian Cricket league and its implications for players, as well as the response by the England and Wales Cricket Board (ECB). They examine whether the restraint of trade theory applies to breakaway leagues,

focusing on its use to challenge the reasonableness of disciplinary measures imposed on players and in relation to participation in competition, as well as the application of Articles 81 and 82 EC Treaty.

Finally, there has recently appeared a major work on this subject by the authors Richard Parrish and Samuli Miettinen (*The Sporting Exception in European Union Law* reviewed in [2008] *Nederlands Juristenblad* p. 1369). The authors engage in a comprehensive analysis of this question on the basis of the relevant rules on transfers and other contractual issues, as well as the various rules of sports governance. Inevitably, they also involve the major decisions by the ECJ in their analysis, such as the Bosman and Meca Medina rulings. They also analyse a number of decisions by the European Commission in the field of competition law which are relevant to sporting activity.

### **French footballer contractual dispute referred to European Court of Justice**

The case under review is not unrelated to the issues raised in the previous two features – i.e. the development whereby many young European footballers are tempted towards the sunny uplands of English football because of the difference in labour legislation which prevails this side of the Channel. The player in question, being the defendant in this dispute, had signed his first professional contract with an English league club. This was in apparent contravention of Article 23 of the French Professional Footballers Charter, which has the character of a collective bargaining agreement. This provision obliges the young player to sign his first professional contract with the club which trained him if the latter so wishes. The industrial court (*Conseil de prud'hommes*) had ruled that the player in question had accordingly breached his contractual obligations, and ordered him to pay compensation to his first club.

However, the Court of Appeal invalidated this decision, ruling that the said Article 23 was unlawful under the provisions of EU law relating to the free movement of workers. The matter then reached the Supreme Court (*Cour de Cassation*) which decided to suspend proceedings in order to request a preliminary ruling from the European Court of Justice on the question of the consistency of the French national provision with EU law. At the time of writing, however, the ECJ had not yet pronounced itself on this matter (*Decision of 9/7/2008, JCP-La Semaine Juridique of 1/10/2008, p. 36*).

# 10. Company Law

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Bankruptcy (actual or threatened) of sporting clubs & bodies

[None]

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Other issues

## UEFA seeks to control debt-ridden clubs

As is the case with other associations enjoying corporate legal status, professional football clubs are subject to certain controls and monitoring as far as their finances are concerned. However, there are some who consider that these supervisory mechanisms are far from adequate and that, more particularly, they fail to regulate the extent to which such clubs may incur financial debts. One major personality in the game who has consistently voiced concerns about this is none other than Michele Platini, the current President of the European governing body UEFA. In late June 2008, he launched an outspoken attack on those top teams – most of whom are in the English Premier League – who had allegedly cheated their way to success on the back the debts they had contracted, by buying players they could not afford. He insisted that European football should be “clean and transparent”, with clubs being prevented from buying success on credit.

Mr. Platini repeated these sentiments as his organisation was about to launch an investigation into the major financial challenges facing European football, which covered not only club debts but also the inequality between rich and poor teams. This investigation is currently being carried out by a team of legal and financial experts is to culminate in a set of recommendations as to how to create a “level playing field” between clubs (*The Guardian of 29/8/2008, p. 37*). It should be noted that UEFA already operates certain controls on football clubs debt. This enabled them to deny CSKA Sofia entry to the 2007-8 European Champions League because of unpaid debts owed to the Bulgarian National Social Security Institute and other creditors (*The Independent of 9/10/2008, p. 54*). However, there is obvious concern that the existing regulatory framework is inadequate, particularly in the light of the desire to prevent a few teams from dominating the top European competitions. These concerns have been voiced even by those in charge of sport in the countries which are accused of distorting the competition this way. Thus Lord Triesman, the Chairman of the English Football Association, recently launched an outspoken critique of the Premier League clubs for carrying a total of £.3 billion in debt (*The Daily Telegraph of 9/10/2008, p. S7*).

# 11. Procedural Law and Evidence

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[None]

# 12. International Private Law

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[None]

# 13. Fiscal Law

## Fiscal law

### Canada raises taxes to lure back GP racing

Montreal was a regular forum for Formula One motor racing – that is, until the calendar for 2009 was drawn up and the largest Canadian city was omitted as a result of a dispute between it and the F1 rights holder, Bernie Ecclestone, who claimed that the city owed him payments from the current season's race. In order to remedy this situation, the mayor of Montreal, Gerard Tremblay, proposed in mid-November 2008 that hotel taxes be increased over the grand prix weekend in a bid to raise the money owed (*The Guardian of 14/11/2008*, p. S2). At the time of writing, it was not known whether this measure had been carried out or not.

### MLB agents ponder beating possible tax increase (US)

The election of President Obama in the US seems already to have produced some effects on the world of sport – at least in fiscal terms. Some baseball agents have mooted the possibility of attempting to beat a possible tax increase for their well-paid clients. President-elect Barack Obama has proposed increasing the top federal income tax rate from 35 percent to 39.6 percent, where it was under the Clinton administration. If signing bonuses are paid before the year ends, they likely would be taxed at the current rate and would not be subject to any tax increase. According to agent Craig Landis:

***"It's something we'll consider. Besides the federal issue, we have a state issue in some cases, anyway, where it's advantageous to take signing bonuses because of the state income tax. A Florida resident can take the signing bonus and not have to pay his team's state tax."*** (*Associated Press, www.findlaw.com of 5/11/2008*)

Obama's proposal would increase federal income tax on families earning over \$250,000 annually, money that would help finance a decrease for employees and their families earning less than \$200,000 annually. Next year's major league minimum is \$400,000. Agent Scott Boras, negotiating eight- and possibly nine-figure deals for free agents Manny Ramirez and Mark Teixeira, has already considered the possibility of requesting larger signing bonuses payable this year in some of his contracts.

Free agents cannot start negotiating financial terms with all teams until mid-November. Only a relatively small percentage of contracts are finalized before 1 January. Nevertheless, for a high-earning free agent earning \$10 million in 2009, Mr. Obama's plan could increase his federal tax by more than \$400,000 (*Ibid*).

# 14. Human Rights/Civil liberties

## Racism in sport

### Fall-out from Hamilton racial abuse continues (even if Bernie thinks it is all a joke...)

There appears to be little love lost between the Spanish motor racing public and British No 1 rider Lewis Hamilton. As will be recalled from a previous issue of this Journal (*[2007] 2 Sport and the Law Journal p. 60*), the displacement of top Spanish driver Fernando Alonso by Hamilton prompted a reaction from some Spanish fans which went well beyond the lively and robust banter which sports fans normally engaged in. When the Formula One teams went to Spain for pre-season testing, Mr. Hamilton was greeted by racist insults and the sight of a group of supporters with blackened faces and wearing Afro wigs. The response by the world governing body, the FIA, was to fine the circuit in question and institute an anti-racism campaign.

These moves do not seem to have improved matters, judging by the appearance of a voodoo-style internet website which taunts Mr. Hamilton about the colour of his skin, with more than 16,000 messages using terms such as "nigger" and "half-breed". One, calling himself David, left a message saying "\*\*\*\* you \*\*\*\* monkey". Another dubbed Hamilton a *conguito* – a type of chocolate sweet with racist overtones – and wrote "Conguito, you are going to die". The website also encourages visitors to leave imaginary nails for Mr. Hamilton on a computer mock-up of the racetrack at Interlagos (Brazil), where the next race was scheduled to take place (*The Daily Telegraph of 31/10/2008, p. S1*). It appears that not only Mr. Hamilton, but also his family, had suffered considerably as a result of these attacks, particularly his 16-year-old brother Nicholas, who suffers from cerebral palsy. It also emerged that, during his stay in Sao Paulo for the race which eventually saw him crowned world champion, Hamilton had been insulted by two Brazilian comedians and handed a toy black cat – a symbol of bad luck in Brazil – at a sponsor's function (*The Guardian of 4/11/2008, p. S1*).

Matters were not improved when, a few days later, the F1 commercial rights holder, Bernie Ecclestone, during an interview broadcast on Radio Five Live, expressed his opinion that the entire affair had been blown out of proportion. He said:

***"It's all nonsense. In Spain people supported Fernando Alonso and in Brazil they supported Felipe Massa. I don't think it has anything to do with racism. There were a few people in Spain... and that was probably taken at the beginning as a joke rather than anything abusive. People sort of look and read things into things that are not there.***

***All of those things are all a bit of a joke. People are entitled to support who they want to support. When was he insulted? Do you remember the Ferrari guys that wore the red wigs when they went? People are [just] expressing themselves"*** (*The Independent of 7/11/2008, p. 75*).

Unsurprisingly, Mr. Hamilton viewed the matter somewhat differently, even though he did not dwell on Ecclestone's comments to any considerable extent, merely restricting himself to stating that he did not particularly regard the affair as a joke, and giving every indication that he wished to put the matter behind him (*Ibid*). Other commentators were less reticent in their reaction. Keith Vaz MP, the Chairman of the British Labour Party's ethnic minority task force, not only condemned the remarks made by the commercial rights holder, but also revealed that he had received a letter from the Spanish ambassador describing how incensed he had been by the racist abuse levelled at the world champion. Danny Lynch, a spokesman for "Kick it Out", the organisation campaigning against racism in sport, described Mr. Ecclestone's comments as "very worrying" (*The Guardian of 7/11/2008, p. S1*). Ecclestone later attempted to mitigate the impact of his statement, and announced that he had spoken to Mr. Hamilton's father who had assured his son that "everything was fine". He defended his stance on racism, recalling that it was he who removed Formula One racing from South Africa because of the apartheid regime (*The Guardian of 8/11/2008, p. S12*).

### Football governing bodies in the wars over racism and how to tackle it

No-one will deny that facing down and tackling the scourge of racialism in sport is a particularly difficult one, hedged as it is by all manner of practical, legal and financial considerations. It is also a matter of general agreement that, at every level, the bodies governing sport, and particularly football, have shown an increasing awareness, both of the problem and of the need to take decisive action. Nevertheless, their handling of the issue in individual cases has remained subject to criticism, as past issues of this Journal will amply testify. The period under review has, unfortunately not been free from controversy in this regard.

Certainly there were considerable grounds for optimism earlier this year, particularly when the European governing body in the sport, UEFA, signalled its intent to ensure that the Euro 2008 tournament should be conducted in a manner which was untainted as possible by this cancer. In a move unprecedented in football history, captains of the four semi-finalists delivered anti-

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racist addresses before kick-off. This was the result of UEFA president Michel Platini joining forces with anti-racist organisations, including the aforementioned “Kick it Out” campaign, to form the “Unite Against Racism” (UAR) movement, which was on display most visibly during the tournament, with hoardings bearing their message at every ground. In the past, the governing bodies had shied away from involving the captains of teams in making such statements, but this development signalled Mr. Platini’s determination to tackle the issue head-on (*The Daily Telegraph of 20/6/2008, p. S6*).

Exactly how much this contributed to the cause during the Euro 2008 championship is a matter of debate, but the fact is that the tournament appears to have passed off without any serious incidents of a racial nature. However, no sooner had the football season restarted than renewed signs appeared that all was not well – and that the governing bodies were not perhaps as serious in their intent as they had purported to be. The occasion was the World Cup qualifier between Croatia and England in Zagreb, during which a good deal of racist abuse was directed at the visiting striker, Emile Heskey by certain sections of the home support. Monkey chants were heard after Mr. Heskey was cautioned for a foul on Nico Kovac (*The Guardian of 12/9/2008, p. S4*). It is true that the abuse was not, has had been the case on earlier occasions, sustained for very long; nevertheless, the English FA submitted a formal complaint to the world governing body FIFA over the incident (*The Times of 12/9/2008, p. 106*). Davor Gavran, for the Croatian FA, condemned the abuse but stresses that the chants were “very much isolated” (*Ibid*).

Two weeks later, it was announced that FIFA had issued the Croatians with a fine amounting to £15,000. The English FA reacted positively, stressing that the most important outcome of the decision was that FIFA actually recognised that there had been racist chanting, adding that it was not for them to act as “judge and jury” on the question whether this penalty was equal to the offence (*The Guardian of 26/9/2008*). Others this side of the Channel were not so reticent. Gordon Taylor, the Chief Executive of the Professional Footballers’ Association, condemned the paltry nature of the financial penalty, went so far as to say

**“It’s not even a slap on the wrist – FIFA needs to do a lot more., in actions rather than words. There are a host of options available to them. In the future at matches, they could make sure Croatian advertising hoardings carry suitable messages and they could reinforce that with messages over the public address system. Outside the match itself, they could market a campaign aimed at**

**eradicating the problem. They could insist the players speak out about it. Measures other than a fine need to be taken. They could even invoke legislation. Given the past political problems in the area, perhaps it is not surprising it has surfaced, but that does not excuse the supporters’ actions. Emile Heskey should not have been subjected to that. it’s not a slap on the wrist – it’s more like a tickle on the finger”**

(*Daily Mail of 26/9/2008, p. 92*).

Fifa’s paltry fine also seemed to expose the extent to which it has rowed back on its commitment to take discrimination “very seriously”. In a letter sent to member football associations in March 2006 the world body’s general secretary, Urs Linsi, said:

**“Fifa has always taken its role in combating discrimination of any kind very seriously. Despite this there has been a surge in discriminating gestures and language at matches. The Fifa executive committee therefore decided ... to impose harsher sanctions. Those sanctions included a three-point deduction for the racist actions of “any player, official or spectator”**

(*The Guardian of 30/9/2008, p. S2*)

However, it has now emerged that despite these anti-racist moves made in March 2006 the decision was overturned at Fifa’s general congress meeting in Sydney this May. The new disciplinary code, in force since August, absolves member associations of any specific responsibility for the actions of fans, restricting that to “players and/or officials” (*Ibid*).

The European governing body, UEFA, has also experienced difficulties in its attempts to deal with the problem. In early October 2008, racist chanting towards visiting black players was heard during the European Champions’ League game between Atletico Madrid and Marseille at the Estadio Vicente Calderon. Thereupon UEFA fined Atletico £120,000 and ordered the club to play their next two European home games at a different ground, at least 300 km from their own stadium (*Daily Mail of 16/10/2008, p. 89*). However, this decision, although markedly more decisive than the FIFA response to the Heskey affair mentioned above, had other unfortunate consequences. The fans of clubs which had already made arrangements to travel to Madrid in anticipation of European Champions League matches were understandably not impressed. This was particularly the case with Liverpool’s supporters, who labelled the decision as “idiotic”. However, UEFA replied that they had no intention of retreating, with spokesman William Galliard, whilst expressing sympathy for the Liverpool fans, claiming that his organisation “had no alternative” (*The Daily Telegraph of 15/10/2008, p. S8*).

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### Racial issues continue to pose problems for South African sport

#### *New black rugby coach tackles task head-on – as more is revealed about selection shenanigans...*

Even in the euphoria of Nelson Mandela's release from prison and the official ending of the apartheid era nearly 20 years ago, it was hard to imagine that, a mere generation on, that bastion of white supremacy, called the South African national rugby team, would not only contain black players but actually be managed by a black – even if he bears a name (Peter de Villiers) which is as Afrikaans as the Voortrekker monument. But, as was reported in the previous issue of this Journal (p. 58), this blessed morn actually dawned earlier this year, and the new coach has set about his task in a brisk and, some would say, peremptory fashion, criticising the regime under which South Africa's players have lived in the past as "spoonfeeding" which makes them scared of making decisions. In other words, he wants his players to take the field with a greater sense of personal responsibility. This "no-nonsense" approach to his task is attributed in no small measure to his background and earlier years, which were spent under the strictures of the apartheid regime (*The Independent of 7/6/2008, p. 72*).

However, it has also come to light that some of the legacy of the previous supremacist political regime had been in evidence during the process of selection which ultimately saw Mr. De Villiers acceded to his current position. The latter he obtained by the smallest of margins, but there was more to this than met the proverbial ocular. The entire selection process was tainted by whispers of inappropriate dealings, threats and outrageous slurs against the candidate – who was already known as a thoroughly honourable and decent man. Mr. De Villiers did not rise to the bait, commenting only that he knew certain people were prejudiced against him because of his skin colour, but that if they wanted him to be 10 times better than he was he was determined to live up to this expectation (*Ibid*).

#### *The Luke Watson affair*

The unfortunate legacy of apartheid has, however, continued to haunt South African rugby in different ways. The side's preparations for the European tour of November 2008 was subject to heavy tensions when reports emerged that several "Springboks" had threatened to boycott the tour if flanker Luke Watson was included in the squad. The reason for this was that Mr. Watson had been quoted as saying that the sport in his country was being run by Dutchmen, which made him want to vomit on the national jersey. The South

African Rugby Union (SARU) had launched an inquiry into the remarks, allegedly made in a speech to a rugby gathering in Cape Town which was recorded without his knowledge. The outcome of this enquiry was unknown at the time of writing, but could earn the player, whose father was an anti-apartheid activist, a charge of misconduct (*The Guardian of 21/10/2008, p. S6*).

It later emerged that, in fact, half the South African squad had conferred with John Smit, the captain, requesting him to inform coach de Villiers that they were unwilling to participate in the tour if Watson was selected. One newspaper quoted an unnamed player as saying that Mr. Watson "did not belong in the side" because team members did not wish to play with him. However, Andy Marinos, the acting managing director of South African Rugby, dismissed such reports as speculation, firmly denying that "any verbal or written threats" had been made regarding selection. Watson, for his part, claimed that his views had been misrepresented, whereas his father claimed that "sinister forces" were behind the release of the alleged observations, adding that his son was seeking legal advice on the issue. However, fresh controversy surrounded the affair when Jake White, South Africa's former coach, claimed that he had come under pressure to select Mr. Watson even though he felt that the back-row forward was not good enough for international honours (*Ibid*). The immediate problem of Mr. Watson's presence in the team, however, was solved a few days later when the player announced his unavailability for the tour (*The Observer of 26/10/2008, p. 42*).

It should be added that this issue, as is so often the case in South Africa, was narrowly linked to the national political scene – more particularly the ruling African National Congress (ANC) party. The comments allegedly issued by Watson were made at a time of renewed controversy surrounding the age-old mascot of South African rugby, the springbok. At its annual congress, held in Polokwane, the ANC voted to have this emblem removed from rugby jerseys and replaced by the king protea flower under which all other South African sporting teams play. The Springbok has been the emblem of South African rugby for more than a century and became the sporting symbol of the National Party during the apartheid era. Following the first multi-racial elections in 1994, all other South African national teams, including those of football and cricket, adopted the protea as their logo. However, in 1995, in a move seen as being crucial to the emergence of the "Rainbow Nation", the then President, Nelson Mandela, ruled that the national senior rugby team would be allowed to retain the springbok, despite its association with white

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supremacy. Since 2003, the national rugby squad's logo has featured both the protea and the springbok (*Ibid*).

However, among the party's grassroots there appears to have occurred a fundamental change of views on this topic. Asad Bhorat, the president of the Soweto Rugby Club, went so far as to declare that the continued use of the springbok was "akin to the German national team wearing the swastika". Watson's remarks about his desire to expectorate on the national rugby jersey had echoed the sentiments expressed earlier by ANC sports portfolio committee chairman Butana Komphela, who had stated that the emblem "makes me want to puke". Pro-springbok campaigners had responded by sending packets of Valoid – an anti-nausea drug – to both Komphela and Watson. The controversy also came a week before the inaugural congress of a breakaway wing of the ANC. Naturally, there were voices raised in favour of compromise – most notably that of the sports minister, Makhakesi Stofile. Speaking at a conference organised in Durban to discuss integration in South African sport, he proposed that the king protea be displayed on the left side of the players' jerseys, with the springbok being moved to the right side, where it would replace an existing sponsor's logo. SARU may be loath to forfeit sponsorship money, but may be compelled to accept the suggestion in order to gain government endorsement for South Africa's bid to host the Rugby World Cup (*Ibid*). The outcome of this case was not yet known at the time of writing.

### ***Television documentary revisits issues surrounding controversial cricket "rebel tour"***

The extent to which the sporting boycott to which South Africa was subjected during the apartheid years contributed towards the downfall of the latter has been a matter of considerable and heated debate for the past two decades. What is an undisputed fact, however, is that attempts to circumvent the boycott by unofficial means generated almost as much controversy and bad feeling, both in sporting and political terms. One such attempt was the notorious "rebel cricket tour" in which a motley band of international cricketers, most of them well past their best, was assembled in order to compete in a number of unofficial fixtures mimicking a genuine visiting tour. This and other aspects of the intimate relationship between the racist regime and sporting endeavour formed the subject-matter of a three-part documentary, called *Out of the Wilderness*, which was recently featured on Sky television and in which the journalist Charles Colville retells the story of the nation's sporting isolation.

The main message of the documentary was that the

regime's pariah status was entirely self-induced. As if its policy of selecting sporting teams by skin colour were not sufficiently repulsive, in 1969 the South African government attempted to influence the composition of others when it refused to allow the England side to tour with the mixed-race South African-born Basil d'Oliveira amongst their number. If nothing else, it proved to be a stupidly misguided move on the part of the ruling Nationalist Party. The English cricket authorities (which at the time were subsumed under the Marylebone Cricket Club [MCC]) hardly constituted a hotbed of radicalism at the time. Just because hirsute students were marching against the apartheid regime at the time, they saw no reason to abandon sporting relations with South Africa. However, the banning of Mr. D'Oliveira compelled a naturally reluctant English cricketing authority to take action. Thus began 20 years of isolation (*The Daily Telegraph of 19/7/2008, p. S20*).

The second part of the film examined the way in which the South African cricket authorities tried to circumvent the ban by reaching for the chequebook and organising rebel tours. As self-styled cricketing magnates, from Kerry Packer to Sir Allen Stanford, have proved down the ages, if sufficient amounts of cash are produced there will always be cricketers of acceptable quality prepared to challenge the status quo – and in the 1980s there were plenty who were happy enough to take part in the ersatz tour. A somewhat disquieting aspect of the documentary is the number of "rebels" who to this day remain unrepentant about their role in the affair. At least the Middlesex and England spinner John Emburey was candid enough to admit that he was motivated solely by the money. Fast bowler Colin Croft, on the other hand, cast himself and his fellow-rebel West Indian players as the equivalent of Alabamian folk hero Rosa Parks, there to demonstrate to racist South Africa that the black man could excel at cricket on the same level as his white counterpart and thus help to accelerate the demise of apartheid.

It was, however, the Middlesex and England all-rounder and former captain Mike Gatting who was the subject-matter of the greatest amount of opprobrium. He did not even possess the aforementioned West Indians' slenderest of fig leaves by way of justification, and by 1990 no-one could plead ignorance of the exact nature and effect of the South African regime. In fact it can fairly be said that it was Mr. Gatting's presence which proved not to be the catalyst for the failure of the entire enterprise, which was ultimately abandoned in a welter of organised demonstrations and disorderly press conferences. The shambolic demise of this discredited enterprise highlighted the growing absurdity of a dying regime – a month after the tour was called off in

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embarrassment, anti-apartheid hero Nelson Mandela was released from prison and the swift transition to multi-racial democracy was unleashed (*Ibid*).

### ***Belated recognition of Aboriginal conqueror of Bradman (Australia)***

South Africa may have been the most notorious example of a major cricketing country which discriminated against players on the basis of their racial origin. However, other countries, whilst never elevating such prejudice to official status, nevertheless have experienced difficulties in omitting such considerations from their selection policies. One such case is that of Australian Eddie Gilbert, who was the fastest bowler of his era, so fast, in fact, that he knocked the bat out of Sir Donald Bradman's hands before dismissing him for nought. But while Bradman is a household name around the world, few people have heard of Mr. Gilbert, even in his native land. Whereas Bradman was a white Australian, Gilbert was an Aboriginal man who lived on a government-run mission and was compulsorily chaperoned by white officials when travelling to matches. Denied a place on the national team, he was forced out of first-class cricket amid allegations of cheating, and died in a mental institution. He was buried in an unmarked grave.

Recently, however, 30 years after his death, Gilbert's extraordinary talents have finally received a belated nod of recognition, in the shape of a life-size bronze statue which was unveiled at the Queensland Cricket Academy in Brisbane in early November 2008. However, although Mr. Gilbert's family are delighted at this outcome, the memorial has been dogged by controversy. The statue was commissioned not by the Queensland Government, nor by its cricketing authorities, but by Indigenous Sport Queensland, an organisation that assists and promotes Aboriginal sporting performers. It had been hoped that the statue would find a home at the Brisbane Cricket Ground, the scene of Gilbert's celebrated encounter with Bradman in 1931. But the idea was vetoed, prompting local media to suggest that, decades on, Gilbert remains unaccepted by the cricketing establishment. Wayne Coolwell, President of Indigenous Sport Queensland, commented that he did not believe the decision was racially motivated. But Mr Coolwell, an Aboriginal former sports broadcaster, is shocked that Gilbert has yet to achieve the recognition he deserves, stating

***"Here's an Aboriginal fellow who played for Queensland, and was widely admired, and he's still not being recognised 70 years later. He was an amazing natural athlete, but the majority of people wouldn't know much about him"***

*(The Independent of 1/10/2008, p. 14).*

Gilbert developed a unique style of fast bowling which was based on a whip-like wrist action, and stories about his prowess abounded. His blistering deliveries were claimed to raise smoke on a concrete pitch, with one of his balls reportedly crashing through a picket fence and killing a small dog. Another struck a box of matches in the wicket-keeper's pocket and set them alight. As apocryphal as such tales may be, Gilbert was a cricketer of remarkable ability – yet he was never selected to represent Australia. Few doubt that racism was to blame. This was an era when the movements of Aboriginal Queenslanders were controlled by white superintendents, whose authorisation had to be sought to move around, work, and even spend money. Gilbert, a quietly-spoken man, was not permitted to stay in the same hotels as his team-mates.

He was mobbed by fans but regarded as a curiosity. He once commented that it was acceptable to be a hero on the field, but that a black man "can be lonely when he is not accepted after the game" (*Ibid*). Gilbert's career was, moreover, punctuated by slurs on his sporting conduct. His catapult-style action was questioned from his first appearance for Queensland in 1930, with critics alleging that he threw the ball rather than bowling it. Slow-motion film of his arm action revealed nothing improper, but the accusations persisted – particularly after he had humiliated "The Don". On that day, in the space of one over, Gilbert relieved Bradman of his bat, knocked him to the ground, and then dismissed the world's greatest batsman for no score. Bradman said it was the fastest bowling he had ever faced. However, in subsequent matches, though, Gilbert was repeatedly "no-balled" by the umpire, and in 1936 he was forced to retire in disgrace. He became an alcoholic and spent his last 30 years in a psychiatric hospital. His name and his exploits were forgotten. It was not until 2007 that a headstone placed on his grave. The statue will be unveiled by his son, Eddie Barney, a former professional boxer (*Ibid*).

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### Human rights issues

#### Requirement that women golfers pass English test – a breach of human rights?

It is well-known that English is the lingua franca in the world of golf (indeed, for most other sports as well). The vast majority of non-native speakers of the language succeed in mastering at least the rudiments of the language for everyday purposes. However, there are some who maintain that this is not invariably the case on the women's golf tour – to the point where this poses practical problems for tournament organisers. By their inability to express themselves in English they have even committed the heinous sin of failing to provide corporate sponsors with colourful post-tournament press conferences. That at least is the implication of the recent ruling issued by the Ladies Professional Golf Association (LPGA) which, in late August 2008, announced that its 121 international players would be required to pass an oral English examination at the beginning of the year 2009. Failure to pass will result in immediate suspension from the tour. Libba Galloway, the Deputy Commissioner of the LPGA tour, attempted to justify this imposition in the following terms:

***"We live in a sports-entertainment environment. For an athlete to be successful today in the world we live in, they need to be great performers on and off the course, and being able to communicate effectively with sponsors and fans is a big part of this. Being a US-based tour, and with the majority of our fan base, pro-am contestants, sponsors and participants being English-speaking, we think it is important for our players to effectively communicate in English"*** (*The Independent of 28/8/2008, p. 24*).

Although the LPGA has a membership associated with 24 countries, this move is aimed primarily at its contingent of 45 South Korean players, many of whom are teenagers and have little ability to understand even rudimentary English. The LPGA added that it would provide language-learning software and tutoring for players who failed the test. However, the move attracted criticism from civil liberties campaigners, who claimed that this requirement could infringe human rights. Thus Howard Simon, Executive Director of the American Civil Liberties Union in Florida, commented that such requirements might violate Florida state law which prohibits discrimination in public accommodations because language was "a key element of a person's national origin", and that people should be judged on their ability to perform (*The Guardian of 28/8/2008, p. S1*). On the other hand, Angela Park, born in Brazil of South Korean heritage and raised in the US, commented that the policy was "fair and good for the tour" (*The Daily Telegraph of 27/8/2008, p. S15*).

#### Barcelona FC boycott Catalan-free airline (Spain/Germany)

Catalans regard recognition of their language as an essential human right. This may explain the decision by top European football club FC Barcelona to boycott a German budget airline because it refuses to make in-flight announcements in the Catalan language. The club had booked places to travel to the US with Air Berlin, but cancelled the flight and forfeited the money paid (*The Daily Telegraph of 2/8/2008, p. 20*).

### Gender issues

#### Tennis feminist pioneer promotes gender equality in Qatar

Billie Jean King is known not only for the many titles she won during her illustrious lawn tennis career, but also for being a campaigner advocating equal rights for women as regards remuneration and other working conditions. Retirement from active tennis does not, however, appear to have dampened her ardour for the cause, and in early November she visited the conservative Muslim sheikhdom of Qatar to promote gender equality in sport. She was not unrealistic about the task facing her, stating that change in this area was difficult and time-consuming. In fact, she confided that one of the main reasons why she wanted to visit the sheikhdom was to learn and listen. She conceded that a shift toward gender parity in sport is a gradual process that requires respect for all cultures and religions.

***"Human rights is (sic) very important. But it is going to take generations to have a shift. Things do not happen quickly, but we have to start some place (sic). Just like we began in the United States, standing out in the street and stopping cars to give them tickets to women's tennis events"*** (*Associated Press, www.findlaw.com of 7/11/2008*)

Two years ago, the WTA Tour and UNESCO started a program to promote women's equality in sport, and King was declared "global mentor" of the programme at a news conference in Doha on Thursday. Ms. King, who won a total of 39 Grand Slam titles in singles, doubles and mixed doubles, formed the Women's Tennis Association in 1973. That year saw a less admirable chapter in the fight for gender equality in the shape of the exhibition match she won against Bobby Riggs, which was dubbed "The Battle of the Sexes". Players Venus Williams, Tatiana Golovin and Zheng Jie are also involved in the WTA/UNESCO programme.

Women have fewer opportunities than men in sports and other fields in Qatar, which sent an all-male team to

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the Beijing Olympics this year. Ms. King noted that Doha had hosted a WTA event since 2001. In addition, WTA head Larry Scott said 2008 was the first year the season-ending championships for female tennis players was putting up the same prize money as the end-of-year championships for the men in Shanghai. He added that the barriers have broken down very quickly, with Wimbledon and Roland Garros putting equal prize money on in 2007. In addition, he averred that the Doha organisers had informed him that they wanted to be “the first championships to offer equal prize money for the women”, which, in his view, spoke volumes for itself (*Ibid*).

### **Palio di Siena embroiled in sexism controversy (Italy)**

The Palio of Siena is a rumbustious horse race around the city’s main piazza, which has been bitterly contested for the past eight centuries. It has been featured in these columns under this general heading before, but mainly from the point of view of the concerns raised about the participant horses’ well-being. On this occasion, however, the controversy is based on gender rights, since the event proved to be one of the most unlikely flashpoints of feminist endeavour imaginable when, a week before the 2008 event was to be held, it was faced with a feminist revolt.

Every year, some 70,000 spectators visit the ancient mediaeval city in order to steep themselves in the pageantry of the 800-year-old race. Teams bearing the colours of their city district (*contrada*) race around a perilous packed-earth track located in the city centre. Riders are permitted to whip not only their own steeds, but also other horses and their jockeys (*fantini*). The winner is the first horse past the post – with or without its rider. However, this year a legal challenge has been made by the women of one *contrada* against their team, the Goose (*Oca*). Of the 17 *contrade*, the *Oca* is the only one to have prevented women from taking part in the organisation of the team. They are not allowed inside the elegant salon near the cathedral where the race strategy is plotted. According to Paola Martini, one of the aggrieved *Oca* women:

**“There is no rule that expressly excludes us. But it is custom that we do not take part. It is illogical, against the constitution, the law and against all good sense”** (*The Daily Telegraph of 26/6/2008, p. 15*).

Support has been forthcoming from Andrea Descortes, the most famous *fantino* in palio history, who won five times in *Ocas*’ colours spanning a 21-year career. He described the Palio women’s cause as “a question of

justice” and added that it was about time that recognition was given to the fact that men and women were equals. This point can be emphasised merely by pointing out that other *contrade* have adopted a more enlightened attitude. As far back as 1947, Princess Sobilia Palmieri Nuti Carafa di Roccella assumed the presidency of the *Nicchio* *contrada*. In addition, two women have already participated as jockeys – Virginia Tacci in 1581 and Rosanna Bonelli in 1957. In spite of this, a recent referendum amongst *Oca* members revealed little enthusiasm for the admission of females. Of 424 voters, only 29 were in favour. Maurizio Meli, one of the squad’s directors, commented that there appeared to be a reluctance to change a winning formula (*Ibid*). In fact, many commentators have compared the *Oca* to the Juventus football team given their eminent record of success in winning the event.

The feminist rebels have appointed Marco Comporti, a local lawyer, to represent their interests, and they are determined to fight for their rights at the judicial level. The controversy has, in the meantime, already claimed one victim, in the shape of the resignation of the head of the *Oca*’s electoral commission (*Ibid*).

### **Beijing Olympics laboratory to smoke out gender cheats (China)**

Over the years, there has been more than one suspicion that at least some competitors in international sporting events may have been less than truthful about the gender to which he/she belongs, in order to further their medal-winning chances. The Olympics have not been spared such suspicions, which is why, in recent years, an effort has been made by the relevant authorities to stamp out such cheating manoeuvres. This is why the organisers of the Beijing Olympics earlier this year established a sex determination laboratory in order to test female athletes suspected of being of the male gender.

Experts at the laboratory, which is located at the Peking Union Medical College Hospital, were set the task of evaluating dubious cases on the basis of their external appearance, and of taking samples testing sex hormones, genes and chromosomes. It should be recalled in this context that Indian athlete Santhi Soundarajan was deprived of an Asian games silver medal in 2006 after having failed a gender verification test (*The Daily Telegraph of 28/7/2008, p. S27*).

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### Gay diver defies Australian sporting taboo

It is an undeniable fact that Australia's major cities can claim to have thriving gay communities, with the Sydney Gay and Lesbian Mardi Gras, which recently celebrated its 30th birthday, having become a mainstream cultural event. Yet Australian sport remains a bastion of heterosexuality, at least on the surface. In recent months, a diver, Matthew Mitcham, has taken his first cautious steps towards dispelling that myth. Twenty-year-old Mr. Mitcham, who competed at the Beijing Games, was the first openly gay Australian to take part in an Olympic tournament. The Queenslander, who is now based in Sydney, informed a leading Australian newspaper that he had applied for a grant to enable his partner, Lachlan, to accompany him to the Games. Lachlan has supported him throughout a turbulent period during which he battled against depression and temporarily retired from his chosen sport (*The Independent of 26/5/2008, p. 21*).

Mr. Mitcham's decision to reveal details of his personal life was a brave one. Australia is a country which is not only obsessed with sport, but also continues to expect its sporting heroes to conform to old-fashioned notions of masculinity. The diver quit his sport in mid-2006 and returned to it last year. In early July 2008, he beat two Chinese Olympic favourites at a World Cup event in Fort Lauderdale, Florida, with four perfect dives from the 10-metre platform. It is true that Dawn Fraser, one of Australia's Olympic swimming greats, has acknowledged having had lesbian relationships. But when the gold medallist competed at the 1960 Rome Games and in Tokyo in 1964, her sexuality was a private affair. The American gold medal-winning diver, Greg Louganis, competed at the Montreal Games in 1976, in Los Angeles in 1984 and in Seoul in 1988. Shortly after returning from Seoul, he came out as both gay and HIV-positive (*Ibid*).

### Animal rights issues

[None]

### Other issues

#### Poland coach apologises for "sick" Euro 2008 tabloid war

It is well known that all is fair in love, war and football tournament preparations, but sometimes those involved go a little too far to meet with tolerance and a sense of humour. That limit was definitely reached in the midst of Poland's preparations for the Euro 2008 tournament. At a certain point, a tabloid newspaper featured a gruesome depiction of him holding the severed heads of Germany's national trainer and team captain and demanded that he should slaughter them at the forthcoming Euro 2008 championships. The photomontage in Super Express of Poland's Dutch coach, Leo Beenhakker, clutching the bloodied heads of Michael Ballack and Joachim Löw provoked outrage in Germany and threatened to overshadow the match between the two group B teams during the first week of the tournament (*The Guardian of 6/6/2008, p. 17*).

The picture ran alongside the caption: "Leo, Give us their heads," arguing that Poland, which has never beaten Germany, had waited too long for a win over its neighbour. The image followed another tabloid's take on the rivalry, which showed Ballack wearing a Prussian helmet and recalled a 15th-century battle in which Teutonic knights were defeated by the Poles. Peter Danckert, the Chairman of Germany's parliamentary sports commission, described the picture as an "absolute scandal", adding his wish that the Polish government would react to it "in an appropriate manner". On the other hand, Germany's leading tabloid Bild responded by stating, in a provocative banner headline, that Poland had declared war against Germany.

Mr. Beenhakker described the stunt as "mad, dirty and sick" and apologised to Germany, on behalf of Poland's squad. The German-Polish football rivalry obviously stems from the two nations' troubled history, namely Nazi Germany's invasion of Poland, which sparked the second world war. The tabloid coverage has led to comparisons with the German-English rivalry and the Mirror's "Achtung Surrender!" headline during Euro 96, along with its pastiche of Neville Chamberlain's 1939 declaration: "Mirror declares football war on Germany!", for which the paper's former editor Piers Morgan was compelled to issue an apology (*Ibid*).

# 15. Drugs legislation & related issues

## General, scientific and technological developments

### **Cera and blood-transfusion tests: false dawn or definitive breakthrough?**

The regular reader of this column will by now be accustomed to the various technological and scientific developments which have been hailed as the ultimate breakthrough in the campaign against doping and its nefarious by-products. More often than not the hopes thus raised have been dashed sooner rather than later, as the despairing cry is heard that the “cheats always stay one step ahead of the regulators”. However, in the course of the last year it was learned that cycling dope-takers may be in for a shock following two major breakthroughs – the so-called CERA test and a new method of detecting unlawful blood transfusions. Both are explained in greater detail below.

As to the latter, there had of late been growing speculation that a test for previously undetectable blood transfusions would be introduced and used to analyse blood samples collected at this year’s Tour de France and Beijing Olympics, after comments made by the head of the French anti-doping agency, Pierre Bordry. The World Anti-Doping Agency (WADA) also confirmed that the new test was in the offing but declined to say whether it had been approved. Olivier Rabin, the director of science at WADA, said:

***“We do not indicate when a test is ready, so as not to warn athletes. We are looking for specific methods to reveal autologous blood transfusions, but as of today these methods are not implemented – they’re still at the validation stage. But [a test] is coming”***

*(The Guardian of 14/10/2008, p. S5).*

Autologous transfusions involve the removal and re-injection of an athlete’s own blood and was previously undetectable. A test for homologous transfusions – the transfusion of someone else’s blood – has been available for more than eight years. As was mentioned earlier, the speculation over a possible new test for autologous transfusions, which duplicate the effect of EPO in increasing the flow of oxygen-carrying red blood cells and so helping endurance, followed claims made by Mr. Bordry to German television. The French anti-doping expert said that his agency possessed “serious evidence” about cases of autologous transfusions which had occurred during the Tour. He added that it will soon be possible to prove autologous transfusions, which will accordingly be followed by appropriate tests. Mr. Rabin added that the big breakthrough was likely not to come

with the development of the single test for autologous transfusions but with the introduction of the “athlete’s passport”, tracking their blood values. He added that, hitherto, the analysis of blood or urine samples has been akin to “looking at a single picture”; however, the passport was more akin to a movie, where one could follow the movement of the parameters. The athlete therefore becomes his own point of reference. Rabin also confirmed that, like the autologous transfusion test, the passport is “also on its way.”

As to the former, i.e. test for Cera, (the so-called “third generation EPO”), three riders failed urine tests for Cera during the Tour and another two – Stefan Schumacher and Leonardo Piepoli – were declared positive following tests by the French anti-doping agency on blood collected at the time (see below, p. 111). Shortly afterwards, the International Olympic Committee (IOC) stated that the new Cera blood test would be used to analyse almost 1,000 blood samples collected during the Beijing Games. An IOC spokeswoman added that these samples could also be tested for autologous transfusions if a method was “fully validated by the scientific community (and WADA)”. Mr. Rabin confirmed that Roche Holding AG, the Swiss pharmaceutical company that developed the latest brand of EPO, had collaborated with WADA for four years, and that this was typical of what the anti-doping authorities were currently doing, i.e. to attempt to anticipate trends and new products in order to develop tests before these products become commercially available. Cera was approved in Europe in July 2007 (*Ibid*).

Other developments have suggested that this new development may be a real breakthrough rather than yet another false dawn, with many commentators stressing the need for its urgent introduction. Thus former Olympic runner Steve Cram, writing in a leading British newspaper, hailed the new CERA test, and attempted to show how necessary its introduction was by going into considerable detail as to the danger posed by the third-generation blood-booster (Continuous Erythropoiesis Receptor Activator, to give the drug its full name). Developed by the pharmaceutical company Roche, it assists the kidneys in producing increased levels of EPO, which results in greater red blood cell development. The advantage of this product is that it is much more effective than its predecessors, producing a slower, more sustained release of EPO, reducing the need for regular injections. It was developed to aid patients such as those on dialysis but the sporting world sat up and took interest.

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The Food and Drug Administration in America refused Mircera, its trade name, a licence but only to protect its own EPO manufacturers. To its credit, Roche as early as 2004 realised the potential abuse of its product once it became readily available and contacted WADA to give it an early view of the drug's composition in order to help the organisation develop a workable test. He also confirmed that the IOC had authorised WADA to analyse the Beijing samples. At this point they will only be able to test the 969 blood samples that were taken at the Olympics and not the 5,000 or so urine samples that has been widely reported, although it is hoped that will be possible in the future. The cooperation between the manufacturers, the testing labs, Wada and the IOC has in this instance shown how effective drug testing can be (*The Guardian of 14/10/2008, p. S10*).

However, according to Mr. Cram, the same cooperation is still not evident in other quarters, as the independent observers' report commissioned by WADA in Beijing has shown. Perhaps the most startling fact to emerge was that 102 nations, half of those competing, were unable or refused to give adequate whereabouts information relating to their athletes in the immediate period leading up to the Games. The report suggests that many National Olympic Committees are sadly not even aware of their responsibilities in this area, a fact which the IOC has said it will look into as a matter of urgency. Ignorance was never an adequate excuse but it was slightly more palatable than complicity. During the Games there were eyebrows raised when certain athletes arrived in Beijing seemingly at the last minute. The Belorussian throwers were a case in point. Perhaps it came as no surprise that two of their hammer throwers, both medallists, were found to have tested positive for testosterone. They had already left again by the time the results were announced. But at least they were caught.

The report makes interesting reading around these individual cases and others such as Fani Halkia the Greek athlete who tested positive at the Beijing Olympics (see below), but it also highlights some of the smaller but significant issues around maintaining effective procedures and protocols. At a major Games the most probable way to escape a drug ban is to find legal fault with those trying to apply the rules. No system can ever be perfect, especially when much of it relies on human control, and therefore it was essential that all those involved were diligent (*Ibid*).

However, there are those who are less sanguine (no pun intended) as to the innovative nature of this test. They believe that blood doping, erythropoietin (EPO)

and its variants, growth hormone, testosterone and designer steroids manipulated to avoid detection are the drugs of choice, and there is a widespread fear that they powered some athletes to glory during the Olympics. The main concern focuses on blood doping, the practice of boosting the body's capacity to transport oxygen by increasing the number of red blood cells. Once thought to be the preserve of endurance athletes such as cyclists, long-distance runners and Nordic skiers, revelations, in this Journal and elsewhere, about the methods used by the sprinters Marion Jones and Dwain Chambers demonstrate that, used in the right way, blood doping can be of benefit to any athlete.

Michael Ashenden, project coordinator for Science and Industry Against Blood Doping, a Brisbane-based organisation that has developed tests to identify blood dopers, is unequivocal about the threat it poses to the integrity of the Games, stating:

***"There is no question that there will be athletes that are using drugs going to Beijing, and no one close to sport should believe otherwise. I don't see any indication that the underlying problem has changed in the four years since Athens, and it may even have got worse."***

(*The Guardian of 31/7/2008, p. S6*)

Mr. Ashenden believes changes in the way athletes exploit EPO mean that no sport can be above suspicion. He added that the authorities used to believe that the main application of EPO was to boost the performance of endurance athletes in competition, but we now know that as early as 2000 Marion Jones was using EPO in training. The fact is that it is used across the board, from the 100m to the marathon and even in team sports. Any sport which operates a credible testing programme finds EPO positives, and those that do not are probably not testing hard enough.

This view is shared by Andy Parkinson, UK Sport's acting director of anti-doping. He states that the classic comment one receives from sports which believe that they do not have a problem is that this is not a drug for their athletes in competition. However, training and recovery are key factors in all sports and EPO can help with that. If an athlete can find a substance that allows them to train to optimum levels and maximise preparation off-season then it gives them an advantage. Parkinson added his opinion there is a chemical for every sport in existence. If a sprinter, for example, takes EPO they can train at a greater intensity, go for longer and get more out of their muscles, then they will benefit.

There are several methods of blood doping, all of them hard to detect. The safest method from the doper's

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point of view is the aforementioned autologous transfusion, whereby an athlete removes blood, stores it for a period of time and then re-introduces it when a boost is needed. EPO, typically produced from cultured animal cells, is detectable in urine for less than a week, but cheats have become more sophisticated in the way they use it. A decade ago they would take large quantities of EPO in the off-season to build up red blood cells, and redose prior to competition. Now there is a growing trend towards micro-dosing, where athletes take small, barely detectable amounts of EPO to maintain levels (*Ibid*).

### DNA doping poses new threat

To intensify the problems faced by anti-doping authorities the world over – and as if to emphasise the doom-laden prediction that the latter were engaging in the pursuit of the uncatchable – a new threat to sporting probity emerged in early August 2008 – wryly coinciding with the final days before the opening of the Beijing Games. This peril apparently consists in an undetectable form of doping which involves the injection of foreign DNA into athletes' bodies. The World Anti-Doping Agency (WADA) were made aware of this process as early as 2003, when they placed it on their list of prohibited drugs and methods, but there persists a fear that its use could become rife as the drug users attempt to remain one step ahead of the testers.

"Gene doping", as this new process is known, involves DNA being injected into muscles or bone cells, and proteins being introduced into tissue or blood cells. Sometimes the DNA can be introduced into the system through inhalation. According to Dr. Andy Miah, a respected researcher with the Institute for Ethics and Emerging Technologies in the US,

"People were starting to talk about this at the Athens Olympics. Many scientists will say it is still not possible, but I am not taking this for granted. We need to assume first that it's happening. London 2012 should be watching Beijing very carefully to see what is possible. There has never been a clean Olympics (*The Daily Telegraph of 6/8/2008, p. S6*).

It is not as yet known whether there were any cases of suspected gene doping at the 2008 Olympics.

### Doping issues and measures – international bodies

#### Tennis doping chief describes new drugs policy as "unworkable"

The new updated anti-doping code recently adopted by the World Anti-Doping Association (WADA) is to enter into effect in January 2009 – and the difficulties appear to have started even before this official commencement date. Thus the man in charge of tackling drug-taking in tennis has warned of "significant problems" as a result of these new rules. The concerns expressed by Stuart Miller, head of the anti-doping division at the International Tennis Federation (ITF), are focused on the "whereabouts" provision contained in WADA's updated code, which states that all athletes must notify testers of their precise location for one hour of every day and update that information every three months. A failure to do so, or to be in their named location on three occasions, will result in a penalty which could include a life ban from the sport (*The Guardian of 18/6/2008, p. 35*).

It is true that a year-round "whereabouts" policy is already in existence in athletics and was the reason why the British 400m runner Christine Ohuruogu was banned from all competition for 12 months in 2006. Ms. Ohuruogu missed three drug tests between October 2005 and July of the following year. However, Mr. Miller believes that the policy is unworkable in tennis because of the peripatetic nature of competitors – they are currently tested out of competition only in the final six weeks of the year – and that this could lead to a surge in bans. He added:

***"Tennis is not like athletics in the sense that those taking part do not map out their training programme and the two or three events they are going to take part in at the start of the year. Tennis players take part in single-elimination competitions and if they get knocked out on day one of an event they'll simply move on to another one, go home or go on holiday. The most important thing from the point of view of the whereabouts provision is that they are not going to be where they said they would be and if you imagine all the players in our pool having to provide us with constantly updated information and us having to keep track of that, it's fair to say there are going to be significant problems going forward. Many players could easily fall foul to a series of missed tests or filing failures quite quickly" (Ibid).***

The Association of Tennis Professionals (ATP) and the World Tennis Association (WTA) have discussed the whereabouts provision with the ITF and, according to Mr. Miller, they too believe it does not fit well with their sport. The players themselves have been notified of the

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updated WADA code and informed that it will be their responsibility to update any changes to their location. Sarah Borwell, Britain's sixth-ranked women's singles player, said she was concerned by the new rule. She pointed out that, as a player, one can be competing in Mexico one day and Vietnam the next, thus making it impossible to tell anyone in advance where exactly one will be for the next three months. It might be easier to track the top players and for them to tell the ITF of their whereabouts because most of them have agents, but it will be difficult for the majority of players on the tours. She concluded that in the long term she did not see this policy working, and that it would give rise to many problems.

Of the 2,028 drugs tests carried out by the ITF in 2007 only eight produced a positive result and of the 10 players who are currently banned for a drugs violation, none have sentences longer than two years, the most high-profile being Martina Hingis, who, as has been reported extensively in previous issues of this Journal, tested positive for cocaine at Wimbledon last year and is excluded from competition until October next year (*Ibid*).

### Doping at the Beijing Olympics

As might have been expected, the Beijing Games witnessed the largest anti-doping operation ever mounted at a sporting event. Over a period of six months, the International Olympic Committee (IOC), the World Anti-Doping Agency (WADA) and the Beijing Organising Committee developed a plan which saw 1,000 officials collect 4,500 samples of blood and urine, which was then transported under guard to laboratories – in armoured cars usually pressed into service in order to carry money to Beijing's banks. This was, then, anti-doping on a military scale, a multi-million dollar operation intended to absorb the cynicism experienced by the global Olympic audience – not to mention its corrupt partners – and to demonstrate that the IOC was doing everything in its power to eradicate the scourge of doping.

It must be admitted that the IOC appeared to be quite realistic in its expectations in this regard, with its President, Jacques Rogge, predicting as many as 40 positive tests at Beijing. However, the deep-seated concern in the anti-doping community was that, for all the testing and other precautions, medals would continue to be carried off by cheats. For reasons adumbrated in the previous two sections under this general heading, there was a feeling that the dopers gathered in the Chinese capital still had the dice loaded

in their favour, and that anyone who was caught could count themselves either stupid or unlucky, given that the sophistication achieved by the doping fraternity had changed the rules of engagement between the athlete and the sporting authorities. It is true that the threat of random testing remains an essential deterrent for opportunists and a last line of defence against determined abusers. However, two decades after the proverbial cover exploded in Seoul with the Ben Johnson scandal, the dopers have been setting a pace which has exposed the limitations of the test-tube approach (*The Guardian of 1/8/2008, p. S8*).

The background to the official start of the Games was hardly auspicious in this respect. The hosts of this year's Games were badly embarrassed when, in late June 2008, China's top backstroke swimmer, Ouyang Kunpeng, was banned for life after testing positive for the anabolic steroid clenbuterol. Mr. Ouyang, who was the winner of four silver medals at the 2006 Asian Games, was his country's best hope for a medal in the Olympic backstroke event. His coach, Feng Shangbao, was also banned for life (*The Guardian of 28/6/2008, p. S13*). It must be conceded that there was at least a remote possibility that the Chinese athlete had unknowingly ingested the substance in question. The drug concerned is widely used in China's pig farms and can enter the food chain. In 2006, 336 residents of Shanghai suffered food poisoning by pork tainted with the weight-loss steroid, popular amongst body-builders. In fact, as a result of this incident, officials of the British Olympic Association (BOA) expressed concern that athletes who were to eat out in Beijing's restaurants might unwittingly ingest banned drugs along with their food (*The Daily Telegraph of 28/6/2008, p. S22*).

More bad news was forthcoming when Bulgaria withdrew their entire weightlifting team from the Olympics after 11 members of the squad tested positive at a training camp (*The Guardian of 28/6/2008, loc. cit.*). It was also revealed that a Jamaican athlete had tested positive for a banned substance which had arisen from Jamaica's national athletics trials held at the end of June (*The Daily Telegraph of 29/7/2008, p. S14*). With only two weeks to go before the official opening, Jessica Hardy, who was due to compete in the 100 metres breaststroke event and the 50 metres freestyle, tested positive for the same stimulant as had done for the Chinese swimmers, i.e. clenbuterol, following her second doping test at the US Olympic Trials in early July. Once again, the athlete concerned vigorously protested her innocence (*Daily Express of 26/7/2008, p. 94*). Barely a few days later, five Russians and two Romanians were provisionally excluded from the Games as a result of one

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of the most sizeable one-day purges in living memory. Some commentators described the Russian case as potentially the greatest doping scandal since the BALCO affair; however, there was also a suspicion that the International Association of Athletics Federations (IAAF), the world governing body in athletics, had announced these cases in the hope that they might be forgotten by the time the athletics events took off in Beijing on 15 August (*Daily Mail of 1/8/2008, p. 96*).

The Russians suspended as a result of the operation included Yelena Soboleva, the world leader of the 800 and 1500 metre events, her close rival Yulia Fomenko, and Tatyana Tomashova, who was the world champion over 1500 metres in 2003 and 2005. The others who had been removed from the team were discus thrower Darya Pishchalnikova, runner-up in last year's world championships, and hammer thrower Gulfiya Khanafeyeva, a former world record holder. They were caught, along with two more Russian athletes who did not make the Olympic team, in a "sting" operation which discovered that they were using other people's urine when giving samples to the testers. All have been charged with "fraudulent substitution of urine" following DNA analysis. As for the two Romanians, the blood samples provided by them revealed suspiciously high concentrations of haemoglobin, which was a possible sign that they were using the EPO drug. In addition, a total of 14 prospective Olympic competitors dropped out of the Greek team because of doping-related issues, and two Israelis and an Italian cyclist had also failed doping tests (*Ibid*). With barely a few days to go before the opening, two Russian walkers were also ejected from the Olympics after failing doping tests – Vladimir Kanaikin and Velry Borchin having tested positive for EPO in out-of-competition tests carried out in April (*The Guardian of 6/8/2008, p. S6*).

There was also controversy when it was learned that the sprinter Katerina Thanou was selected for the Greek team. Ms. Thanou, it will be recalled, was banned for doping offences at the 2004 Olympics in Athens. Although her two-year ban which she subsequently incurred expired in 2006, she and her fellow-doping offender Kostas Kenteris still face criminal charges arising from this affair (*The Daily Telegraph of 24/7/2008, p. B19*). In addition, the IOC had warned her that she would face a disciplinary review to examine her eligibility for this year's Games if she were to be named in the squad. Her lawyer stated that the IOC needed to provide "compelling justification" for reopening the case. In the same year as that in which she and Kenteris were banned, the IOC said that, since the two athletes had surrendered their accreditations voluntarily

when withdrawing from the Athens tournament, their case was closed; however, they reserved the right to review their eligibility for future Games (*The Daily Telegraph of 27/9/2008, loc. cit*). What made the situation all the more bizarre was that, at the same time as threatening to ban Thanou, the IOC were preparing to award the gold medal which was taken away from Marion Jones for her doping offence at the 2000 Olympics to none other than Ms. Thanou, spurred by legal action threatened by the latter's lawyer, Gregory Ioannides (*The Observer of 3/8/2008, p. S16*).

Against the background of these predictions of doping doom and gloom – and bearing in mind the caveat that some guilty parties may have slipped through the net because of the sophistication of the drugs and/or methods used – it has to be admitted that the Games did not entirely fulfil the apocalyptic scenario which had been predicted by many. The Games started off well in this respect with the news that, with one exception, no positives had been found in the more than 600 tests conducted by Olympic officials during the two-week run-up to the Games. IOC medical director Patrick Schamasch announced that around 650 urine and blood tests had been carried out in China and abroad, including the Village in Beijing and at training sites in Singapore (*The Guardian of 8/8/2008, p. S7*). The exception proved to be Maria Moreno, who was expelled from the Games following a positive EPO test conducted in the Village on 31 July (*The Guardian of 12/8/2008, p. S6*). This success was perhaps a tribute not only to the massive testing programme itself, but also to the fact that China's State Food and Drug Administration kept a close watch on the sale of performance-enhancing drugs during the period leading into the Olympics. Inspectors conducted checks on various pharmaceutical companies in the Chinese capital and in Qingdao (*The Daily Telegraph of 5/9/2008, p. S11*).

Naturally, the Games did not pass off entirely without doping-related controversy. Thus a North Korean shooter was stripped of his two medals and expelled, along with a Vietnamese gymnast and a Bulgarian 1500 runner, for failing doping tests. The IOC announced that shooter Kim Jong Su tested positive for the banned betablocker propranolol after winning the silver medal in the 50-metre pistol and bronze in the 10-metre air pistol events. The gymnast Thi Ngan Thuong Do tested positive for the diuretic furosemide. In addition, the Bulgarian Daniela Yordanova was expelled after testing positive for testosterone (*The Guardian of 16/8/2008, p. S2*). It also later emerged that the silver and bronze medallists in the men's hammer throwing event had tested positive for traces of testosterone following the

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final which took place on 17 August (*Daily Mail of 5/9/2008, p. 87*). Moreover, the Greek sprinter Fani Halkia, the shock winner of the 400 hurdles event in Athens four years earlier, had tested positive for a banned substance and would not therefore be defending her title (*The Daily Telegraph of 18/8/2008, p. S10*) and Ukrainian weightlifter Igor Razoronov tested positive for nandrolone (*The Observer of 24/8/2008, p. S5*). However, there was more to come since it was expected that some of the results would only be announced some considerable time after the Games had finished – for reasons which the present author certainly finds quite baffling (if one discounts the cynical side to his nature which suspects that the bad news on positive doping tests are capable of being “news-managed” so as to lessen the impact).

First of all, it was learned, more than a month after the Olympics had finished, that doping samples taken during the Games were to be retested after a banned substance had been detected through a new method following the 2008 Tour de France (see below, p. 111). This was related to the emergence of CERA, the variant of EPO discussed earlier under this heading (see above, p. 104), for which the riders Stefan Schumacher, Riccardo Ricco and Leonardo Piepoli had tested positive. The announcement was made by IOC spokeswoman Emmanuelle Moreau, who said:

**“All samples are currently being repatriated to the WADA-accredited laboratory in lausanne where Olympic samples are usually stored after the games. The details of the retesting procedure are currently being discussed with WADA”**  
(*The Guardian of 9/10/2008, p. S8*).

However laudable an attempt this may have been to keep the fight against doping in line with the latest technological developments, controversy once again raised its head with the “case of the missing data”, which came to light after a team of independent experts sent to the Games to oversee drug-testing procedures on behalf of WADA issued a 50-page report on their findings. The document in question reported the loss of around 300 test results – even though the IOC later issued the reassurance that this loss was “only temporary”. However, the report also highlighted the “relatively low” number of athletes tested for EPO and the failure of almost half of the national Olympic committees to supply information as to the whereabouts of their athletes for out-of-competition testing. Another disclosure was that the Ukrainian heptathlete Lyudmilla Blonska blamed the positive test she had returned for the anabolic steroid methyltestosterone on her husband and coach (*The Independent of 17/10/2008, p. 64*).

The day after the findings of this report were known, the IOC continued to explain away the missing 300 results, insisting that the paperwork for all 4,770 tests had been “reconciled” and that there were no new positive tests to add to the six which were identified during the Games (see above). The full batch was loaded onto an aeroplane in Beijing in mid-October and arrived in Lausanne the next day. An IOC spokesman added:

**“Regarding the 300 “missing tests” it is our understanding that there has been a communication problem between the Beijing laboratory and the independent observer team on the results of a number of tests. The results of these tests were communicated to the IOC by the end of August. All were negative. The results have now been transmittted to the independent observer team”**  
(*The Daily Telegraph of 18/10/2008, p. S17*).

Since then, there has been no further news about these missing data. It has also emerged during the intervening period that the US were stripped of their fourth place finish in the dressage event after it was found that Courtney King’s horse, Mythilus, had tested positive for felbinac, a medication used as an anti-inflammatory pain reliever. Ms. King also lost her 13th place in the individual dressage event and received a one-month ban, which she had already served having been suspended during the Beijing Games (*The Guardian of 23/9/2008, p. S2*). In addition, Irish equestrian Denis Lynch was disqualified from the Beijing olympics because his horse had tested positive for a banned pain reliever (*Associated Press, www.findlaw.com of 17/10/2009*).

### Doping issues and measures – individual countries

#### Graham convicted and banned – does this mean “closure” on BALCO?

The long-running saga of the Bay Area Laboratory Co-operative (BALCO) scandal has been aired in these columns with sufficient frequency to warrant yet another summary of its unseemly history. Suffice it to say that the main “villain of the piece, Victor Conte, was convicted and imprisoned for his part in the affair, and that several athletes have had their reputations tarnished by their association with it. However, there remained one figure whose fate had yet to be definitively decided, i.e. that of Trevor Graham, who once had the reputation of being the world’s leading sprint coach, having worked with Marion Jones, Tim Montgomery and Justin Gatlin, all of whom have subsequently admitted to taking drugs or failed tests. The long-

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awaited trial of the Jamaican-born coach took place in May 2008. Mr. Graham himself had done much to trigger the investigation which uncovered the scandal, when in 2003 he sent, anonymously, a syringe containing a small amount of the then-unknown steroid THG to the drug-testing laboratory at the University of California, alerting the authorities to its existence. Subsequently, many of the athletes coached by Graham have informed the US Government how he instructed them to obtain banned drugs from the prosecution's star witness, Angel Heredia, a former discus thrower from Texas who alleges that for many years he was Graham's "steroid connection" (*The Observer of 18/5/2008, p. S23*).

The charge formally levied against Mr. Graham was that he lied during the BALCO inquiry when he alleged that he had never supplied banned substances to his athletes. In attempting to prove the accused's mendacity, the prosecution called Mr. Heredia to the witness box. However, Graham's defence team attempted to discredit Heredia's reliability as a state witness by claiming that he continued to make a living out of distributing prohibited drugs (*The Sunday Telegraph of 18/5/2008, p. S14*). At the conclusion of the trial, however, Graham was found guilty on one count of lying to investigators, the jurors being unable to reach a verdict on two other counts (*The Independent of 30/5/2008, p. 59*). The jurors convicted him on the charge which related to telephone communications, after the prosecution produced records which showed more than 100 calls between the Graham and heredia between 1998 and 2000. Five of Graham's former athletes also took the stand and admitted they took performance-enhancing drugs on Graham's advice (*The Daily Telegraph of 30/5/2008, p. B21*). At the time of writing, it was not yet known what penalty the court would impose on the former coach. What is known, however, is that Graham was later banned for life from athletics for violation of anti-doping rules (*The Daily Telegraph of 16/7/2008, p. S15*).

It is to be hoped that the verdict closes this sordid chapter in the history of athletics once and for all – although there can be no guarantee of this.

### Doping issues and measures – Athletics

#### **Gatlin unsuccessful in CAS appeal and injunction application (US)**

It will be recalled that this promising US athlete tested positive for testosterone in 2006, as a result of which he was banned for eight years by the US Anti-Doping Agency (USADA) as this was deemed to have been a second offence. This ban was later halved as a result of an arbitration hearing. However, Mr. Gatlin appealed to the Court of Arbitration for Sport (CAS) in the hope of reducing the ban even further and thus becoming eligible for consideration for the Beijing Olympics. He argued that his first offence should not have been considered, since he had stested positive as a junior in 2001 for a drug which was part of his medication for attention deficit disorder. At that time, the International Association of Athletics Federations (IAAF), the world governing body in the sport, accepted a plea of mitigating circumstances and allowed him to return to competition. However, they challenged Gatlin's arguments before the CAS on the grounds that their leniency was accompanied by a public warning that a second doping infringement would bring a lifetime ban (*The Daily Telegraph of 6/6/2008, p. S13*).

Mr. Gatlin's appeal to the CAS turned out to be unsuccessful. He then turned to the ordinary courts for an injunction against his exclusion from the US Olympic Trials (*The Independent of 23/6/2008, p. 57*). However, the judge, Lacey Collier, dissolved a 10-day restraining order which would have allowed Gatlin to take part in the trials (*The Daily Telegraph of 25/6/2008, p. S7*).

#### **Jones completes six-month jail sentence (US)**

It will be recalled from a previous issue of this Journal (*[2007] 2 Sport and the Law Journal p. 67*) that Marion Jones, once regarded as one of the greatest athletes of her generation, was sentenced to a six-month term of imprisonment on two charges of perjury concerning her use of drugs. Once she had begun her jail sentence, Ms. Jones thre herself at the mercy of the US president, George W Bush, pleading for early release (*The Daily Telegraph of 22/6/2008, p. S19*). However, the most powerful figure in US athletics, Douglas Logan of USA Track & Field, pleaded with the President not to accede to her request on the grounds that it would send a "horrible message" ro the young people who idolised her (*The Times of 23/7/2008, p. 64*).

The President ultimately heeded Mr. Logan's advice and refused to commute the sentence. Ms. Jones

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completed her term of imprisonment in September 2008 and vowed "never to run again" (*The Guardian of 30/10/2008, p. S2*).

### Doping issues and measures – Cycling

#### Tour de France scandals continue

This year it was definitely going to be different – but then the same litany has been repeated ad nauseam ever since the first major doping scandal disrupted this most venerated of multi-stage road races ten years ago. Since last year's fiasco, which saw the banning of various top riders including Vinokourov, Rasmussen, Moreni and Sinkewitz, renewed attempts were made for this year's race to ensure that the event was as doping-free as possible. This year, the drug-testing was carried out not by the world governing body in cycling, the UCI, but by the French Anti-Doping Agency (AFLD). Changes in the testing routine were devised in order to keep the riders guessing, which is why, towards the final stages of the race, there was a surprise late-night visit to the hotel of the yellow jersey wearer, Frank Schleck, by the Italian Olympic Committee (CONI). The principle that to be forewarned is to be forearmed seems to have applied here, and it was welcomed by several leading figures, including Bob Stapleton and Jonathan Vaughters of the Garmin team. In addition, there was the famous new test aimed at identifying "autologous transfusions" (i.e. the removal and reinjection of the athlete's own blood) which was previously undetectable. There was also the introduction of the test aimed at detecting the third-generation blood booster CERA, which has already been highlighted above.

However, these precautions were unable to prevent a fresh round of doping cases. Even before the race started, it was announced that Tom Boonen, the former world champion, would not be competing in this year's event after traces of cocaine were found in a urine sample (*The Guardian of 12/6/2008, p. S2*). The race itself was barely one week old when a urine sample taken after Stage One from the Spanish rider Manuel Beltran was found to have contained EPO – a result which was then confirmed by the AFLD. He was led from his hotel in handcuffs and removed from the race (*The Guardian of 12/7/2008, p. S3*). Several days later, Moises Duenas Nevado, sitting 19th in the general classification, became the second Spaniard to test positive and be expelled from the race. Police later searched his hotel room and found several banned substances (*The Guardian of 17/7/2008, p. S8*). Shortly

before the start of the 12th stage, the arrival of two police officers confirmed suspicions that Riccardo Ricco, the Italian who had already appeared to win two stages in the race, had tested positive after having the new CERA test applied to him. As he was taken away for questioning, his seven Saunier Duval team mates were withdrawn from the race (*The Guardian of 18/7/2008, p. S10*). Mr. Ricco later admitted having taken the substance, and was facing a two-year ban and possible police prosecution in France at the time of writing (*The Guardian of 31/7/2008*).

However, there was more to come, in that several test results only became known after the race was over – in some cases inexplicably so. Two weeks after the Tour finished it was learned that Emanuele Sella, a triple stage winner in the Giro d'Italia, had tested positive for CERA (*The Guardian of 6/8/2008, p. S10*). He later admitted to an anti-doping panel that he had used the drug (*Daily Mail of 9/8/2008, p. 101*). Two months later, it emerged that German rider Stefan Schumacher and Italian competitor Leonardo Piepoli had also been caught under the new CERA test. The latter was subsequently banned for 20 months (*The Daily Telegraph of 7/10/2008, p. S19*). A few days later, it was learned that Austrian mountains specialist Bernhard Kohl had also failed the CERA test (*The Guardian of 14/10/2008, p. S10*).

Although these cases were heartening in the sense that they highlighted the success of the new testing arrangements, they also struck the dismal note of despondency in that so many riders were still prepared to flout the rules in this manner, and the near-certainty that more had slipped through the net. This prompted Thomas Bach, the Vice-President of the International Olympic Committee (IOC), to predict that these scandals could threaten the future of cycling as an Olympic sport. Even though Pat McQuaid, the president of the world governing body in the sport, slated this suggestion as "completely unacceptable" (*The Guardian of 8/10/2008, p. S2*) Mr. Bach cannot be the only sporting administrator to think along those lines about a sport which has been given more "fresh starts" than any other in removing this blight from its ranks. Even Mr. McQuaid's announcement that, as from next season, cyclists will face four-year bans if found guilty of serious doping offences (*Daily Mail of 16/10/2008*) may not be sufficient to counter this trend.

## 15. Drugs legislation & related issues

### The Bastianelli affair (Italy)

Unfortunately the Tour has not been the only forum on which major doping scandals have been played out. No sooner had the news about Riccardo Ricci's positive test become known (see above), than Italian cycling received its second body blow of the summer with the announcement that the women's world road race champion, Marta Bastianelli, had tested positive for the banned drug flenfluramine, which is an appetite suppressant used in slimming products. The Italian cycling federation said the substance had been found in a urine sample taken after Bastianelli finished third in the European Under-23 road race championships on July 5 in Verbania, Italy. She was subsequently dropped from Italy's team for the women's road race in Beijing. "She has committed an incredible act of naivety," said the Italian federation's president, Renato di Rocco. "She tested positive for flenfluramine, a dieting product. She's obsessed with her weight. She eats only salad."

Bastianelli insisted she was innocent and blamed her local pharmacist, declaring:

***"I am disgusted with my trusted chemist for preparing a mix of herbs aimed at weight loss. Like always I wanted to read the list of products used and amongst them was benfluorex, which doesn't figure among the list of banned substances. However, laboratory analysis demonstrated that this product contains the ingredient responsible for my positive test. But how could I know that?"***

*(The Guardian of 29/7/2008, p. S7)*

The Italian rider was subsequently banned for one year by the Italian Olympic Committee in October 2008 (*Associated Press, www.findlaw.com of 15/10/2008*)

### Armstrong refuses retesting of 1999 samples (US)

One of the longest-running doping sagas in cycling which has never resulted in any specific charge being laid – let alone penalties being imposed – is the suspicion which has surrounded the seven-times Tour de France winner Lance Armstrong. The sheer magnitude of his achievement has attracted covert and open accusations that he did not manage this feat without the assistance of unlawful substances. These are rumours and innuendo which Mr. Armstrong has always strongly denied, at times even going to law in an effort to scotch this calumny, as can be seen from previous issues of this Journal. This in 2005, within weeks of Mr. Armstrong's record-breaking seventh tour win, the French sports newspaper L'Equipe reported that retesting had indicated the presence of synthetic

EPO in urine samples issuing from the American. A Dutch lawyer appointed by the world governing body UCI later cleared Mr. Armstrong (*[2006] Sport and the Law Journal p. 71*).

The issue seemed to have been passed into history when, in September 2008, Mr. Armstrong announced that he was returning to top-level competition in his sport. This prompted Pierre Bordry, the head of the French anti-doping agency, to express the desire that this return should "take place in the best circumstances" which is why he proposed a new analysis of the six urine samples which he provided on the occasion of his first Tour win, in 1999 (*The Guardian of 2/10/2008, p. S2*). However, the Texan responded negatively to this invitation, saying:

***"There is simply nothing that I can agree to that would provide any relevant evidence about 1999. The samples taken (...) have not been maintained properly, have been compromised in many ways, and even three years ago could not be tested to provide any meaningful results"***  
*(The Guardian of 3/10/2008, p. S6).*

Mr. Bordry expressed his regret at this development, informing the BBC that the rider's refusal amounted to a missed opportunity. Mr. Armstrong for his part continued to maintain that any evidence obtained by the Chatenay-Malabry laboratory in its original retesting of the 1999 samples was flawed. He reminded us that two years previously, he agreed to have all these issues aired at and decided by the Court of Arbitration for Sport (CAS), but that the French ministry refused (*Ibid*). However, Mr. Armstrong has in the meantime put himself forward for future drug-testing – renewing speculation that he would compete in the 2009 Tour de France (*Daily Mail of 10/9/2008, p. 73*).

### Other cases (all months quoted refer to 2008 unless stated otherwise)

**Michael Rasmussen.** In early July, the Danish rider was banned for two years by the Monaco Cycling Federation after being expelled from last year's Tour de France. He had been dismissed by his Rabobank team while leading the Tour four days from the finish after it was discovered that he had lied about his whereabouts in training. The International Cycling Union (UCI) had called upon the Monaco federation, which licences the cyclist, to discipline him (*The Guardian of 2/7/2008, p. S10*). Nevertheless, the very next day a Netherlands court ordered Rabobank to pay him £530,000 in compensation for wrongful dismissal (*The Daily Telegraph of 3/7/2008, p. S19*).

## 15. Drugs legislation & related issues

**Floyd Landis.** After almost two years, the US rider's battle to retain his 2006 Tour de France win came to an end when the Court of Arbitration for Sport (CAS) dismissed his appeal against a positive test for testosterone, and ruled that he should contribute \$100,000 towards the legal fees of the US Anti-Doping Agency (*The Guardian of 1/7/2008, p. S10*).

**Jan Ullrich.** The former Tour de France winner won a court ruling for repayment of outstanding salary after testifying that he never took performance-enhancing drugs when riding for the Coast team at the start of 2003 (*Associated Press, www.findlaw.com of 12/11/2008*).

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### Doping issues and measures – Equestrian Sports

#### **Trainer remark exposes extensive doping in US racing**

It is remarkable that, for a sport where stamina is all-important, and where the recipient of any illegal substances is unable to betray the secret, the sport of racing has hitherto been spared major doping scandals. However, all this looks set to change, at least across the Atlantic, in the wake of a series of revelations which may have serious repercussions for its future.

It has emerged that many top performers in the sport have been abusing drugs to keep their horses on the road, either within the rules or not. Like "mother's little helper" – the gin bottle – steroids have kept the betting turn-stiles ticking over. Instead of horses having a break when they needed it, they have had a shot from the vet and have been pushed back out on to the track. This seems to have become an institutional abuse on a large

scale. Ironically, it has been the "honest" brashness of the Kentucky Derby-winning trainer Rick Dutrow that has gone a long way towards blowing the lid off racing across the pond (*The Daily Telegraph of 7/7/2008, p. S28*).

Mr. Dutrow blurted out the truth when he said "Well, sure, all my horses get steroids on the 15th of each month" in May 2008. However, the problem is that nobody really knows the true extent of the problem – because of Lasix. This drug, which is legal in most of North America, is a diuretic that is believed to prevent bleeding in horses' lungs during racing. However, it is believed that it is also an effective masking agent for other performance-enhancing drugs. And by some strange coincidence practically every horse in training in the US "needs" Lasix to stop it bleeding!

Now that the entire façade of American racing has collapsed, the politicians have been mobilised and the sport will need to be cleaned up – which is, however, easier said than done. When the authorities eventually get round to banning Lasix, there will be many jockeys coming in from races sprayed with blood, which will not play well with the general public. Also, generations of horses who would have been "bleeders" but for Lasix have won races and been retired to stud, which will produce effects for several generations of horses to come (*Ibid*).

A few months later, it was learned that several states instituted restrictions on the use of steroids for racehorses. First off the mark were Kentucky and Maryland, then New York followed (*Associated Press, www.findlaw.com of 14/10/2008*).

## 16. Family Law

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[None]

# 17. Issues specific to individual sports

## Football

### Referee Webb backed by UEFA after controversial Euro 2008 penalty

Football arouses strong passions in many countries, particularly when the national team are involved, and the political leaders of these nations are not immune from being caught up in this fervour. However, it appears that the Polish public and politicians took this phenomenon to unprecedented extremes during the Euro 2008 tournament, when English referee Howard Webb awarded a penalty enabling hosts Austria to snatch a draw against Poland. The events that caused Mr. Webb's decision seemed quite straightforward, in that Mariusz Lewandowski had clearly held Sebastian Podl in the penalty area. However, by some strange convention it appears that referees are supposed to exercise extreme tolerance to this kind of incident when it results from a set piece. Be that as it may, the reaction by the Polish public, who branded Mr. Webb as "public enemy No 1" seemed a trifle exaggerated – but not quite as much as the statement by the Polish Sports Minister who described Mr. Webb as "a fraud" or the bizarre utterances of the Prime Minister, Donald Tusk, who said he wanted to "kill" the South Yorkshire policeman (*The Independent of 13/6/2008, p. 79*).

The European governing body, UEFA, staunchly stood by Mr. Webb. In a statement, Director of Communications William Galliard said:

**"We don't think it is controversial that a player is pulled down by the shirt and a penalty is given. You saw that the free kick was taken twice, that there was a lot of wrestling in the area. It may be that he (Webb) could see this particular foul was worse than the rest of the game." (Ibid).**

However, there was speculation that, in spite of the official backing given to the referee by UEFA, some tacit censure of his decision might take the form of omitting Mr. Webb from any further participation in the tournament. In the event, this was not to be, and the English referee duly officiated in the Spain v Greece match the following week.

### FIFA suspends ban on high-altitude football

Football's governing body, Fifa, has suspended a ban on international matches at high altitude after protests from Andean nations that thin air is nothing to fear. The organisation's executive committee voted in late May 2008 to "take a raincheck" on the controversial ban, allowing Bolivia to host World Cup qualifying games in La Paz, its extremely high-altitude capital. The decision

represented a victory for Evo Morales, Bolivia's president, who had enlisted the support of former Argentinian star Diego Maradona in a campaign against what he (somewhat melodramatically) described as "football apartheid". Sepp Blatter, the FIFA president, said the prohibition had been provisionally lifted while further studies were conducted on the effect of high altitude as well extreme heat, cold and humidity (*The Guardian of 29/5/2008, p. 7*).

The world governing body had introduced a ban on international matches at more than 2,750 metres above sea level the previous year, citing concerns about players' health and the "unfair" advantage to acclimatised home teams. Footballers were allowed to play above this altitude only if they had one week to acclimatise, rising to 15 days for games above 3,000 metres, restrictions which would have prevented many matches in the Andes, the roof of the Americas. The ruling followed complaints by Brazil and other influential members that La Paz and other Andean venues left visiting players gasping for breath and with pounding hearts. A Brazilian club, Flamengo, vowed to boycott high-altitude games after a match at 3,800 metres against Bolivia's Real Potosi left some team members needing oxygen bottles.

Bolivia, which was most affected by the ruling, rallied high-altitude neighbours Ecuador and Peru and much of South America to defend what it called the "universality" of football. Mr. Maradona played an hour-long game at Hernando Siles stadium in La Paz, which is 3,600 metres above sea level, to show that if a 47-year-old could play there, so could fit young professionals. President Morales, a passionate footballer who when not ruling Bolivia can be seen playing for Litoral, an amateur second division team, joined Maradona in the game, as well as playing in an even higher match, at 5,270 metres (*Ibid*).

### Euro 2016 finals to feature 24 teams

In late September 2008, the European governing body UEFA ensured that qualification for the European Championships will in future be easier for smaller nations by agreeing to expand the competition from its present 16 teams to 24 by 2016. Under the new format, 24 teams will be divided into six groups, with the four best third-placed squads joining the two top-ranked teams from each group in the knock-out stage. However, not everyone agreed with this move. Graham Taylor, the former England coach, commented that it would "increase quantity without quality" as well as devaluing the early rounds (*The Daily Telegraph of 26/9/2008, p. B21*).

## 17. Issues specific to individual sports

### Court fines Austrian football fans over misuse of national coat of arms

Petitioners who urged hosts Austria to withdraw from Euro 2008 after some poor performances have been fined for misuse of the national coat of arms. Michael Kriess, the son of the former Austria international Werner and a coordinator of the campaign, which attracted 10,000 signatures, reported that a court in Innsbruck had fined him 1,500 (1,200) for damage to the country's reputation and standing (*The Independent of 22/5/2008, p. 58*).

The black Austrian eagle with a golden crown appears on the website of the online petition ([www.rueckgrat.cc](http://www.rueckgrat.cc)) with a football obscuring its head. Mr. Kriess said he would challenge the fine in court in June. "I am not worried about the Austrian team embarrassing themselves. I'm fully expecting it," he said of the tournament, where Austria were paired in Group B with Germany, Croatia and Poland. According to petitioners, fans fell into a dismal state of depression during a nine-match winless run last year and wished to hand their place to the best of the teams who failed to qualify for the tournament (*Ibid*).

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## Cricket

### Bangladesh spinner faces tests on bowling action

In mid-November 2008, it was learned that the Bangladesh spinner, Abdur Razzak, was to fly to Australia in order to have his bowling action analysed, according to an announcement made by the Bangladesh Cricket Board. The bowler's action had been reported as suspect during the series against New Zealand the previous month. Mr. Razzak's action will be analysed by Marc Portusa, a member of the International Cricket Council panel of human movement specialists at the Australian Institute of Sport (*The Guardian of 12/11/2008, p. S2*). The results of these tests were not yet known at the time of writing.

### MCC call upon ICC to reinstate England Test victory in controversial 2006 Pakistan fixture

It will be recalled that, in August 2006, the Third Test between England and Pakistan came to an abrupt because of a controversial umpiring decision. Initially, the match was awarded to England since Imziam-ul-Haq's team refused to take the field again after being docked five runs after being accused of ball-tampering by umpire Darrell Hair. However, the Executive Board of

the International Cricket Council subsequently altered the result to a draw. In recent months, the Marylebone Cricket Club (MCC) has called for the reinstatement of the original result. According to the MCC Chairman, the former England batsman Tony Lewis, the decision was "wrong and sets a very dangerous precedent". In a statement released later, the MMC explained that the ICC had "no power, under the Laws of Cricket, to decide that results should be altered" regardless of whether it felt them to be "inappropriate" or otherwise (*The Independent of 25/10/2008, p. S12*).

### ECB challenged over ban on ICL rebels

The Indian Cricket League is a recent development whereby the Twenty20 formula is applied to a competition involving sides representing Indian cities. The lure of the sizeable prize money on offer has attracted many players from the leading cricketing nations – including England. The England and Wales Cricket Board (ECB) which controls the game in this country, has opposed participation by the players under its control. In late September 2008 it appeared that the ECB was heading for another legal showdown with the newly-formed League. The breakaway competition received an unexpected boost when the Sri Lankan board agreed to lift the ban preventing players who have appeared in it – including former captain Marvan Atapattu – from participating in domestic cricket. Now the ICL looks poised to step up its campaign for acceptance around the rest of the cricket world. Legal actions are expected over the next month against both the International Cricket Council – who are still refusing to award the ICL the same "authorised unofficial" status enjoyed by the Stanford 20/20 for 20 – and the ECB. According to ICL lawyer Jeremy Roberts:

**"Our clients still want to coexist peacefully with the Indian Premier League, and they want to work with the national boards. They are hoping to receive a response from the ICC over the next week or so. If that doesn't materialise, they will be considering their options closely."**

(*The Daily Telegraph of 23/9/2008, p. S18*)

The ECB had already lost one legal hearing on this issue, having attempted to refuse county registrations to five ICL players in April. Three of those – Justin Kemp, Andrew Hall and Johan van der Wath – appealed against the ruling, and had it overturned on the grounds that the players had signed their ICL contracts in late 2007, before the cricket establishment had made its opposition clear. Next year, the ECB will again try to carry out a similar procedure, although this time they intend to block anyone who has signed his ICL contract since the beginning of the 2008 season. Once again, though, the

## 17. Issues specific to individual sports

lawyers are preparing to challenge the authorities.

It is anticipated that a number of former internationals retiring at the end of this season will be joining the ICL. Former England batsman Graeme Hick has already said that the competition represents “an opportunity that may open up”. Among active players, the likes of Mark Ramprakash, Mark Ealham and Robert Croft have been identified as targets. Mr. Roberts added that “as currently drafted”, the ECB Player Regulations constituted a strong disincentive to recruitment and went against the principle of freedom of trade. (*Ibid*).

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### Athletics

#### **“Blade Runner” Pistorius wins court battle over Olympic participation – but fails to qualify**

Oscar Pistorius is a South African athlete who runs in various races – not only in disabled events but also in those intended for able-bodied contestants. He was born without fibula bones and had the lower part of his legs amputated when he was 11 months old. He was recently banned from the latter events by the International Association of Athletics Federations (IAAF) on the grounds that the “Cheetah” prosthesis which he wears gave him an unfair advantage. However, Mr. Pistorius underwent tests at the Massachusetts Institute of Technology (MIT) where the findings indicated that the implements in question did not give him an extra edge over able-bodied rivals. Accordingly, he applied to the Court of Arbitration for Sport (CAS) for a reversal of this decision.

In mid-May 2008, it emerged that he had won his legal battle before the Court (*The Observer of 18/5/2008, p. S26*). The IAAF immediately declared that it backed the decision. However, the news that he had won his battle was not universally welcomed by all. The distinguished “Paralympian”, Dame Tanni Grey-Thomson commented:

***“For Oscar, it is huge and I can understand why he is doing it. He will be the first Paralympian who is truly known worldwide and the movement will benefit from this. But the argument goes much deeper than Oscar. What happens is that, if he runs at the Olympics, they will have to take this event out of the Paralympics because I would not want the Paralympics race to become the “B” event or the “B” final.”***  
(*The Guardian of 17/5/2008, p. 31*).

At all events, the entire saga ended in something of an anti-climax, since Mr. Pistorius later failed to make the qualifying time for the Beijing Olympics and therefore did not compete (*The Daily Telegraph of 3/7/2008, p. S8*).

# Sport and the Law Journal Reports



## Sport and the Law Journal Reports

**(2008) SLJR 1**

POPPELTON V TRUSTEES OF THE  
PORTSMOUTH YOUTH ACTIVITIES  
COMMITTEE

**Contributory negligence – Duty to warn – Falls from height – Occupiers' liability – Paralysis; Risk – Supervision**

**(2008) SLJR 2**

GRAVIL V (1) CARROLL (2) REDRUTH RUGBY  
CLUB LIMITED

**Rugby – Trespass to the person – Vicarious liability**

**(2008) SLJR 3**

CHIEF CONSTABLE OF GREATER  
MANCHESTER V WIGAN ATHLETIC AFC LTD

**Football matches – Payment – Restitution – Special police services**

**(2008) SLJR 4**

CHAMBERS V BRITISH OLYMPIC  
ASSOCIATION

**Drugs – Interim relief – Interlocutory proceedings – Olympic Games – Sportspersons**

**(2008) SLJR 5**

SHEFFIELD UNITED FOOTBALL CLUB LIMITED  
V WEST HAM UNITED FOOTBALL CLUB PLC

**Arbitration – Interim Injunction – FA Rules – Rule K – jurisdiction of CAS**

**(2008) SLJR 3**

**Football matches; Payment; Restitution; Special police services**

CHIEF CONSTABLE OF GREATER  
MANCHESTER V WIGAN ATHLETIC AFC LTD

*Court of Appeal (Civil Division) Sir Andrew Morritt (Chancellor); Smith, L.J.; Maurice Kay, L.J 19 December 2008 (Reporter: SG)*

**Facts**

The appellant football club (W) appealed against a decision (reported at (2007) SLJR 5 and [2007] EWHC 3095 (Ch)) that it was obliged to pay the respondent Chief Constable for special police services provided pursuant to an implied request by it for such services. For some years W had paid for policing at its football matches. Pursuant to a certificate under the Safety of Sports Grounds Act 1975, it was required to secure at its own expense such policing as was in the opinion of the Chief Constable sufficient to ensure the orderly behaviour of spectators. As from the start of the 2003/2004 season, W was promoted to a higher division and although that meant that additional policing was required, W refused to pay any increased charges for police services. No agreement was reached and although policing was provided at a higher level and at increased cost, W continued to pay only for policing at the levels provided in previous seasons. After two seasons the Chief Constable sought recovery of the unpaid balance of the cost of the policing actually provided, claiming that such policing constituted special policing services within the meaning of the Police Act 1996 s.25. The judge found that there had been an implied request for special police services (SPS) for the purposes of s.25, and that although that did not create a statutory head of claim, the Chief Constable had a basis for recovery either in contract or in restitution. W submitted that the judge's conclusion was not one that was properly open to him in the light of his own findings of fact and the conclusion of the Court of Appeal in Reading Festival Ltd v West Yorkshire Police Authority [2006] EWCA Civ 524, [2006] 1 W.L.R. 2005.

**Held**

(Maurice Kay LJ dissenting) (1) The judge had been wrong to find that there had been an implied request for special police services. It was clear both from the terms of s.25 and from the decision in Reading Festival that to fall within s.25 a request had to match the special police services supplied. However, the match did not need to be exact. It was for the Chief Constable

## Sport and the Law Journal Reports

to determine the level of policing required, so if a person asked for special police services at a private event and those services were provided at the level deemed necessary by the police authority, it was no answer to the police's claim for reimbursement of the cost that the request had not specified the level of policing actually provided. Conversely, if a promoter asked for on-site policing and the police authority concluded that off-site policing was required, it could not, without more, charge the promoter for the off-site policing he did not request. The instant case lay between those two extremes. The judge's findings of fact made it clear that *W* had objected to the increase in the number of officers deployed at its matches, considering that the increased manpower was not necessary. If *W*'s objection was to the level of policing, it was impossible to infer a request for the provision of the special police services to which it objected. That was the only possible conclusion consistent with *Reading Festival, Reading Festival* applied. (2) The Chief Constable was not entitled to recover the costs of providing policing by way of restitution. While it was not clear whether there had been any benefit to *W* in having the extra policing, it was clear that there had been no free acceptance of that higher level of policing: *W* was unable to reject those services unless it also rejected the services that it did want and had requested, *Bookmakers Afternoon Greyhound Services Ltd v Wilf Gilbert (Staffordshire) Ltd [1994] F.S.R. 723 Ch D* applied. There was no factor rendering it unjust for *W* to retain the benefit of the extra policing. There had been an impasse, neither party would back down, and while the police could have reduced the level of policing, for *W* it was all or nothing, either it accepted all the policing provided or stopped playing home matches. Given that choice, even if the extra policing was to be regarded as a benefit to *W*, it should not be made to pay for it. (3) (Per Maurice Kay LJ) The Chief Constable was entitled to recover by way of restitution. *W* had benefitted from the extra policing provided at the Chief Constable's expense, and it would be unjust if it did not make appropriate payment for it.

### Commentary

By a 2-1 majority, the Court of Appeal has ruled that *Wigan FC* had been charged for special police services, which they had not requested. The Court of Appeal decisions has over-ruled the High Court view that football and other sporting clubs need to pay charges for SPS beyond those public in nature and beyond the barriers of the actual stadia and including a much wider area of land on which the stadium stands. The court held that the special policing services at issue outside the ground were not "requested" by the club

within the meaning of the 1996 Police Act and the police were therefore not entitled to recover the cost.

However as was clearly articulated by Mann J at the High Court, in the interests of a good working relationship the club and police should negotiate a shared view on what policing will be required for the coming playing season and come to a common agreement.

### (2008) SLJR 4

**Drugs; Interim relief; Interlocutory proceedings; Olympic Games; Sportspersons**

## CHAMBERS V BRITISH OLYMPIC ASSOCIATION

*Queen's Bench Division Mr. Justice Mackay 18 July 2008 (Reporter: SG)*

### Facts

The applicant athlete (*C*) applied for interim relief on his claim challenging the legality of a bye-law of the respondent association that made him ineligible for membership of the British Olympic team. *C* had been found guilty by the United Kingdom Athletics disciplinary tribunal of doping, namely taking a banned performance enhancing substance, and was given a two-year suspension from participation in athletics. *C* later returned to athletics. His performance at the track was such that, but for a bye-law of the association, he qualified for a nomination by United Kingdom Athletics to the association for selection to be a member of the British Olympic team at the next Olympic Games. The bye-law in question stated that any athlete who had been found guilty of doping was ineligible for selection for membership of the British Olympic team.

Bye-law of the National Olympic Committee - eligibility for membership of Team GB of persons found guilty of a doping offence reads:

- Any person who has been found guilty of a doping offence either
- (i) by the National Governing Body of his/her sport in the United Kingdom; or
  - (ii) by any sporting authority inside or outside the United Kingdom whose decision is recognised by the World Anti Doping Agency (a "Sporting Authority") shall not, subject as provided below, thereafter be eligible for consideration as a member of a Team GB or be considered eligible by the BOA to receive or to continue to benefit from any accreditation as a

## Sport and the Law Journal Reports

member of the Team GB delegation for or in relation to any Olympic Games, any Olympic Winter Games or any European Olympic Youth Festivals.

C claimed that the bye-law amounted to an unfair restraint of trade and was illegal. In the instant proceedings C applied for an injunction restraining the application of the bye-law until the trial of his claim which would occur after the next Olympic Games.

### Held

Application refused. The grant of the injunction would effectively dispose of C's claim. By C's own evidence he would be too old to compete at the 2012 Olympic Games and it was probable that he would not therefore pursue the claim. In those circumstances the court had to examine the degree of likelihood of C succeeding at trial. The key issue was whether the instant court was satisfied to a high degree of assurance that C could establish at trial that the imposition of the bye-law by the association fell outside the reasonable range of response of a body in its position and that C had been significantly restrained in his trade by the bye-law. On the evidence it was not possible for the court to find that there had either been a reviewable restraint of trade or that the bye-law had not been proportionate to give the degree of assurance sufficient to grant the relief sought by C.

### Commentary

Mr Justice Mackay essentially ruled that Chambers' right to work was not a good enough reason to overturn the ban. Although he accepted that many people both inside and outside sport would see this by-law as unlawful, he stated that on the 'balance of conveniences' "In my judgment it would take a much better case than the claimant has presented to persuade me to overturn the status quo at this stage and compel his selection for the Games."

He indicated that he would have denied relief alone on the issue of Chambers delay to bring an action until almost the eve of the selection of athletics Team GB for Beijing.

So this ruling only indicates the problem of being granted an interim injunction on the narrow reasons presented by the claimant. The more significant question of the lawfulness of the BOA bylaw will be considered if the case comes to a full hearing.

## (2008) SLJR 5

### Arbitration - Interim Injunction - FA Rules - Rule K - jurisdiction of CAS

## SHEFFIELD UNITED FOOTBALL CLUB LIMITED V WEST HAM UNITED FOOTBALL CLUB PLC

### *Queen's Bench Division (Commercial Court) Teare J, 26 November 2008 (Reporter: FB)*

### Facts

On 18 September 2008 an arbitral body, constituted under Rule K of the rules of the Football Association, issued an interim award, holding that Sheffield United was entitled to recover damages from West Ham for breach of contract. Sheffield United succeeded in arguing that the engagement of Carlos Tevez by West Ham in the 2006/7 football season had been in breach of the rules of the Premier League. This in turn amounted to a breach of contract, and the arbitrators found that such a breach was an effective cause of Sheffield United being relegated to the Championship. West Ham filed an appeal from this decision to CAS on 2 October 2008.

Sheffield United applied for an interim injunction pursuant to section 37 of the Supreme Court Act 1981 and section 44 of the Arbitration Act 1996, arguing that the pursuit of the appeal to CAS was in breach of the arbitration agreement contained in Rule K and that CAS had no jurisdiction to entertain any such appeal. Further, Sheffield United contended that damages would not be an adequate remedy for such a breach and that the balance of convenience lay in granting an interim injunction to restrain West Ham from taking any steps before CAS, pending the trial of Sheffield United's claim for a permanent injunction.

West Ham denied that the pursuit of an appeal to CAS was in breach of the arbitration agreement. Rather, the parties had agreed to CAS having an appellate arbitral role: the parties were bound by the rules of the Football Association Premier League which in turn bound clubs to comply with the statutes and regulations of FIFA. Article 63 of the FIFA statutes gave CAS jurisdiction to consider appeals against final decisions passed by members.

It was contended that CAS should determine any question as to its jurisdiction, following the decision of the Court of Appeal in *Weissfisch v Julius* [2006] 1 Lloyd's Rep 716. In any event, if there was a breach of

the arbitration agreement, West Ham contended that damages would be an adequate remedy and that the injunction should be refused. West Ham also sought to stay Sheffield United's proceedings pursuant to section 9 of the Arbitration Act 1996.

The parties disputed the appropriate test for the strength of the claimant's claim on such an application. Sheffield United contended that the test was the conventional American Cyanamid test, namely, whether the claimant's case raised a serious issue to be tried. West Ham submitted that the test was higher in the case of an application for an interim anti-suit injunction.

### **Held**

Teare J (granting the injunction) considered the strength of Sheffield United's case. Rule K5(b) provided that an award of the arbitral tribunal was to be final and binding upon the parties from the date it is made. The Judge noted that there was no provision for any arbitral appeal in the 2006-7 FA Rules. He therefore considered that Sheffield United had a very strong argument that the effect of Rule K5(b), and the absence of a provision for an arbitral appeal, was that the award of the arbitral tribunal alone would finally and exclusively determine the issues between the parties.

The Judge could not discern any real prospect that the argument that article 63 created an arbitral right of appeal to CAS would succeed, there being no award passed by the FA, only an award of an arbitral tribunal independent of the FA. Accordingly, Teare J held that Sheffield United had, at its lowest, a very strong case that West Ham's recourse to CAS was in breach of the arbitration agreement: he could not therefore envisage Sheffield United failing at trial to secure a permanent injunction. There was therefore no need to determine the question of the correct test that Sheffield United had to satisfy as to the strength of its claim.

It was held that damages would not be an adequate remedy for breach of an arbitration clause. As to the balance of convenience, the Judge rejected West Ham's argument that CAS should determine its own jurisdiction on the basis that this was not a case where the assertion that the parties had agreed to CAS as an appellate arbitral tribunal had been supported by an argument with any real prospect of success. Teare J held that the balance of convenience lay firmly in favour of granting the injunction sought by Sheffield United. The arbitration agreement between the parties was governed by English law, suggesting that it was for the court rather than CAS to determine its true construction. However prompt CAS would be in

determining the question of its own jurisdiction, the parties would be engaged in the process of arguing that question at a time when they should be engaged in preparing for the quantum hearing.

Teare J was also satisfied that the application met the requirements of section 44(3) and (5) of the Arbitration Act 1996 (which he considered as part of his evaluation of whether it would be just and reasonable to grant the injunction) given that the case was one of urgency and that the tribunal was unable for the time being to act effectively.

West Ham's application to stay Sheffield United's proceedings under section 9 of the Arbitration Act 1996 was also rejected: had West Ham wished to seek a stay under section 9, the application should have been served promptly, making plain that West Ham required the Rule K arbitral tribunal to determine whether or not CAS had been agreed as an appellate arbitral tribunal.

### **Commentary**

This case marks the latest stage of the ongoing legal battle between Sheffield United and West Ham over the Carlos Tevez affair and is of obvious relevance to all those governed by Rule K of the FA Rules. It should be noted that a Rule K award can still be challenged on the grounds of the tribunal's substantive jurisdiction and serious irregularity, pursuant to sections 67 and 68 of the Arbitration Act 1996 respectively, as expressly recognised in the current FA Rules (the equivalent of the former Rule K5(b) is Rule K10(b)). ■ BASL

***Fiona Banks is at Monckton Chambers.***