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This issue of the *Sport and Law Journal* is the first to be offered as hard copy as well as the electronic version – more on this below.

This issue concerns a number of on-going and current issues. The Opinion and Practice section provides comment on three topical topics. First, Mel Goldberg’s ‘How Unfit can a Football Club Owner be, before he is Deemed not to be a “Fit and Proper Person”?’, focuses on this vital issue of financial governance in professional football. Second, Nick King’s ‘The (Red) Devil is in the Detail: review of Proactive Sports Management Ltd v Rooney’, focuses on the litigation involving the activities of football agents. Third, Stephen Boyd’s ‘Image Rights Contracts: Morality Clauses’ examines how these clauses operate so as potentially bring to a close lucrative image rights contracts.

A new feature in each issue will be an interview with a leading Sports Law expert. This time the focus is on Maurice Watkins.

The Analysis section has two articles concerning ambush marketing. J. Tyrone Marcus ‘Ambush Marketing: an Analysis of its threat to Sports Rights Holders and the Efficacy of Past, Present and Proposed Anti-infringement Programmes’ provides examples from a number of international events including the Cricket World Cup of 2007 in the West Indies. Sarah Storey’s ‘Pilfering, Piracy and Prevention: Developments in Combating Ambush Marketing’, provides analysis of the variety of anti-ambush marketing provisions open to event organizers to employ.

The Reviews section has the usual items, the Sports Law Foreign Update, Book Reviews and the Sport and the Law Journal Reports, which are augmented by the new feature of a regular EU Law Sports Policy update.

A question that has been asked many times over the last few weeks, is “whether sexism rife in football”. Hidden attitudes to women in football on the part of leading figures within the game were revealed by recorded off-camera comments by Sky commentators, Richard Keys and Andy Gray. They questioned the ability of a female assistant referee’s ability to understand the offside rule. In fact, Sian Massey, the assistant referee concerned, was subsequently to get a key offside decision right in the game between Wolverhampton Wanderers and Liverpool to allow a goal by the Liverpool striker, Fernando Torres. They also criticised Wendy Toms, who in the late 1990s was the first female assistant referee in the Premier League, as well making a sarcastic comment about Karren Brady, the deputy chair of West Ham.

Subsequently released video clips involving the pair, suggested that sexist behaviour and attitudes were rife and it is heartening that Keys and Gray have exited Sky with haste. Although there were claims by some that this was an example of ‘political correctness gone mad’ and the behaviour of the pair was common in areas such as the workplace and was simply a form of banter, the overriding response was the need to engage with these forms of discriminatory and harassing behaviour.

Football, traditionally a male dominated, conservative and closed-world has engaged with issues such as racism and has in many ways seen as leading how this problem can effectively be engaged with through such initiatives as the ‘Kick it Out’ campaign. However, an issue such as homophobia is still largely ignored.

How has female participation in football changed? Many more women and girls are now spectators at professional and amateur games. Women’s participation in playing football has increased significantly. One would think that women who want to develop a career in officiating matches would be encouraged and nurtured, rather than ridiculed. Football is
better off by being inclusive and applying the values that individuals from a diversity of backgrounds bring with them.

One surprising issue of the Keys and Gray Affair, was that these sexist issues are around football in 2011 in the context of anti-discriminatory policies and legal provisions. In 1998, registered football agent, Rachel Anderson won a sex discrimination action against the Professional Football Association when she was refused entry to the PFA Annual dinner because she was not a man! She was reported as saying, “I find the PFA’s attitude more insulting to their sex than to mine, it’s not the common attitude of men in today’s world – they are truly dinosaurs.” Fast forward over 10 years and many commentators where using the same term to describe the dinosaurs of Keys and Gray.

What has happened in the intervening years? The law has provided support for women gaining rights in the sports workplace, although under s.44 of the Sex Discrimination Act 1975, discrimination against where women seeking to compete with men in competition was allowed (see Bennett v Football Association (1978) unreported CA Transcript 591; also see discussion of case and s 44 of the SDA in Cradle, D, From Boot Money to Bosman: Football, Society and the Law (2000), London: Cavendish).

However it has been clarified that what is now s.195 (3) of the Equality Act 2010, cannot be invoked as a defence where the relevant sports participants are of the same gender. In Couch v British Board of Boxing Control, unreported, Case No 2304231/97. it was held that the decision of the Board to withhold a licence to box professionally from Jane Couch, the women’s world welterweight champion, constituted unlawful sex discrimination. The decision of the Board was criticised for being based on ‘gender-based stereotypes and assumptions’.

As far as women wanting to be match officials, in the earlier case of Petty v British Judo Association [1981] ICR 660 EAT, Petty argued unlawful discrimination when the British Judo Association refused to permit her to referee an All-England’s men’s contest. The Association pleaded s 44 of the Sex Discrimination Act on the basis that a woman would not have the strength to separate two male combatants. Browne-Wilkinson J stated: ‘…we cannot see how provisions as to referees relate to the ‘participation’ of the competitors in the contest … we think the words should be given their obvious meaning and not extended so as to cover any discrimination other than provisions designed to regulate who is to take part in the contest as a competitor’.

S.195(4) of the EA contains a new provision relating to children participating in sport. This requires consideration as to whether it is appropriate to take into account a child’s age and state of development in determining whether a sport or game is gender-affected. This suggests that differences in strength and physical stamina may not be so pronounced in child, as against adult, competitors and therefore children should be permitted to compete on an equal basis irrespective of gender in certain sports.

Even if elite sports such as football continue to be segregated, recent research at the University of the West of England indicates women are fully able to compete in physically challenging competition by exhibiting similar values to their male counterparts. The research suggests women players see pain and injury as an ‘occupational hazard’ and play through painful injuries during matches to prove themselves. Indeed

Football governance in England is rightly criticised as often being unaccountable and out of touch with modern values. Sexism (and homophobia) are two issues that football needs to be seen to addressing.
there was evidence that women are more robust due to psychological and sociological factors, which affect their attitude to pain, injury and risk.

Football governance in England is rightly criticised as often being unaccountable and out of touch with modern values. Sexism (and also homophobia) are two issues that football needs to be seen to addressing. The Keys and Gray Affair has just highlighted what have been on-going concerns. Writing in The Guardian in September 2010, the social commentator Beatrix Campbell, commented that sexism is rife and unchecked in football. This is shown by the private behaviour of footballers, and the relaxed attitudes of club managements to such behaviour. In the words of Campbell: “But for all the sound and fury, footballers’ misogyny is apparently sanctioned. When footballers sexually exploit women, go to lap dancing clubs, buy sex or “harvest” local girls to line them up for shagging parties, it still doesn’t count, somehow, as sexism ... Sexism may not yet be recognised for what it is, but something about masculine attitudes to morality is shifting on the terraces. Men taking their kids to the game don’t want them to hear the c-word any more than they want to hear the n-word.”

The football authorities, almost universally populated by men, need to show that they are not dinosaurs on this issue.

Finally, 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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The early volumes of the Journal of the British Association for Sport and Law were published and distributed in hard copy. Technological innovation and rising printing costs led the Association to reconsider the position and to decide to migrate to electronic distribution of the Journal.

The Association’s membership was recently surveyed about the Journal and its format. The overwhelming majority of respondents were in favour of reverting to distribution in hard copy. We have listened to the membership! The result is this issue of the Journal which is published again in hard copy and will also be available to members via the website.

It is also worth mentioning that a project is under way aiming to digitise the early volumes of the Journal which were published in hard copy. This exercise will take time and money but our objective is to ensure that the complete Journal archive will ultimately be available to members via the website.

Adrian Barr-Smith
The test was introduced in 2004, though as yet no owner of a top flight Club has failed the Premier League criteria.

What about Portsmouth? That Club had four owners in one season and had the dubious distinction of being the first Premier Club to go into administration with massive debts reported to be over £120,000,000. How much money did those owners put in and were they all fit and proper persons?

Thaksin Shinawatra was allowed to own Manchester City and would have failed the test when he and his wife were charged with corruption in his native Thailand but had had already sold his stake in the Club. In essence he decided to sell before he became a dismissed seller.

What exactly are the Rules?

• Clubs must submit independently audited accounts to the Premier League by 1 March each year, with requirements to note any material qualifications or issues raised by auditors.

• Requirement for clubs to submit future financial information to the Premier League by 31 March each year. This will act as an improved early warning system should any club take undue financial risks which may have consequences for future financial stability.

• An annual requirement to demonstrate to the Premier League board that a club does not have outstanding debts to other clubs.

• An annual requirement to demonstrate to the Premier League board that a club is not in debt with regard to income tax or National Insurance and payroll taxes.

• These rules are to ensure that Premier League football clubs can meet their obligations throughout a season including being able to fulfill all fixtures, fulfill contractual obligations to the Premier League and demonstrate that they can meet all payments due during a season.

• Any qualification raised in accounts or risk seen by the Premier League board could result in action to help prevent a club from exposing itself to financial difficulties that may be deemed unsustainable or put at risk the future financial sustainability of a club.

• Clubs that fall into such financial difficulty could be subject to financial controls relating to transfer activity and/or player salaries.

Tony Pulis (current manager of Stoke City and a former manager of Portsmouth) when referring to the situation at Portsmouth said “the system had broken down “

Pulis wanted Portsmouth investigated by reference to the club having had four owners in one season leaving the Club with huge debts, unpaid salaries unpaid and local suppliers joining a queue with others in administration.

The Premier League responded by claiming Pulis had “conflated” two issues, Club ownership and financial health, more on that later.

The test brought in to try to prevent clubs from being taken over by dishonest owners, applies to people wishing to become Directors or taking a shareholding of more than 30% and primarily relates to an individual’s criminal record or whether they have been bankrupt.

Does that mean everyone who has no criminal record and has never been made bankrupt is a fit and proper person?
The Premier League believes it is difficult to assess a potential owner's financial viability and a more far-reaching test could preclude different models of ownership such as Supporters’ Trusts running clubs.

“A means or intentions test is difficult – an individual could show you a bank account stuffed full of cash, but never actually put any of it into the club,” added the Premier League spokesman.

“On the flipside would you want to preclude potential owners – including Supporters’ Trusts – that want to come in and run the club on a self-financing model?”

While the top-flight test falls short of the standards required by the financial services sector, Simon Chadwick (Professor of Sport Business at Coventry University) believes the Premier League has some justification in not introducing more draconian regulations.

“Under European Union law, given that sport has no special status, it could simply be the case that a club being acquired by an overseas investor could actually challenge an over-zealous test,” he said: “It may well be some time yet before we see the development of a much broader and deeper test.”

However, two leading supporters’ groups dismissed the Premier League’s current test as unworkable.

“I don’t believe any kind of test will really be fit for purpose,” argues Duncan Drasdo, (chief executive of Manchester United Supporters Trust,) who wants supporters of last season’s Champions to have a meaningful ownership stake in the club. The Trust recently recruited its 50,000th member.

“In the end, there is an inevitable conflict of interest if the owners and supporters are not one and the same.

“It can work for prolonged periods but at some point you get new owners like the Glazers, or owners that change their behavior, and the problem surfaces.”

Brendon Bone of SOS Pompey – a Portsmouth fans’ group – described the fit and proper person test as “almost meaningless”. “Fit and proper person is an industry-standard term. It doesn't look into anyone’s motives,” said Bone. “Portsmouth have been bought by rich businessmen who then don’t seem to have any money. Motive should be the biggest check.”

**Comparison with Premier League and Football League Rules**

There are various matters that are dealt with differently under the various Rules.

By way of example, under both the FA and The Football League’s rules, but not under the Premier League’s rules, a Director will be disqualified from acting as Director of a club if (s)he is “subject to a ban from involvement in the administration of a sport by a Sports Governing Body [any ruling body of a sport that is registered with UK Sport/Sport England, or any corresponding national or international association] or such other similar forms of disqualification as may operate from time to time”. Accordingly the Football League has been considering the position of Flavio Briatore, the current chairman of Queens Park Rangers, who was originally banned from participation in Formula One following “crash-gate”. However, if QPR were in the Premier League it would not be an issue at all.

In the light of the current debt levels in English football, the financial resources and plans of owners are likely to come under even more scrutiny in the case of e.g. Liverpool FC and Manchester United FC with their American owners. How much have their respective owners put in and how much have they taken out?
The recent Panorama TV programme highlighted the poor financial health of the Glazers in relation to their Shopping Malls in the U.S. Is the profitability of Manchester United underpinning the Glazers’ bad U.S. investments and if so, how long will this be allowed to continue?

Football Finances
In the context of the financial state of Premier League Clubs, are they being put into jeopardy by inherent weakness of the fit and proper persons test?

The 19th edition of the Deloitte Annual Review of Football Finance 2010 (the ‘Review’) provides an analysis and commentary on recent financial developments and future prospects in the world’s most popular sport. It emphasises how English football’s domestic /international profile and deeply rooted supporter commitment has underpinned stellar rates of revenue growth making it effectively recession resistant. The commercial appeal of the Premier League is self evident. The revenue it generates enables member clubs to attract the world’s best players. However, the challenge remains as to how best to control the associated costs in order to deliver successful and profitable club businesses.

Despite the challenging global economic environment, the European football market grew to €15.7 billion in 2008/09 with the revenues of the Premier League, Ligue 1, Bundesliga, Serie A and La Liga growing by 3% to €7.9 billion.

More specifically the Premier League increased its sterling revenue by £49m (3%) in 2008/9, the lowest growth rate of any of the leagues mentioned. The continued depreciation of sterling against the euro led to a €115m (5%) reduction in euro terms, to €2,326m total revenue. On the other hand the Bundesliga saw a growth of €137m (10%) in revenues, the largest absolute and relative growth of any league.

Whilst the European football market grew in such a turbulent economic environment, the review highlights that the imbalance between revenue and costs has, in the main, worsened.

Premier league growth of wages in 2008/9 increased by £132m (11%) to over £1.3 billion making it the third year running to have seen a double digit percentage growth, the wage growth outpaced the revenue growth in 2008/2009 causing the Premier League’s wages/revenue ratio to reach a record high of 67% as clubs look to secure their league status or break into lucrative European competitions. This has in turn resulted in the operating profits of the premier league to fall by more than half to £79m, the lowest they have been since 1999/2000 as the £132m wage increase consumed far more than the £49m revenue increase.

“On many occasions we have hoped that increased revenues would facilitate a move towards a more rational approach but in a classic example of competitive game theory, clubs are continually driven to maximise wages rather than profitability” (Deloitte 2010)

Among current owners of Premier league teams there appears to be a continuing shift away from maximising profit and securing the long term future of the club. In doing so, they are in fact moving from a sustainable ‘not for profit’ model towards one with potentially calamitous consistent and significant loss making characteristics.

The new Premier League overseas broadcast deals will result in an additional £7m per season for each Premier League club for the 2010/11 for the forthcoming season with each club receiving £17m per year for the next three years. There is the additional potential for further growth by way of Premier League international rights fees. Should it not be the responsibility of the ‘fit and proper’ person in charge to exert effective cost control to ensure the financial security of his/her club rather than continue to believe that an increase in Premier League revenue gives an automatic right to increase the spend on players?

Manchester City have the financial capability to outspend everyone at present to satiate the desire of their owners to secure the hegemony of English football, but is the strategy sound and for how long can it be sustained?
In the light of the current debt levels in English football, the financial resources and plans of owners are likely to come under even more scrutiny.

The clubs outside the ‘big four’ have seen the fastest wage inflation with average total wage costs increasing by 75% since 2004/05. Doubtless propelled, either by ambition for European qualification or the need to secure Premier League status. Is it not in fact incumbent upon those in charge of their clubs to be realistic in their ambition and ensure that they live within their means? Experience teaches that an increase in spend on players and wages will not guarantee on-field success. Newcastle in 2008/09 and Portsmouth in 2009/10 prove the point.

Extra spend on players and salaries appears acceptable for the clubs that generate the highest revenues. Manchester United and Arsenal who generate almost £2 in every £5 of match day revenue across the whole Premier League but should this allow them to over spend in the pursuit of continued success, without thought for the financial consequences of their actions? Portsmouth, won the FA. cup in 2008 with a team of super stars and were relegated two years later on the brink of financial extinction. Newcastle United with fanatical home support, and average attendance of more than 50,000 and an owner worth reputedly £2 billion spent lavishly in the pursuit of success and within 12 months were relegated and forced to trim their playing squad to Championship requirements. The need for those in control to adopt a “fit and proper” fiscal policy cannot be overstated.

As a reminder, Portsmouth generated operating losses in 2008/09 of £24m owing to unrealistic player expenditure levels given its revenue generating potential. The warning signs were clear but obviously ignored by all four ‘fit and proper’ individuals that took control of the club, as it spiralled into administration, collecting the accolade of becoming the first Premier League club so to do. This highlights the implications of poor cost control and was described by the Premier League’s own Chief Executive as “rank bad management”.

Clearly, clubs should learn from the mistakes of others to avoid falling into similar distress and ring fence their increased revenue to ensure financial security. The Premier League clubs’ revenue increased by £451m between 2006/07 and 2008/09, primarily owing to the significant uplift in the 2007/08-2009/10 broadcast contracts. This presented clubs with a tremendous opportunity to generate significant operating and pre-tax profits which could be used to reduce the £2.7 billion net debt they were carrying at the end of the 2006/07 season. This opportunity was not taken and over this period almost all (96%) of the incremental broadcast revenue of £374m was spent on wage costs.

Final remarks
The Review highlights how the structure of our clubs needs to be redressed if the majority of them are to exercise sensible control of their wage/revenue ratio. Continuing to live beyond their means in the pursuit of on-field success renders the future of many clubs, sustainable only in the short term. The Review demonstrates the need to rein back the growth in wages, and preferably reduce them, overall. The recent introduction of financial fair play regulations by both the Premier League and UEFA, only goes so far. Whereas this is bound to encourage the leading clubs to achieve a better balance between their levels of spending and income generation in accordance with the new ‘break even requirements’ that will in turn limit the inflationary pressure on players’ salaries and transfer fees, it will not however bring about a new found level of competence in those who own and run our great clubs.

Manchester City have the financial capability to outspend everyone at present in order to satiate the desire of their owners to secure the hegemony of English football, but is the strategy sound and for how long can it be sustained? Perhaps the answer lies in the parlous financial state of Europe’s most glamorous on and off-field club, Barcelona?

The ‘fit and proper person’ criterion does little to ensure competence or financial wherewithal among club owners.

All those who have failed so lamentably in the past have sailed through the test with flying colours.
The (Red) Devil is in the Detail: review of Proactive Sports Management Ltd v Rooney

BY NICK KING, SHERIDANS SOLICITORS

Introduction
Although aged just 17, in 2003 Wayne Rooney was already the most talked about young footballer in England. Having excelled in Everton's youth teams he made the transition to the Barclay's Premier League, with eye-catching ease. A match-winning wonder goal against reigning league champions Arsenal had made Rooney the youngest goalscorer in Premier League history and brought him to the attention of football fans across the country. The accolades he earned from his remarkable first season included a call-up to the England national team, BBC Young Sports Personality of the Year award and second place in the PFA's Young Player of the Year. Rooney was “the next big thing”.

Long gone are the days when football was just a sport and its participants merely sportsmen. Footballers now sit comfortably alongside pop stars, actors and models in being offered an array of commercial opportunities through which they can exploit their image by way of lucrative commercial deals on top of their multi-million pound playing contracts. Despite his tender years, it was clear that the financial rewards which would present themselves (assuming he went on to fulfil his potential) would be considerable.

The recent High Court action brought against Rooney (and his wife, Coleen) by Proactive Sports Management Limited (“Proactive”) (Proactive Sports Management Ltd v Rooney and Ors [2010] EWHC 1807 (QB)), the agency set up by Paul Stretford which had represented Rooney from 2002 to 2008, has not only given a fascinating insight into the inner workings of the sports management business but has also provided a number of lessons for those involved in representing sports personalities.

Background
Rooney signed his first professional contract with Everton on 17 January 2003 and, as he confirmed in his autobiography, was already seeking to exploit his image:

“I think I was the first 17-year-old to have image rights written into his first professional contract which meant I would get a percentage of all commercial rights sold by the club from the start.”

In contemplation of the exploitation of his image rights, Rooney had set up a corporate vehicle, Stoneygate 48 Limited (“Stoneygate”), to which he assigned the rights in his name and image on 16 January 2003.

Between 17 January 2003 and 3 February 2003, Stoneygate entered into an 8 year image rights representation agreement (the “IRRA”) with Proactive.

Pursuant to the IRRA, Proactive was entitled to receive, by way of remuneration for the services it provided to Stoneygate, a commission of 20% on revenues generated through all of Rooney’s “off-field” activities, including the exploitation of his image rights. Proactive would be Stoneygate’s exclusive agent for the entire duration of the IRRA.

Although as an Everton player, Rooney had generated some income through the exploitation of his image, it was following his transfer to Manchester United on 31 August 2004 that Proactive (and, in particular, Mr Stretford) were able to procure lucrative deals with some of world’s most influential corporations and brands, including Nike, Coca Cola, and EA Sports.

In May 2008, Paul Stretford left Proactive and set up a competing sports management agency. Whilst footballers are often labelled as disloyal, Rooney stayed true to Mr Stretford, the man who had originally persuaded him to sign with Proactive.
Although the IRRA was for a fixed term of 8 years with no express provision for early termination, Rooney/Stoneygate started moving all of their business to Mr Streford from around July 2008 and by October 2008 were refusing to co-operate further with Proactive or pay any further commissions.

On 18 December 2009, Stoneygate sought to formally terminate the IRRA by way of a letter from its solicitors to Proactive. Proactive accepted the letter as constituting a repudiatory breach of the IRRA and subsequently commenced proceedings, the basis of which was that Proactive was entitled to 20% commission on all of the income generated by Rooney's off-field activities for the full 8 year term of the IRRA. Proactive, therefore sought to recover:

1. Nearly £1.1 million for arrears of commission;

2. A declaration that, notwithstanding the termination of the agreement, it would remain entitled to receive post termination commissions as and when they fell due (a total figure in excess of £3m was put forward during the course of the trial); and

3. Damages arising out of the alleged repudiatory breach of contract. Although these could not be quantified at trial, an estimate of £3-4 million was advanced by Proactive, representing Proactive's lost opportunity to earn further commissions.

In their defence, Rooney/Stoneygate argued that the IRRA was unenforceable on the grounds that it was in restraint of trade and that Proactive had not demonstrated that such restraints were reasonable having proper regard to the legitimate interests of the parties or, alternatively, that the IRRA was void for mistake.

In the event that the Court held the IRRA to be valid, Stoneygate denied that it was in breach of contract and asserted that in no circumstances could it be liable to pay commissions to Proactive on sums which fell due after Proactive had ceased to provide its services.

In reply, Proactive argued that if the IRRA would otherwise be held unenforceable then Stoneygate had lost the right to challenge its validity through having continued to be bound by its terms. Furthermore, even if the IRRA were unenforceable, it would remain entitled to a restitutionary remedy to receive fair compensation for the services it had provided.

Decision
1. Post Termination Commission

Working on the basis that the agreement was, prima facie, valid, the Court first considered whether Proactive would be entitled to claim commission on sums which fell due after the termination of the IRRA.

For reasons which were not particularly clear, the IRRA did not contain any express provision regulating the right to commission after expiry or termination. In the absence of such an express provision, the Court was asked to consider whether, as a matter of contractual construction, the remuneration provisions of the IRRA, would reasonably be understood as conferring upon Proactive a right to post-termination commission and that this must have been what the parties had intended.

In finding against the existence of a right to post termination commission, the Judge was persuaded by:

Footballers now sit comfortably alongside pop stars, actors and models in being offered an array of commercial opportunities...
• The fact that the IRRA provided that remuneration (by way of commission) was expressed to be in consideration for the performance of the “Services” by Proactive. “Services” were not limited to procuring contracts but also included servicing any contracts to which Stoneygate was a party and generally representing Stoneygate in all areas of image rights exploitation, licensing and personality management.

• The fact that it was the provision of “Services” over the whole of the contract period which gave rise to the right to remuneration meant that the right to commission would terminate at the expiration of the contract period.

• The IRRA provided for certain payments to be made by Stoneygate in the event that the IRRA was terminated by Stoneygate prior to the expiry of the 8 year term. Although this provision attempted to quantify any loss and damage arising out of a repudiatory breach of the IRRA, it did not mention any continuing obligation to pay commission after early termination.

• The IRRA was not an informal contract but a detailed agreement, professionally drafted by solicitors. If a right to post termination commission arose under the IRRA, it was reasonable to expect an express provision to be included. Quoting Lord Hoffman, the Judge agreed that “If the parties had intended something to happen, the instrument would have said so”.

• The commercial consequences of construing the IRRA so as to give Proactive a right to post termination commission. For example, if Proactive were entitled to commission on long-term sponsorship contracts entered into near the end of the contract period, it would mean that Stoneygate would have to pay commission at 20% but without Proactive having to provide any further services. Assuming Stoneygate appointed a new agent, this could result in it paying double commissions.

• It was not (as Proactive alleged) “commercially absurd” that an agent might agree to provide a range of services for its client in return for a percentage of the income receivable by the client during the subsistence of the agreement only.

To conclude, the Judge found that if the IRRA would otherwise be enforceable, Proactive would have no right to contractual commissions after termination (even if such termination was unlawful).

2. RESTRAINT OF TRADE

The Judge readily found that the IRRA imposed significant restrictions on Rooney’s freedom to exploit his talent and consequently fell within the scope of the doctrine of restraint of trade. In support of his finding, the Judge was particularly persuaded by the following factors:

• Proactive had received legal advice prior to entering the IRRA that it was at risk of being declared unenforceable as a restraint of trade.

• The IRRA was not the result of a negotiation between parties with equal bargaining power and/or commercial sophistication. Neither Rooney (who was a minor) nor his parents had any experience of agreements of this type. Such was the trust which they placed in Mr Stretford, they were happy to accept the terms put before them.

• Despite the Rooney’s inexperience, Proactive did not ensure that they took independent legal advice.

• The IRRA did not represent an industry standard. The terms were not commonplace in the market. In particular, its 8 year term was found to be unique (neither expert witness could recall ever having seen such a lengthy term before).

The majority of image rights agreements run for two years (so as to tie-in to a corresponding on-field agency agreement, the maximum length of which is two years in accordance with FIFA and FA regulations).
The majority of image rights agreements run for 2 years (so as to tie-in to a corresponding on-field agency agreement, the maximum length of which is two years in accordance with FIFA and FA regulations). More unusual were agreements for a period of 4 or 5 years, although these too would necessarily be unreasonable.

An 8 year term would represent the average total length of a footballer's career and although Rooney's career was likely to be longer, the agreement might still cover half his career.

- Proactive was entitled to receive commission at a rate of 20% (the very top end of usual rates charged by agents) throughout the full 8 year term of the IRRA. There was no attempt to impose a cap or sliding scale or to afford Stoneygate the right to renegotiate the level of commission if certain benchmarks were reached.

3. JUSTIFICATION

Having decided that the IRRA fell within the doctrine of restraint of trade, the Court then considered whether the restrictions could be justified as being reasonable in the legitimate interests of the parties. However, the Judge found that Proactive had failed to discharge its burden of proof in this regard and could not justify the imposition of onerous terms for such a long period of time. In particular, the Judge made the following findings:

- Contrary to Proactive's arguments, there was little commercial risk in agreeing to act for Rooney at such an early stage of his career. Although Proactive had agreed to pay Rooney a £50,000 "signing on" fee, this initial outlay was more than recouped as soon as he signed his professional forms with Everton and lucrative sponsorship deals were obtained within a matter of months.

- The obligation for Proactive to use "best" rather than "reasonable" endeavours to represent Stoneygate, would not, in practice, result in Proactive making any investment which it would not have made anyway so as to justify the imposition of an 8 year term.

- Whilst a longer term agreement could help to avoid the dangers associated with a short-term, “quick buck” approach to commercial rights exploitation and encourage Proactive to take a more strategic approach, there was no reason why an 8 year term was necessary to fulfil this aim.

An agreement of four (or even a five) years might have been regarded as reasonable on the basis that it would cover a full cycle of international competitions such as the World Cup and European Championships, which may be essential components of a long term plan to maximise the value in a player's image.

For these reasons, the Judge found that the IRRA was not enforceable on the basis that it was an unreasonable restraint of trade.

As mentioned above, Stoneygate and Rooney also pleaded mistake so as to make the IRRA void. It suffices to say that the Judge did not find in Stoneygate's favour and found that there was no such mistake. Similarly, the Court was not persuaded that Stoneygate had lost the right to challenge the validity of the IRRA through having continued to be bound by its terms. However, having found the IRRA unenforceable on other grounds, little turns on these findings.

4. REMEDIES

In finding that the IRRA was not enforceable, it followed that Proactive could not pursue any contractual claim to recover arrears of commission (in the form of unpaid invoices), post-termination commissions as they fell due or damages for breach of contract. However, it was undeniable that Proactive had provided services for Stoneygate's benefit. The Judge therefore held that Proactive was entitled to a restitutionary remedy and that the assessment of the amount payable to Proactive on a quantum meruit basis should be stood over to a separate assessment hearing.

Should the claim not settle in the meantime, the assessment hearing will seek to quantify the reasonable value of the services Proactive provided, though the basis upon which the Court will undertake this quantification is open to further debate.

Although if the IRRA had contract had been enforceable, Proactive would have been entitled to commission at 20%, the Judge has already made it clear that he will not allow the assessment of damages to undermine the policy of the rule rendering the contract unenforceable and the quantum of
damages should not be determined by reference to the contractual provisions. However, it is not clear how the Judge would seek to reconcile the position if the more persuasive expert evidence confirms that a reasonable amount to be paid in respect for particular services would be a commission of 20% or that it should even include an equivalent to post termination commission.

The Court will also need to resolve the issue of how a commission should be split as between the separate services of procuring/negotiating an image rights contract and then servicing that contract by making sure that its terms are fully complied with.

Practical considerations
The case is, so far at least, unlikely to be considered a success by either party. Rooney has been dragged into an intrusive Court battle and had his finances publicly scrutinised, whereas Proactive have seemingly missed out on commissions potentially running to millions of pounds. However, it has highlighted a number of issues which anyone involved in negotiating, drafting and/or advising on representation agreements needs to bear in mind if they are to avoid their own agreements coming under the scrutiny of the Courts.

Whilst having the IRRA declared unenforceable may (subject to the assessment of damages hearing) have worked in Rooney’s favour, it would be a high risk strategy to intentionally enter an image rights agreement of questionable validity. Accordingly, steps should be taken to try and make sure that the agreement is enforceable and the following should be borne in mind:

Duration
- In football, it seems to be a given a 2 year term would be reasonable for an image rights representation agreement.

- A term of 4-5 years may also be reasonable if there is proper justification (such as the agent investing in a longer term strategy that would take time to maximise returns, perhaps through synchronisation with a full cycle of major Championships).

- The longer the agreement, the more likely it is that there will need to be other provisions which make the agreement reasonable. For example, a clear right to terminate (for either party) and provisions setting out the consequences of termination. In the case of the agent, he will wish to make sure that he is properly compensated for any initial investment he has made in representing the player and be properly rewarded for any contracts which he has procured. In contrast, the player will wish to limit the compensation payable to the agent so that he is not precluded from seeking alternative representation without having to pay commission twice.

- As the value in a player’s image may change over the term of the agreement, the parties should consider setting out certain circumstances in which the level of commission can be renegotiated. Whilst a young player may have no option but to agree 20% commission at the beginning of his career, within a few years, he may have reached the position where he could negotiate a commission of nearer to 10%. Depending on the length of contract, the difference in income could be substantial. On the other hand, the agent will seek to argue that it is only through his efforts in nurturing the player’s image that his value has risen to such a degree. Accordingly, it would perhaps be reasonable to allow for the agreement to be renegotiated once a particular level of income has been achieved. Alternatively, there could be a sliding scale of commissions.

Independent legal advice
- In finding the 8 year term unreasonable, the Judge placed great emphasis on the fact that Rooney and his family were inexperienced in dealing with commercial contracts and did not take independent legal advice on the IRRA that was a determining factor. Indeed, given the Judge’s comments it appears that a much shorter agreement could still be held unenforceable in the absence of the player taking independent advice.

- The Judge was clearly of the view that a player must receive sufficient advice so as to allow him a real understanding of the terms being proposed as well as his own negotiating position and ability to seek a better deal, whether from that agent or another; the risk being that in the absence of such advice, the player may otherwise accept the higher end of the commission spectrum.

- Notwithstanding that there is an inherent risk for an agent in insisting that a player he wants to sign should
The case is, so far at least, unlikely to be considered a success by either party. Rooney has been dragged into an intrusive Court battle and had his finances publicly scrutinised. Seek independent advice and possibly then not want to accept the terms on offer, the risk in not insisting that the player do this appears to be too high.

- Rather than simply telling the player that he should go and get advice, the agent should make sure that he does and it is worth noting that although the IRRA included a clause acknowledging that Rooney and Stoneygate had obtained independent advice, this was not true and was of no comfort to the Judge in showing that Rooney had been advised to take external advice but declined to do so.

**Contractual provisions dealing with commission**

- If the parties agree that there should be a right for the agent to earn commission after the end of the representation agreement (whether by expiry or early termination) this right should be expressly set out in the agreement.

- A right to post termination commission is likely to fetter the player’s ability to leave his existing agent without finding himself in a position where he has to pay twice (for example, by having to pay his new agent to service the contracts procured by his old agents, who continues to receive commissions). Accordingly, the boundaries of what should be commissionable after the termination of the agreement need to be carefully considered so as not to leave open the possibility that the agreement might be an unenforceable restraint of trade.

- Consideration should also be given as to how the remuneration payable to the agent (i.e. the commissions) are linked to the services the agent provides. From the agent’s point of view, it would clearly be advantageous for most of the commission to be linked to the procurement of a lucrative contract rather than having to assist the player in fulfilling his obligations under that contract or devising a long term strategy for the player’s image rights exploitation. In contrast, a player is likely to consider the strategic and day-to-day assistance given by the agent to be more important than procuring the contracts themselves.

**Final remarks**

Despite a surprising number of reports claiming that Stoneygate had been ordered to pay Proactive £90,000, in fact, there has not yet been any decision as to how much Stoneygate will ultimately have to pay. As mentioned above, the damages due to Proactive on a *quantum meruit* basis will now be determined at a separate hearing.

In the meantime, the only money which Stoneygate was ordered to pay was in respect of a small invoice (of approximately £5,000) for accountancy services which Proactive had obtained for Stoneygate.

The other £85,000 which the Judge ordered should be paid to Proactive was payable by Speed 9849 Limited (“Speed”), which is the corporate vehicle through which Coleen Rooney exploits her commercial opportunities. However, further consideration of this decision is outside the scope of this article.
The revelations concerning the private life of Tiger Woods have brought to the fore the importance and effect of morality clauses in image rights contracts.

Sponsors use morality clauses in an attempt quickly to eliminate the celebrity/product association in the mind of the consumer where the celebrity’s image has come into disrepute in the view of the public.¹

The golfer became the first sportsman to earn more than $1 billion from sponsorship deals and endorsements. However, several sponsors, including AT&T, Accenture and Gillette have cut their ties with him.

According to a recent study by Professor Victor Stango at The University of California Davis: “Total shareholder losses may exceed several decades’ worth of Tiger Woods’ personal endorsement income”.

In other words, the public took such a dim view of Mr Woods’ conduct that the reputation of certain of his sponsors was damaged by their association with him.

Given the likelihood of such losses in the event of serious misconduct, sponsors must choose players carefully and ensure that they are protected against their not infrequent falls from grace, brought to light by ever increasing public scrutiny, and often caused by a combination of youth, money, power and testosterone.

Examples of Morality Clauses
A sponsor’s entitlement to sever ties with a sportsman for ‘bad behaviour’ will depend on the width of the morality clause. Older agreements tended to have very specific morality provisions, for example, requiring conviction, or perhaps even just arrest. Modern clauses tend to be far more general, such as the following example:

“Without prejudice to any other right or remedy COMPANY may have under this Contract or otherwise, COMPANY may terminate this Contract immediately upon giving written notice to PLAYER, on or at any time after the happening or occurrence of any of the following events or circumstances:

• the commercial value of the PLAYER Endorsement and related services is in the reasonable opinion of COMPANY substantially impaired by PLAYER’s statements, behaviour or conduct which has unquestionably brought PLAYER’s character into disrepute;

• PLAYER acts in a manner that, in the reasonable opinion of COMPANY, shocks or offends the community or which manifests contempt or disregard for diversity, public morals or decency;

• (without prejudice to the foregoing) PLAYER is convicted of any criminal offence, or commits a violation of any anti-doping rule (including without limitation testing positive in any doping test) of any national or international football governing body or anti-doping organisation, or is admitted or recommended for treatment or therapy for addiction to or abuse of drugs or alcohol”.

Morality clauses in celebrity contracts are nothing new; indeed, Universal Studios began including such clauses in its agreements with actors and actresses as early as 1921.²

However, there has been a significant increase in the use of such clauses over the last 15 years. The Sports Media Challenge survey, conducted in 1997, indicated that less than half of all endorsement deals included morality clauses³. By 2003, industry estimates started at a minimum of 75%⁴. According to Sam Rush, COO of Wasserman Media Group,
the global sports and entertainment company, it would be surprising if an image rights contract drafted today omitted such a clause.

Sponsorship is all about money and creating value. Provided that disreputable conduct was thought unlikely to affect a sponsor’s income, it is improbable that a sponsor would seek to invoke the clause.

In practice, such clauses are only relied on where the commercial value of the endorsement has been affected or where a sponsor wishes to escape from an unprofitable contract. It would be very rare indeed for a sponsor to invoke a morality clause simply as a matter of principle.

Sponsors generally want the flexibility to get out of a contract at the first “whiff of scandal.” On the other hand, “players’ agents often negotiate for specific language that limits termination clauses to the athlete’s conviction of a crime.”

As regards convictions, doping violations and disreputable conduct about which there can be no doubt the player committed, reliance on such clauses should be reasonably straightforward.

But what of allegations, for example, of marital infidelity, which the player denies?

The above clause gives the sponsor a broad discretion, leaving it under (i) and (ii) to their “reasonable opinion” about the effect of the player’s actions. There is no doubt that “reasonable opinion” will depend on the sponsor’s product, the target market and its views of morality. It seems to me on the basis of the above clause that any sponsor would find it hard to justify in court the decision to terminate an image rights contract unless it was tolerably clear that the player had actually behaved in the manner alleged.

The benchmark of acceptability is likely to be higher for an online gambling company, whose customers might prefer a “Mr Edgy,” than for the producer of children’s snacks, which insists on a “Mr Clean.” Much, of course, will depend on the commercial clout of the player. An individual with “star power” can expect a more moderate clause and a more indulgent sponsor. He could also insist the contract provide that any dispute arising out of his conduct, including the lawfulness of termination and whether a particular incident or incidents had adversely affected the value of his endorsement, should be referred to arbitration.

Termination
The arbitration clause in American basketball star Chris Webber’s shoe endorsement agreement with Fila allowed him to challenge Fila’s decision to terminate him as an endorser. In the ensuing hearing, Webber was awarded $2.61m for Fila’s wrongful termination despite Webber being caught and charged with marijuana possession while on a Fila promotional campaign. According to Howe Burch, Fila’s senior vice president of marketing, “The contract said that had he been convicted of a crime, we could terminate him, but since he only paid an administrative fine and wasn’t technically convicted, the court ruled in his favor.”

If the sponsor wants to be entitled to terminate the contract if disreputable conduct comes to light, which took place before the contract was made, the clause has to be drawn sufficiently widely to allow him to do so (which, in my opinion, is not the case with the clause above).
Moreover, if a sponsor has already produced and/or launched an advertisement campaign using a player's image, which it cannot use/hast to take down as the result of player misconduct, it will have incurred a significant wasted cost. A recent example is the French fast food chain, ‘Quick’, which cancelled a TV advertisement featuring Nicholas Anelka and removed him from all advertising in their restaurants. Posters showing the striker holding up a burger as if it were a trophy were also removed from the streets of Paris. Valerie Reynal, head of communications for Quick France, said the decision was taken because Anelka’s presence “could be badly perceived by our customers". If a sponsor only has a right of termination for player misconduct, it will not be able to recover such wasted costs. Accordingly, sponsors should also request a “no bad behaviour” warranty.

It is also relevant to point out that the community in some countries, for example France, are less likely to be shocked or offended by sexual shenanigans than others. Image rights contracts for players whose image transcends national boundaries must, therefore, take account of such cultural differences.

Reverse morality clauses

“Although morals clauses generally focus on the endorser’s behaviour, the endorsing athlete should also consider the risk of being associated with certain advertisers. In light of recent well-publicised corporate wrongdoing, athletes may now want to think about including morals clauses language for advertisers’ behaviour as well, thus ensuring that they have the ability to extricate themselves from an endorsement deal if an advertiser engages in questionable behaviour. Such a “reverse morals clause” may include language that would allow the athlete to terminate if punitive actions are taken by a court or governmental authorities...”

Summary

A sponsor should seek to include a wide-reaching morality clause that:

- is expansive and subjective in nature, thereby allowing the company broad discretion in its invocation of the clause
- includes a “no bad behaviour” warranty

On the other hand, players should take the opposite approach, seeking:

- narrow and objective morality clauses
- that give the sponsor minimal discretion to invoke the clause
- an independent third party review in determining whether the alleged violation meets the threshold for termination
- the inclusion of a “reverse morals clause”.

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4 Ibid.
7 Darren Rovell, No Ringing Endorsement from Corporate Sponsors, ESPN.com, Aug 21, 2003 (quoting Peter Land, GM of Edelman’s Sports & Entertainment practice who negotiates deals on behalf of companies, cited in Auerbach.
8 Ibid. 9
10 Christopher R. Chase of Frankfurt Kurnit Klein & Selz, United States: A Moral Dilemma: Morals Clauses in Endorsement Agreements.
11 Kressler, at 255;
12 Auerbach, at 9.
13 Kressler at 255.
14 Auerbach at 9.
Maurice Watkins LLB, LLM is a Director of Manchester United Football Club, as well as being the club’s solicitor. He is also Joint Senior Partner of Brabners Chaffe Street LLP Solicitors in Manchester, a director of the Rugby Football League and Chairman of the Greyhound Board of Great Britain.

Educated at Manchester Grammar School and University College London, Mr. Watkins has overseen numerous high profile football transfers both at home in the United Kingdom and abroad. He has also represented clubs and players before various bodies, including the disciplinary authorities of FIFA, UEFA, and the FA. He has, in addition, represented players and clubs at the Court of Arbitration for Sport and before international and league compensation tribunals. He regularly speaks and writes on football and sports law issues within the United Kingdom and internationally. He is also Director of the British Association of Sport and the Law (BASL) having previously served as its Chairman and President and is a member of the Premier League Legal Advisory Group.

Q: Mr. Watkins, you are a practitioner of sports law of considerable experience and expertise. From this position of eminence, what would you identify as the most pressing legal challenges facing the world of sport today?

MW: On a general basis, I would say that the most important questions with which sport currently has to contend are the various problems surrounding doping, and the festering issue of corruption, as evidenced all too plainly by the high profile match fixing allegations’ scandal which has seriously undermined the sport of cricket. The proliferation of sports betting has significantly increased the risk to the integrity of sport from corrupt elements.

If we look more specifically at football, particularly English football, the Premier League is facing challenges from Ofcom which could lead to changes in the pay-television landscape. There is also the Premier League’s case before the ECJ against the Portsmouth landlady Karen Murphy, which could have significant implications for any sports rights holders selling rights on an exclusive individual territory basis.

From a regulatory standpoint, there are also issues concerning the financing of football with the introduction of UEFA’s Financial Fair Play initiative with its break-even requirements whereby a club must not repeatedly spend more than the income it generates, subject to some tolerable deviations. This initiative applies to UEFA’s area of authority, namely its own competitions, but the Premier League has always accepted UEFA’s overall objectives and most of its detailed recommendations, and some of its financial fair play initiatives have been incorporated into Premier League rules.

But the way UEFA’s initiative will be applied from 2011/2012 onwards has some concerns for the English game, particularly the potential restrictions there may be on the investment by way of equity or gift from benefactors. Why should those investments be unacceptable? Benefactor income has been a feature of English football since the foundation of the professional game in the 1880’s. In some countries state aid and municipal or subsidised stadia are common, whereas English clubs stand on their own two feet. We will have to see how this works out over the next few years and whether UEFA is successful in implementing the initiative uniformly across the 53 countries forming the UEFA football family. It is not lost on the administrators of the English game that their tendency to implement initiatives to the letter is not replicated in other jurisdictions and the so-called level playing field can often have some serious potholes and inclines.
Q: From the point of view of your everyday practice with one of our top Premier League teams, one would imagine that players’ contracts are also a prominent concern of yours...

MW: Definitely. Their importance is emphasised by the fact that we are dealing here with what is arguably the most successful domestic football competition in the world, with clubs vying with each other for the best players. Without those star international players watching Premier League football be so keenly sought after? One only has to consider that, last season, the share of broadcasting fees (domestic and international) paid to the top sides such as Manchester United and Chelsea from the sale of Premier League matches amounted to just over £50 million each. Incidentally – and harking back to the “fairplay” issue raised under the previous question – it should also be pointed out that the bottom club received over £30 million. This distribution mechanism makes the Premier League the most equitable of Europe’s major football leagues with the ratio from top to bottom earning club a very creditable 1.66:1. In other leagues, particularly those that allow individual clubs to sell their own broadcast rights, the ratio can get close to 19:1.

Q: What are your views on the growth of the intellectual property dimension in sport – for example, players’ image rights? Will this achieve as high a profile in sport as is currently the case in the US?

MW: As regards players’ image rights, that is an extremely hot topic at the moment, especially in football with the interest currently being taken by the tax authorities – which is why I would prefer not to comment specifically on this particular issue at this juncture. However, at a practical overall level, the creation, ownership and licensing of intellectual property underlines the commercial exploitation of sport by sporting rightsholders particularly in the areas of sponsorship, merchandising and broadcasting. There is a strong argument to say that in England, for example, the intellectual property dimension has no lesser profile than it does in the US.

Q: What about the European dimension to all this?

MW: In view of the enormous success achieved by the Premier League from the broadcasting of fixtures, not only throughout Europe, but also all over the world, we are beginning to see the impact of regulatory involvement at the EU level and from other jurisdictions. On the subject of EU law, the one development which had a tremendous impact was obviously the 1996 European Court of Justice decision in Bosman. Seen from my position as legal advisor to Manchester United, this case had enormous repercussions, particularly through the removal of the old “3+2” rule, which thereafter enabled the club to field a more realistic team in European competitions. It is notable that only five of the 13 players who featured in United’s 1999 Champions league final win over Bayern Munich were English. Before the Bosman ruling, that team could never have set foot on the pitch. On the wider scale, Bosman led to future EC intervention and new transfer rules, including the bringing in of “transfer windows” and measures aimed at securing the stability of contracts – which regulations, give or take a few amendments, continue to apply to this present day.

Q: Let me press you on the Bosman case. In recent years, concern has risen at some of the extreme implications of this decision in terms of the financial excesses to which it has given rise in the transfer market. Proposals aimed at curbing these extremes have included the “6+5” rule advanced by FIFA and sundry variants on this formula. Do these endeavours stand any chance of success, in your view?

MW: Let me say first of all that the 6+5 proposal is, frankly, a “non-starter” since it is clearly contrary to the relevant provisions of EU law. Indeed FIFA has abandoned its proposal. The variants on this proposal which are based on home-grown players stand a much better chance of acceptance, although even these rules, which are not ostensibly based on nationality, are described by some as non-starter.

It is notable that only five of the 13 players who featured in United’s 1999 Champions league final win over Bayern Munich were English. Before the Bosman ruling, that team could never have set foot on the pitch.
being suspect under EU rules on the grounds of indirect indirect discrimination, an issue which for the present remains undecided. I believe that the best possible regulatory framework on the subject is provided by the current Premier League rules, which is based on the “squad” principle. This states that, of a maximum 25-strong squad of players, eight must be “home-grown” players. A Home Grown player in this domestic context is to be defined as a player who, irrespective of his nationality or age, has been registered (continuously or not) with any club which is affiliated to The FA or Football Association of Wales for a period of three seasons or 36 months prior to his 21st birthday. There is, of course, a sizeable loophole to this, in that it is possible for a club to sign any number of under-21 players. That represents the extent to which the Premier League has accepted restrictions on the number of foreign players its clubs are allowed to field. But when we talk about financial excesses in the transfer market we have to remember, where the Premier League is concerned, that we are talking about maintaining its position as the most successful league in the world which can only be achieved by attracting the best players in the world.

Q: On the subject of the case law, adjudication in sporting disputes has been given an entirely new dimension by the establishment of the Court of Arbitration for Sport (CAS). How effective a judicial forum for sporting disputes has this body been, in your view?

MW: On the whole, I would say it is an effective judicial forum. From a footballing point of view, it has had its workload considerably increased because of the jurisdiction it now has over appeals from the FIFA Dispute Resolution Chamber (DRC) and other FIFA bodies, which has enabled us to appreciate the benefits of this court. The procedure is certainly faster than is the case with the DRC, and the hearings take place in a relatively relaxed atmosphere. It is true that the smoothness of these hearings can sometimes be found wanting, but then that is only to be expected, given that disputes arise from a wide variety of countries each with its own legal system. Another drawback is the difficulty involved in gaining access to the Court’s case law. With many of the cases being confidential it is difficult and time consuming for practitioners to track down relevant jurisprudence and there has to be a reliance on anecdotal reporting to initiate targeted enquiry. Nevertheless it is certainly a highly reputable body which is taken very

I believe that the best possible regulatory framework on the subject is provided by the current Premier League rules, which is based on the “squad” principle. This states that, of a maximum 25-strong squad of players, eight must be “home-grown” players seriously in sports law circles. Those who have been involved in its operation invariably come away with the feeling that they have had a fair and proper hearing. Because of its location, there is a Swiss law dimension, but this does not in any way detract from the Court’s eminence as a sporting judicial organ.

Q: The very existence of the CAS raises an interesting point. On the one hand, there are constant complaints that “the law is interfering too much in the world of sport”. On the other hand sport is developing its own, closed, judicial framework as exemplified by the Court. How would you explain this apparent conundrum?

MW: Here we have alighted on one of the issues of sports law to which I have devoted a great deal of thought, i.e. the specificity of sporting regulation. Let me state quite plainly that I do not for one moment consider that sport should be above the law. However, sporting activity presents a number of characteristics which have carved out a special legal position for sport. This is certainly recognised by the CAS. Let us take, for example, the Matuzalem case. This concerned a Brazilian player, the captain and top scorer at Shakhtar Donetsk, who just before the start of the qualifying rounds of the Champions League unilaterally terminated his contract in 2007 with immediate effect, relying on Article 17 of the FIFA Regulations.

When it came to assessing the amount of compensation payable by Matuzalem under Article 17(1) of the FIFA...
regulations, the CAS stated that a judging body must keep in mind that the dispute is taking place in the somehow special world of sport. It awarded Shakhtar €600,000 (as part of its overall award of €11.9m), a sum equal to six months salary under the Shakhtar playing contract, which the Panel considered was adequate to compensate the club for the sporting loss of its captain and top scorer. It will be interesting to see how this concept of sporting loss will be developed by the FIFA decision making bodies and the CAS in future disputes. The specificity of sport also manifests itself with regard to nationality requirements, transfer rules, rules relating to the protection of minors and third party interest rules. All these rules have been implemented to address the specific nature of football. However, there is often a fine line between what may be permissible and in the best interests of the game and what may go too far and be deemed contrary to EC law.

Q: So this is another issue where the European dimension rears its head?
MW: Certainly. There is a constant struggle between sport stakeholders who argue that sport operates under different conditions and in an entirely different environment from other EU industries. As such they argue that certain restrictions and prohibitions which apply to other EU industries under EC law should not be referable to sport. In short, sport is special and should be treated as such. On the other hand, the EU institutions, as illustrated in the Meca-Medina case, have sought to widen the reach of EC law within the context of sport. Here, the ECJ rejected the widely held notion that “purely sporting” rules automatically fall outside the scope of the EC competition regime. The ECJ held that the primary question to consider was: does the sporting activity constitute an economic activity so as to fall within the scope of the EC Treaty? If so, the conditions for engaging in it, whether of a sporting nature or otherwise (e.g. compliance with doping regulations in this case) should satisfy the provisions of the EC Treaty that provide for free movement of persons, freedom to provide services and free and open competition. Professional football clearly constitutes an “economic activity”.

Q: But if sport is to develop its own dimension and profile under the law, does this not reinforce the impression, held by some sections of the media and the public at large, that sport is somehow “above the law” – particularly where, for example, they note that sporting figures have escaped criminal penalties because of the skills of the renowned “loophole lawyer”?
MW: Again, let me state quite plainly: no sporting figure should be, or regard him/herself, as above the law. The interventions of Mr. Nick Freeman, to whom I presume you are alluding in your question, gained media attention because of the sporting performers involved – but as I recollect the courts decided the cases purely on the legal and evidential issues, regardless of the personalities involved. But, it is true, there are times when the celebrity status of our sporting figures who become enmeshed with the law can actually count against them. Take, for example, the case of the former Manchester United star Eric Cantona and his altercation with a fan at an away football ground – a case in which we represented the footballer. At first instance, the magistrate imposed a two-week custodial sentence, but it was clear from the decision that it was influenced by the player’s celebrity rather than by the nature of the offence. This was confirmed when the decision was overturned on appeal and a community service order substituted. So, on the whole, my answer to your question would be “no”.

Q: One of the legal challenges you mentioned at the start of this interview was that posed by corruption in sport. In the world of football, this issue has recently been thrown into sharp relief by the manner in which FIFA reached its decision on the staging of the 2018 World Cup, and the various accusations of corruption which accompanied this decision. Indeed, this is not the first time that suspicions of institutional corruption have swirled around football’s world governing body. Do you see this as a major problem affecting FIFA?
MW: I have to tread rather carefully here, because we are currently representing one of the accused personalities, whose case may go on appeal to the CAS (and which will no doubt give you something to write about in your “Foreign Update”). Look, I know the leading personalities of FIFA fairly well, and find it very difficult to believe that it is institutionally corrupt. I think the problem with the controversy surrounding the 2018 bid lies elsewhere – in the area of transparency. First, there was the lack of transparency.
With the Premier League we have the most successful league in the world competing to maintain that position and having to compete for the best players. That task has already been made more difficult by changes in UK taxation levels and weakness of sterling.

in the decision making process linked with the rather unseemly vote canvassing of Exco members and, secondly, in relation particularly to the English Bid, was that doomed ab initio because of the apparently unsaid criteria for awarding the event? If “legacy” was the key factor and the desire of FIFA to spread the reach of the beautiful game to new areas, then it mattered not a jot that England had the best technical bid. The FA might just as well have saved its money. Football is too firmly entrenched in this country and it is difficult to see that there would have been any real legacy resulting from the hosting of the tournament. The aftermath to the award of the 2022 World Cup has also brought the system into further controversy. How could it be that once the event had been awarded there should be FIFA suggestions that the event be played during the winter and not the summer and be shared with countries neighbouring to Qatar rather than Qatar alone?

Broadening your question somewhat, there is another major issue as regards these international governing bodies, and that is the issue of subsidiarity – i.e. the extent of the control that these bodies should have over national sport. It should be remembered that they are, in the first instance, organisers of competitions (World Cup in the case of FIFA, European Champions League, Europa League and European Nations championship in the case of UEFA). I do not believe that these bodies should seek to be competent to interfere in the running of national competitions to the extent they are attempting to do today.

Q: But is such action not necessary at the world or European level when it comes to monitoring the ownership of football clubs? Surely the example of the fate suffered by Portsmouth in the English Premier League shows the need to apply a suitability test at the international level?

MW: No, I don’t think so – I still believe that the principle of subsidiarity should apply here. You mentioned the case of Portsmouth; well, that saga actually served as a catalyst for major changes in the way the Premier League monitors inter alia the change of ownership and financial viability of our big clubs. The League now interviews potential new owners quite rigorously, and I believe that the system currently works quite well.

Q: Finally, Mr. Watkins, let us return to an issue we broached earlier – the manner in which the vast expenditure of money is said to threaten the future of the game. One mechanism which has been proposed is the introduction of a salary cap, such as those operating in US sports and in Rugby League. Do you see such a measure also being introduced in football?

MW: No, I cannot see it except, to the limited extent we have in the second division of the Football League. With the Premier League we have the most successful league in the world competing to maintain that position and having to compete for the best players in the world. That task has already been made more difficult by changes in UK taxation levels and weakness of sterling. Also, what format will the cap take? A percentage of revenue would not work, nor would a set league-wide cap. To maintain the success of the league we have to support investment and some measure of risk taking. I am not suggesting that there is nothing that should be done to control the influence of money. Clubs need to manage costs and particularly salary levels. Measures (including sanctions) are already present in the rule books. I mentioned earlier the “fair play” rules recently introduced by UEFA – let’s see how these work out and take the issue from there.
Ambush Marketing: An analysis of its threat to sports rights holders and the efficacy of past, present and proposed anti-infringement programmes

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Background: The Booming Business of Sport

The global sporting industry has witnessed tremendous growth over the last two decades as it relates to spectator interest, participation and television viewership. However, it is probably in the realm of sports business that the most phenomenal growth has taken place. Sports governing bodies, especially at the international level, have depended on sponsorship, media rights, merchandising and ticket sales as their main sources of revenue. In mid-December 2009, Richard Carrion indicated that the International Olympic Committee (IOC) expected to amass over $2 billion for the United States (US) television rights for the 2014 and 2016 Winter and Summer Olympics. By October 2010, Sochi 2014 organisers had already raised US$1 billion in sponsorship revenue and was on the verge of surpassing the $1.2 billion raised by Beijing 2008 organisers. These types of figures are now commonplace in sports marketing circles and confirm the magnitude of sports business globally.

Ambush marketing has the practical effect of compromising this very potential for sports event organisers to generate revenue, especially through sponsors’ contributions. Alex Kelham succinctly observes that ambush marketing “fundamentally undermines the key principle of sponsorship” which is exclusivity. When exclusivity is compromised the magnetic appeal of sports sponsorship loses much of its effect and the ramifications can be telling.

Sports rights

“The first and most fundamental point is that English law does not recognise the existence of proprietary rights in a sports event per se.”

Prima facie, this principle appears unorthodox. Becker observes that in British Commonwealth countries like the United Kingdom, Australia, New Zealand, Canada and South Africa, plus in other nations like Germany, Switzerland, Sweden and Japan, an independent proprietary right in an event is not recognised. The Australian authority of Victoria Park Racing has been identified as the leading source from which the abovementioned legal proposition is gleaned. Latham CJ propounded that “a ‘spectacle’ cannot be ‘owned’ in any sense of the word.” The Sport and General Press decision (“Our Dogs” case) was cited in Victoria Park as establishing that a plaintiff would have to rely on contractual rights if he desired to exclude another from taking photographs at an event he organised. Notwithstanding this, it is also accepted that in practical terms, sports rights do exist. Legal commentators hold the view that these rights, which are unquestionably valuable, are derived from a combination of principles arising from property, contract, tort and intellectual property law. The corollary of owning valuable rights is the desire and need to safeguard them from anything that may diminish their worth. Ambush marketing is seen as one of the biggest threats to lucrative sports rights.

The plethora of definitions for ‘ambush marketing’ lends credence to Phillip Johnson’s view that it is an amorphous concept. There is general agreement that the ambush marketing practice describes the unauthorised association that entities or individuals seek to make with the reputation and goodwill of prestigious sporting events. It has often been subdivided into association ambush and intrusion ambush, the former occurring in 1984 when Kodak sponsored the ABC television broadcasts of the Los Angeles Olympics, although the worldwide sponsor was Fuji and the latter taking place at the 1996 Atlanta Olympics where Nike, a non-sponsor, bought billboards in and around the Games’ venues although Reebok was the official footwear sponsor. Notably not everyone sees ambush marketing as negative, wrong or illegal. Also called “parasitic marketing” or “guerilla marketing,” some see the practice as creative, innovative and clever. Such feedback was given when Great Britain’s Linford
Christie appeared for a media interview inconspicuous Puma contact lenses at the 1996 Atlanta Olympics.

For sponsors, ambush marketing damages the commercial relationship between themselves and the event organiser. With the stakes being very high, many financial and legal consequences stand to follow. Evidently, the line between what is lawful and what is not can easily get blurred in the context of competing interests and juridical complexities. Whatever the legal status of ambush marketing may be, nations hopeful of hosting sporting events must be pro-active.

The bidding process and the call to implement protective legislation
It is axiomatic that the Olympic Games and the FIFA World Cup are the two most high profile sporting spectacles. It is also now common practice for bidding nations to give the IOC and FIFA undertakings that brand protection will play a central role in hosting the Olympics and the World Cup respectively. Divergence only occurs in the methods used for such protection. Recent trends suggest, though, that legislative intervention has become the regular prelude to event hosting and that various factors influence the anti-infringement measures.

Among those factors, economic considerations rank high. Such motivation cannot be trivialised in light of the vast contributions in cash and kind made by sponsors. Social and cultural considerations can overlap with the commercial ones depending on the status of the host nation. This was prevalent during Cricket World Cup 2007, hosted by nine Caribbean countries. The efforts to have both a safe and commercially ‘clean’ event ultimately led to a sporting spectacle robbed of atmosphere and vitality. Confused cricket fans at warm-up matches were compelled to remove T-shirts with non-sponsor branding in order to protect the commercial rights of event partners such as Hero Honda, LG and Pepsi. This was reminiscent of the Germany 2006 World Cup Bavaria beer ambush of Budweiser where supporters of the Dutch team were directed to remove their orange lederhosen which displayed Bavaria branding.

What distinguished the Caribbean experience, though, was its inexperience as a hosting region which resulted in some timidity in imposing cultural motivations on the economic ones. That region is inherently festive, a feature that has characterised the way cricket is played and which continues to foster a vibrant spectator atmosphere. The generally held view after the event was that ICC policy was given primacy over spectator passion raising questions about whether the enactment of sport-specific legislation, generally, is done in a vacuum, oblivious to third party concerns.

The passing of the legislation in the Caribbean gave effect to many of the objectives stated in the policy considerations for the implementation of the ICC Cricket World Cup West Indies 2007 Act, 2006 including the protection of commercial rights, the control of ambush marketing and the protection of CWC marks, indicia and images. It appears, then, that there are times when it is appropriate for host nations to insist that the overall ‘good of the game’ must entail a multifaceted approach.

Similarly, the role of political motivation cannot be underestimated as the award of the 2008 Summer Olympics to Beijing, China indicated. Blackshaw noted the “mixed reaction” to China “in light of a poor human rights record” but also commended the IOC for preferring engagement to ostracism. The socio-economic success of the Games appears to have justified a political gamble taken by the IOC.

The surprising Beijing choice was compounded by China’s poor brand protection record which led the BP Council to ask “what happens when the world’s biggest opportunity for merchandising revenue meets the world’s counterfeiting capital?” There was nothing in China’s history of IP protection to inspire confidence that it would protect the Olympic brand. Yet, it was an opportune time for China to prove detractors wrong, by delivering a world-class event while leading the anti-ambush charge when it mattered most. It can be reasonably inferred that China’s motivation therein was more political than economic. Evidently, the call for anti-infringement legislation has multiple roots. The evidence of event hosting today suggests that those roots are only going to become more firmly established with the passage of time.

The question still begs, though, whether it is fair for a country with world-class facilities, a strong sporting history, financial support, an efficient transportation system, five-star hotels and a visionary post-event legacy plan to be rejected from hosting a major sporting event because it did not intend to enact brand protection legislation. The danger that these influential world governing bodies face is that although their
objectives are legitimate, they are bordering on micro-managing the hosting of major events. It is in this context that competition law concerns are raised, since most sports governing bodies hold dominant market positions due to the fact that their governance structure gives them a virtual monopoly. In the European context, the competition provisions of the EC Treaty may very well apply if the decisions of the sporting bodies distort trade between member states or are deemed anti-competitive in light of dominant positions held in the sports market. EC law, though, does not frown upon the existence of a dominant position, but the abuse of it.

This alleged “micro-management” of event hosting by powerful world bodies is a reflection of the changed priorities of modern sporting culture. Previously, the salient factor in bidding was the quality of facilities. While that remains a central feature, the paramount consideration is now the protection of commercial interests so that brand protection and strong intellectual property security are pertinent and perhaps, indispensable elements of a bid package.

Olympic bids
An Olympic host city and its NOC are obliged to protect the Olympic symbol, the Olympic motto as well as the terms ‘Olympic’ and ‘Olympiad.’ It is pragmatic for this to be realised thorough legislation, unless the IOC grants permission to each of approximately 205 NOC’s to register the terms as word marks, an admittedly cumbersome process. Trade mark law permits, inter alia, the registration of words as trade marks, especially if the principal requirement of distinctiveness is met.

NOC’s have also sought to obtain Olympic IP protection by persuading their governments to become signatories to relevant international treaties like the 1981 Nairobi Treaty, although that Treaty applies only to the Olympic symbol and not the other Olympic properties. There is general agreement that the Treaty was not popular because, as Michalos notes, “the requirement of the authorisation of the IOC, rather than of the respective national Olympic Committee, is probably the stumbling block of many nations.” Johnson adds that a real problem is created with such an expectation since a country’s domestic law may have already granted rights in the Olympic symbol to the NOC, as is the case in the USA under its 1978 Amateur Sports Act.

The upshot is that, at least with regard to the Olympics, the implementation of specific legislation is the preferred option for bidding nations. Alternatively, the existing legal structure must be potent.

Rio’s Success
The Rio Bid contained a compact brand protection programme. Both the State and City of Rio de Janeiro had already passed Olympic Acts. “Rio 2016” was registered with the Brazilian Trademark Office while brand protection was based on the 1988 Federal Constitution, the 1996 Industrial Property Law, the 1998 Pelé Law and the 2003 Counterfeit Law.

Similar to the failed Tokyo 2016 bid, the Brazilian approach was to amend the existing legislative framework “as necessary to accommodate any Games-specific requirements.” Article 124 of the Industrial Property Law is particularly relevant to the ambush marketing fight as it “prohibits companies that are not official sponsors, providers or supporters of the Olympic Games from registering any item, brand or symbol which could easily be confused with official partners and symbols.” As a result of its legislative proactiveness, Brazil was well placed to prove that Olympic and other commercial brands would be secure.

The reasons for choosing one bidding territory over another are not usually given after the event is awarded. Yet, certain fundamental issues surface:

(i) Is that country’s culture a “protective” one when it comes to sports, brands and marketing?

(ii) Does the bidding nation have a track record of strong IP protection?

(iii) Does it have an effective law enforcement policy and practice?

These questions deserve consideration and may reveal what future trends will develop for sports hosting. The palpable conclusion is that the practice of enacting protective legislation for sports events is well entrenched. The only distinction from one bid to another is whether the legislation already exists or new legislation must be introduced. Some territories have secured brand protection by amending existing laws. In South Africa, both the Trade Practices Act
AMBUSH MARKETING: AN ANALYSIS OF ITS THREAT TO SPORTS RIGHTS HOLDERS AND THE EFFICACY OF PAST, PRESENT AND PROPOSED ANTI-INFRINGEMENT PROGRAMMES

76 of 1976 and the Merchandise Marks Act 1941 were amended to prepare for CWC 2003, the 2009 Confederations Cup and the 2010 FIFA World Cup. In Switzerland, in anticipation of the 2008 European Football Championships, amendments were made to the Federal Act on Unlawful Competition provoking much controversy. Australia amended its 1987 Olympic Insignia Protection Act (OIPA) to prepare for the 2000 Sydney Olympics, but still saw it fit to enact the Olympic Arrangements Act 2000 (OAA) and the Sydney 2000 Games (Indicia and Images) Protection Act 1996 (Sydney Act). The OAA was one of those pieces of ‘sunset legislation’ that was passed for a limited time only, while the Sydney Act expanded the list of protected words first created under the OIPA 1987.

Whatever route is taken, the onus remains on event organisers to strike the balance between satisfying the needs of event partners while adhering to the broad spectrum of legal principles.

Sui generis legislation: Necessity and legality

“There is a growing trend for governments, in response to pressure from event organizers wishing to protect their events and contractual agreements with their sponsors, to introduce specific anti-ambush laws. These go beyond the traditional protections offered by trademark law, unfair competition/passing off, copyright, competition laws and human rights...”

The popularity of ambush marketing legislation especially within the last decade has brought it under close legal scrutiny. The backdrop for the enacting of ambush marketing legislation in many instances is the inadequacy of existing laws, including intellectual property and unfair competition laws. Opponents of ambush marketing legislation believe that some provisions are oppressive, draconian, restrictive or unnecessary. Duthie presents various alternatives to enacting legislation including controlling the levels of sponsorship, media regulation and intellectual property protection.

The idea behind controlling the levels of sponsorship is to restrict the exposure given to non-event sponsors who may nevertheless be the sponsors of teams or individuals. Bitel holds the view that fewer sponsors are better, preferring FIFA’s 6-sponsor model to the 30-plus sponsors used for the New York City Marathon.

In practical terms, this may mean that athletes will not be allowed to display branding from their sponsors during press conferences or prize-giving ceremonies, for instance. This type of scenario is not uncommon as occurred during a medal ceremony at the 1992 Barcelona Olympics when basketball legend Michael Jordan could be seen covering the logo of US team sponsor, Reebok, in order to protect his personal endorsement with Nike. Similarly, at Beijing 2008, star US basketball player Dwight Howard, personally endorsed by Adidas, used a basketball to hide the Nike logo on his US kit. This type of restriction is admittedly more of a practical measure than a legally enforceable one since an event organiser will be hard-pressed to prove any illegality on the part of a commercial entity who has genuinely invested financially and otherwise in a team or athlete.

As far as media regulation is concerned, event organisers can seek to control the broadcast sponsorship of an event so that confusion is reduced. Verow acknowledges that broadcast sponsorship is an effective means of ambushing an event and his proposed solution concurs with Leone’s view that instead of “demanding ever more stringent legislation, sponsors themselves should be expected to counter ambush marketing by purchasing all the commercial opportunities afforded by a particular event.” This “saturation sponsorship” strategy can also include the purchase of billboard and other advertising space in and around the event venue.

Intellectual property regulation is one of the most used and effective anti-ambush tools. Copyright, patent, design and trademark laws provide a strong legal basis for brand protection, while offering various remedies against infringement. It is for this reason that Leone believes that official sponsors are not defenseless under existing law and can avail themselves of intellectual property and unfair competition laws. Pauline Dore, in reviewing LOCOG’s preparation for the 2012 Olympics also mentions the traditional legal methods like passing off, trade mark and copyright law, while Lewis and Taylor add to that list regulation through the Olympic Charter and International Paralympic Committee Handbook, contractual controls, education and public relations.

Hence, opposing viewpoints exist regarding the necessity of sui generis legislation. The New Zealand criteria for enacting protective legislation is useful and includes the following considerations: Will the event:
• attract a large number of international participants or spectators
• raise New Zealand’s international profile
• require a high level of professional management and co-ordination
• attract a large number of New Zealanders as participants or spectators
• offer substantial sporting, cultural, social, and economic benefit to New Zealand?

This model, though in need of further specifications for each of the benchmarks set, is commendable since it seeks to establish objective criteria upon which decisions are made with regard to protection from infringement.

**Passing Legal Muster**

“…their legal validity could and should be challenged from an enforceability perspective in certain specific circumstances.”

Mouritz’s assertion that the Vancouver 2010 ambush marketing legislation deserved a legal challenge confirms that scrutiny is not misplaced for anti-ambush laws. On closer examination, other principles of law are often compromised by ambush marketing legislative provisions.

**Copyright, patent, design and trade mark laws provide a strong legal basis for brand protection, while offering various remedies against infringement**

**Competition Law**

The merger of sport, business and law has become well established during the last few decades. Not only is this synthesis a practical one, it now also has legal backing as European Court of Justice (ECJ) and Court of Arbitration for Sport (CAS) jurisprudence have acknowledged the application of EU law to sport. The line of cases beginning with Walrave\(^{38}\) and Dona\(^{39}\) through to Bosman\(^{40}\), Kolpak\(^{41}\) and Simutenkov\(^{42}\) and culminating with more recent rulings in Meca-Medim\(^{43}\), QC Leisure,\(^{44}\) Webster\(^{45}\) and Matuzalem\(^{46}\) tell a compelling story of how sport has been impacted by the rule of law, especially where it constitutes an economic activity under Article 2 of the Treaty of Rome.

By virtue of the European Community (EC) Treaties and the 1998 Competition Act in the United Kingdom, principles of competition law have been conspicuous in the regulation of the commercial aspects of sport. Treaty Articles 81 and 82\(^{47}\) respectively address matters relating to distortion of competition and abuse of dominant market positions. Decisions in Hendry\(^{48}\) and MOTOE\(^{49}\) highlight the approach of the ECJ with respect to Article 82 questions. In the former case, Lloyd J. evaluated the defendant body’s rules as they sought to restrict the formation of rival snooker tournaments. He held that such a rule breached competition law and was also an unreasonable restraint of trade. The latter case also addressed the abuse of dominant positions in the context where the Greek State refused to grant MOTOE\(^{50}\) the necessary authorisation under Greek law, to organise motorcycle competitions in Greece.\(^{51}\)

The question begs whether the IOC’s and FIFA’s monopoly positions are abused when they offer exclusivity to one set of sponsors over another. That issue resembles the matters raised in the Danish Tennis Federation (DTF)\(^{52}\) litigation in which there was an apparent lack of objective criteria in the selection of exclusive tennis ball manufacturers. The court in DTF objected to the Federation’s decision to appoint tennis ball manufacturers without the objectivity of a tendering process. Additionally, the length of exclusivity granted to Slazenger and Trethorn in that case, meant that other manufacturers were excluded from the market for the full period of exclusivity which was three years. It is hard to dispute that exclusive arrangements, especially if lengthy, will distort competition. Only if these restrictions are proportionate and are made in pursuit of legitimate objectives will they escape the punitive hand of competition authorities.
It is also not uncommon for sponsorship contracts to include rights of first refusal for existing sponsors who therefore get to monopolise their association with a particular brand, tournament or event. This, too, may very well contravene Article 101 of the TFEU since again, competition is restricted. Once more, issues of proportionality and legitimacy of objectives become key determining factors in assessing the legality of a rights holder’s actions.

Restrictions on competition are not misplaced because in the absence of them, income-earning potential through sponsorship can be undermined with detrimental effect. No sponsor will show alacrity in making future investments if there is no tangible benefit when current investments are made. At the same time, the conduct of event organisers must also be kept on a leash of competitive parity. Gardiner notes that “competition regimes exist to regulate economic activity within countries and are usually predicated on the notions of ‘fair play.’ Most competition regimes aim to avoid anti-competitive behavior of cartels and prevent firms from abusing their dominance in any particular market.” Hence, legal doctrines like the essential facilities doctrine exist to ensure that strong market powers do not unlawfully exclude others from market entry. It is nevertheless important to articulate that exclusivity in and of itself is not illicit if there is a lawful tendering process, as enunciated in Danish Tennis Federation.

Constitutional Law
“To date, the laws in the United States have been on the side of ambush marketers. As long as their statements are generally truthful, they have been protected as commercial speech under the First Amendment.”

One of the biggest legal hurdles to the enactment and enforcement of ambush marketing legislation is the potential conflict with constitutional and/or fundamental human rights. Kaufmann-Kohler, Rigozzi and Malinverni note that since 1970, the ECJ held that the protection of fundamental rights is a general principle of European law. An analysis of specific clauses in ambush marketing legislation reveals that some provisions are likely to be declared legally unenforceable. A useful starting point is the United Stated (US) status quo where unlike “other nations such as the United Kingdom, New Zealand and South Africa, the US has not enacted legislation which prohibits ambush marketing.” This reality clarifies Schmitz’s assertion that in the US a trade mark holder will more often than not seek relief against an ambusher under the 1946 Lanham Act. The implication, then, is that US lawmakers are wary of enacting legislation that can be deemed to breach constitutional rights, a fact which requires a special Parliamentary majority in some Commonwealth nations. It is this legal friction that is at the centre of the ongoing controversy caused by the whereabouts requirements of the World-Anti-Doping Agency for athletes in national or international registered testing pools. Evidently, the balancing of competing rights is a central feature of any effective legal system.

Many constitutions also protect the freedom of expression. Anti-ambush laws purport to curtail that liberty. This tension mirrors the dichotomy between the “potentially conflicting rights” of ECHR Articles 8 and 10 as it concerns the right to privacy and the freedom of expression. These competing interests were judicially considered by the South African Constitutional Court in Laugh It Off Promotions. The court held that “this case brings to the fore the novel, and rather vexed, matter of the proper interface between the guarantee of free expression enshrined in s.16 (1) of the Constitution and the protection of intellectual property rights attached to registered trade marks as envisaged by s.34 (1) (c) of the Trade Marks Act 194 of 1993 and consequently to related marketing brands…” This right to free speech will continue to be a thorn in the side of law-
makers if they fail to consider the panoply of vested rights among various stakeholders.

The Law of Tort
“Economic torts are also relevant to sport. There the wrong doing consists of a deliberate act, not involving a breach of contract towards the victim, causing economic loss.”

Beloff’s succinct analysis of the marriage of tort and sport reaches the heart of the offences of passing off, trespass and deprivation of property without compensation. Ambush marketing laws that seek to regulate advertising and marketing conduct in the locations bordering event venues usually ignore the proprietary rights of private landowners. Rights to property are also well enshrined fundamental and constitutional rights. The problem with the anti-ambush laws is that landowners who cede proprietary rights for the duration of the event are not compensated. These imbalances must be addressed at the drafting stage of sui generis laws.

Advertising and Media Law
“The proposed amendments have already provoked a vehement reaction in Switzerland. Certain voices complain about the impairment of the liberty to produce advertisements, others reproach the Swiss Government for being compliant with UEFA and cementing the quasi-monopolistic status of large sports organisations.”

Hufschmid captured the reactions to Switzerland’s brand protection attempts prior to Euro 2008. The cry was the familiar one from media organisations who jealously guard their rights. It seems, though, that the complaints in Switzerland did produce a negative impact given reports of 18 instances of ambush marketing at Euro 2008 co-hosted by Switzerland and Austria. The Centre for the International Business of Sport (CIBS) reported Burger King’s “red card” advertising campaign which ambushed Mc Donald’s official sponsorship as well as Heineken’s ambush of event sponsor Carlsberg through its distribution of Heineken-branded hats for the benefit of Dutch fans. It appears that respecting the liberty to produce advertisements was exactly the open door that Burger King needed to create an association with Euro 2008 without being an official sponsor.

In South Africa, the Advertising Standards Authority adopted a Code of Advertising Practice and Procedural Guide, with the main objective of consumer protection and the promotion of advertising fair play. One of the central features of the Code is the stipulation that express permission must be obtained by any advertiser seeking to refer to a living individual. The Code therefore contemplates the protection of privacy, a useful tool to prevent the unauthorised exploitation of an athlete’s image.

Clean Venue, Clean City, Clean Athlete!
Like FIFA, the IOC’s vision of an effective commercial programme is an enigmatic mixture of foresight and paranoia. The ‘clean venue’ concept is well established but its legality remains in doubt. New Zealand, for instance, apparently lost the right to co-host the 2003 Rugby World Cup due to its failure to provide ‘clean venues.’ The legal footing for this expectation from world bodies is, at best, shaky and is destined to be challenged sooner than later.

Admittedly, the ‘clean city’ vision is commendable and the search for “commercial purity” in and around event venues is reasonably justifiable but in practical terms, the purging of an entire city is disproportionate. Nevertheless, it is the concept of the ‘clean athlete’ that is most disturbing. ‘Clean athlete’ in this regard is not to be confused with a drug-free athlete, which is a universally desired objective. Instead, it refers to the sportsman or sportswoman who is prohibited from displaying the branding of his or her individual sponsor during the period of the sporting event. There is an inherent injustice when an entity has decided to invest in the growth and development of an athlete and through that support, the athlete achieves global acclaim. Now that the athlete has qualified for the Olympics, for instance, he has to divorce himself for two weeks from the very body that helped to harness his innate ability. Seemingly, this is justified because Brand Z, the athlete’s sponsor, is not an Olympic sponsor. The solution herein is in the negotiation and conclusion of clearly defined contracts and carefully-drafted sporting rules that effectively consider the rights of athlete, sponsor and event organiser.
Lessons From Vancouver 2010
After its successful bid, the Vancouver Organising Committee for the 2010 Winter Olympics (VANOC) proposed the Olympic and Paralympic Marks Bill C-47 as the relevant statute to address the ambush marketing threat. Its justification lay in the fact that the total operating revenue was US $1.63 million of which US $760 million was expected to be contributed by VANOC sponsors. Mouritz notes that this sum represented the biggest portion of VANOC’s Operating Revenues. Therefore, the case was built for strong measures to be enforced to protect the significant contribution made by VANOC’s commercial partners. Nevertheless, Mouritz equally observes that the Bill contained what he called “very stringent protective provisions” believing that the Canadian Legislator went overboard.

Like London 2012 and Sydney 2000, Vancouver 2010 has sought to protect words like “Gold” and “Silver” as well as the word “winter.” Consequently, the Vancouver laws were deemed “overly restrictive.” Perhaps during the 2009 Christmas season, these overbroad limitations made Canadians hesitant to recite the verse referring to “five golden rings” in the popular “12 Days of Christmas” carol!

A significant issue surfaced: “The question at hand is therefore whether the restrictive provisions in the Bill on the use of Olympic trademarks and of generic Olympic terms are legally enforceable under English law in a non-commercial setting.” The Canadian Bill did not allow for non-commercial use of Olympic trademarks nor of the generic Olympic terms. Canada’s Trade Marks Act, like the UK 1994 Trade Mark Act creates an infringement only when protected marks are used “in the course of trade.” There is no infringement if use is not in the course of trade. For this reason, Mouritz argues that “non-commercial use of the Olympic Trademarks would fall outside of ECJ case law, and, in any event, the UK Trade Marks Act 1994 and the Canadian Trade Marks Act and should therefore be allowed in absence of the Bill. There is thus a conflict between the Bill and VANOC’s policies on one hand and UK and Canadian intellectual property laws and ECJ case law on the other hand in relation to non-commercial use.”

Indeed a conflict was apparent since ECJ, UK and Canadian jurisprudence catered for non-commercial trade mark use while the VANOC bill does not. The explanation given is that the Canadian Government was “applying the legal principle of lex specialis derogat lex generalis in order to justify its departure from its own trade mark legislation.” Under that principle, where there are two conflicting laws, the more specific law takes precedence over the more general law.

When considering non-commercial use of generic Olympic terms in domain names as well as the freedom of expression right granted under the ECHR, Mouritz concludes that the Canadian legislative provisions will be hard-pressed to be found as legally enforceable. It is hard to disagree with this viewpoint.

The legal landscape of South Africa 2010 and London 2012
“Two Dutch women have appeared in court in South Africa over an alleged “ambush marketing” stunt at a World Cup match. They were released on bail.”

FIFA and the South Africa 2010 organisers received much criticism over the arrest of the two Dutch supporters who were pawns in Bavaria’s second consecutive attempt to ambush a football World Cup. The charges were eventually dropped, but questions of proportionately inevitably were raised by many onlookers. The vastness of football business today points to the likely continuity of these types of disputes.

About a year earlier, FIFA’s contentious muscles were flexed in the North Gauteng High Court in Pretoria, South Africa. In FIFA v. Eastwood Tavern the Defendant restaurant embellished its signage with the inscription “World Cup 2010” which would have been conspicuous in its appearance due to its proximity to Loftus Stadium in Pretoria, one of the 2010 World Cup venues. Further, the number ‘2010’ and the words “two thousand and ten South Africa” were featured close to the hoisted flags of reputable football-playing countries. The Court decided in FIFA’s favour ordering Eastern Tavern to abstain from this form of unlawful competition.

The decision was a predictable one given the passage of the 2010 FIFA World Cup South Africa Special Measures Act 11 of 2006 and the Second 2010 FIFA World Cup South Africa Special Measures Act 12 of 2006 and Government Gazette notice of December 14, 2007. Annexure C 1 to the Gazette
notice prohibited the use of expressions including but not limited to “World Cup 2010” “2010 FIFA World Cup South Africa” “SA 2010” “2010 FIFA World Cup” and “Football World Cup.” Additionally, the World Cup in South Africa was designated a “protected event” under s.15 (A) of the Merchandise Marks Act, offering the event statutory protection.

The South African Constitutional Court in the Laugh It Off decision was forced to balance competing interests relating to protection of IP rights and freedom of expression. Any discussion of juridical developments in South Africa must consider its status as a constitutional state, in which the 1996 Constitution, including its Bill of Rights, has priority over other rules, including those of sports bodies. The Bill of Rights provides for the right of access to court, which is also an ECHR right, as well as rights to equality, property, freedom of expression and administrative justice.

In Coetze v Comitis, the South African High Court took the bold step of setting aside in their entirety, the rules of the Professional Footballers Association. The rationale for this was that they breached the fundamental rights of the footballers. Again, the priority given to the fundamental rights of athletes was evident, a trend that is likely to continue as sportsmen show a greater willingness to explore and exercise their legal options.

London 2012: The legislative landscape
The London Olympic Games and Paralympic Games Act 2006 (LOGPGA) was passed within months of London being awarded the 2012 Olympic and Paralympic Games on July 6, 2005. Key initiatives created by the LOGPGA include the London Olympic Association Right and the Paralympic Association Right as well as Advertising and Street Trading Regulations. LOGPGA also made amendments to The Olympic Symbol Etc. (Protection) Act 1995 (OSPA), an Act which created the Olympic Association right in the UK.

A significant feature of OSPA is that it transcends the wide gamut of past, present and future Olympic and Paralympic Games so that its effect will outlive the 2012 Games. Miller identifies why the protection of the London 2012 brand is essential noting that “Until the end of 2012 LOCOG is the guardian of the Olympic Rings and the Paralympic agitos. It is legally bound to protect these Symbols and the value, integrity and image of the Olympic Games and Paralympic Games.” Use of the London 2012 is reserved for LOCOG licensees including the IOC’s leading international sponsors and the major domestic sponsors.

The scope of LOGPGA 2006 protection
LOCOG has employed the combination of “traditional legal protections” and specific statutory rights. Under the traditional legal mechanisms, reliance has been placed on copyright, trademark and contract law. With regard to the statutory rights, LOCOG was granted special rights under LOGPGA to prevent unauthorised associations, the sale of counterfeit merchandise and conduct that undermines revenue generation.

The LOGPGA goes on to identify ‘Listed Expressions’ which are reserved only for LOCOG sponsors, partners and licensees. This is an area that produces much disagreement since generic words like “summer” “gold” or “silver” are given protection when used in conjunction with other expressions like the number “2012” or the word “Games.” It is no surprise that advertisers have expressed their concerns that the Act restricts artistic license. Whether the defences offered under the Act such as journalistic or artistic use, honest statement and incidental use provide sufficient security for advertisers and non-sponsors is an important consideration. Legislators of sport-related statutes have the unenviable task of stipulating Parliamentary intention while offering sufficient exemptions that recognise other stakeholder rights.

The London Olympic Games and Paralympic Games Act 2006 (LOGPGA) was passed within months of London being awarded the 2012 Olympic and Paralympic Games.
Words like “Olympic(s)”, “Olympian(s)” and “Olympiad(s)”, unsurprisingly, have received special protection. The matter becomes contentious when attempts are made to protect generic words like “silver”, “gold” and “games.”

The LOGPGA in Schedule 3 makes amendments to the OSPA and seeks to expand the category of protected words to include words “so similar to a protected word as to be likely to create in the public mind an association with the Olympic Games or Olympic movement.” It therefore seems that “golden games” would constitute an infringement of the Act. The fact that there is no need for the association to be either intentional or misleading increases the likelihood of an offence being committed. Such breadth on its face appears disproportionate to what is necessary to protect the Olympic brand.

Further, the LOGPGA has given protection to “2012” “twenty twelve” and “two thousand and twelve.” Interestingly, another permutation “two zero one two,” clumsy as it sounds, was not protected and arguably could be used to infringe the LOCOG marks. Apparently, no obstacles may exist to deter a commercial entity that sells televisions, for instance, from advertising with the slogan: “Get the Best View of Two Zero One Two.” Doubt remains as to whether such an advertisement creates sufficient association with the 2012 Games to breach the LOGPGA. Admittedly, these issues rarely are straightforward, nor can legislation ever capture every possible infringement. It becomes a matter of reasonable limitations and proportionate restrictions.

The juxtaposition of academic and judicial opinions

“Italy is an interesting example of a specific legislation adopted in relation to the Turin Winter Games which did not give rise to any court case. We have no means to determine whether this is due to the extreme efficiency or the uselessness of that legislative package, or a little bit of both.”

Kobel’s frank assessment confirms the general position that relatively few ambush marketing disputes have culminated in litigation. This could be either the result of effective anti-infringement programmes or from ambush marketers skillfully circumventing the law. Thoughts vary on the double-barreled question of what behavior actually constitutes ambush marketing and whether the practice per se is lawful or unlawful. Both limbs are not easily discernible. While Leone considers the practice “perfectly legitimate,” Mandel calls it “stealing” and “thievery.” Even when there is agreement on activities that can be classed as ambush marketing, its legality and often its morality remain factious issues.

Judicial Opinion

“It is humbly submitted that the Delhi High Court judgment refusing to accept ambush marketing as a ground for relief is a retrograde step.”

Bhattacharjee’s comments were made following the decision in ICC v. Britannia in which the Delhi High Court held that ambush marketing was not available to the Plaintiff, the ICCDIL, as it sought injunctive relief against Britannia Industries. The Plaintiff claimed that the Defendant’s scheme “Britannia Khao World Cup Jao” amounted to unfair trading and that its use of the 2003 WC logo was unauthorised and constituted ambush marketing. Holding that the balance of convenience did not lie in the Plaintiff’s favour, the court observed that the Plaintiff’s failure to contest the existence of a lawful agency agreement on the Defendant’s behalf was fatal to its case. Further, the evidence in the rights contracts confirmed Britannia’s entitlement to use some of the event marks that it did, including the mascot.

Bhattacharjee’s concern is meritorious. Even though the legality of Britannia’s actions hinged on the rights granted in the relevant commercial agreements, the better approach for the Delhi High Court would have been to allow the plea of ambush marketing, even if the requirements to establish an offence were not met. To reject the plea is to imply that the claim was frivolous, arbitrary or capricious. Were the case heard in South Africa, the competition venue, the ICCDIL’s case would have had a stronger legal footing due to the amendments made to the 1976 Trade Practices Act and the 1941 Merchandise Marks Act. The amended laws prohibited the implication of a contractual or other connection with a sponsored event, and the unauthorised use of a trade mark relating to the event which use achieves publicity or derives benefit from the event.

Before a South African court, the ambush marketing plea would at least be open to the ICCDIL, although it would have failed since Britannia had the requisite authorisation to
use the event marks on its promotional material. It is submitted that in rejecting the plea of ambush marketing, the Delhi High court failed to embrace the modern sports business culture and bowled an unplayable delivery at event organisers. The court, even if it ruled in Britannia’s favour, missed an opportunity to make a categorical statement about the damage that ambush marketing can cause to the long-term health of sports funding and development.

In Arvee107 and in EGSS108, the ICCDIL, as Plaintiff in both decisions, had contrasting results. In the former case, the court rejected the pleas of passing off and ambush marketing, holding that there was no misuse of the ICC logo with the effect that consumers would not conclude that there was a connection between the Defendant’s goods and the 2003 CWC sponsors.109 However, in EGSS, an injunction was granted against the use of the ICC logo which use was deemed to have been caught by the Indian Copyright Act.110

It is hard to reconcile the Indian World Cup cases, especially since copyright law, if applicable in EGSS should have been equally relevant in Arvee and Britannia. The dichotomy in the decisions may be explained by considering the causes of action presented to the court in each case. Had the ICCDIL not pursued passing off and ambush marketing in the first two cases, but instead relied on traditional intellectual property law, the outcome may very well have been different. The courts, generally, appear more willing to entertain causes of action based on well-entrenched legal principles, rather than novel grounds for relief, even if they are legally sound. That trend is also evident in North America.

American jurisprudence reveals “the willingness of the courts to protect sponsorship and licensing contracts”111 under section 43(a) of the Lanham Act which covers false designations of origin and false descriptions or representations. Such was the case in MasterCard v. Sprint112 where both parties had official status, MasterCard as an official sponsor and Sprint, the official long distance telecommunications provider. Difficulties occurred when Sprint did not respect the product exclusivity requirements of ISL Football AG which had granted MasterCard the exclusive right to use the trademark ‘World Cup 94’ on card-based payment and account access devices, which included phone cards.113 Sprint’s use of the World Cup trade mark on its telephone cards was deemed unlawful since it was outside of its designated product category.

Schmid’s acknowledgment of the United States Olympic Committee (USOC) line of cases which cemented the function of the 1998 Ted Stephens Olympic and Amateur Sports Act (OAS Act)114 is useful. In Stop the Olympic Vision115, Union Sport116, International Federation of Body Builders117 and David Shoe118, the courts held that the purpose of the OAS Act was to “insure the market value of licences.”119 This shows an admirable appreciation of and awareness for the value of the commerce of sport. In the US courts, then, primacy is accorded to contractual obligations in commercial agreements and there is an unmistakable loyalty to the letter of the law. This was evident in FIFA v. Nike.120

In that case, FIFA sought a restraining order that would stop Nike from using the designation “USA 2003” in circumstances where Adidas was the official footwear sponsor for the 2003 Women’s World Cup121. At the same time, Nike had a legitimate claim for use of the designation being the sponsor of the US Women’s National Soccer Team. Interestingly, the court refused to grant the order, holding that the “Football Association had not acquired secondary meaning in the descriptive designation ‘USA 2003.'”122

The ruling raises critical legal issues. The declaration of the designation as distinctive brings to bear the importance of trade mark owners showing alacrity not only in registering their marks but also in complying with registration requirements. In the WORLD CUP 2006 OHIM123 series of decisions124, the cancellation division held that although the marks GERMANY 2006, WORLD CUP GERMANY, WORLD CUP 2006 and WM 2006 “were suggestive of the tournament does not mean that they are devoid of distinctive character.”125

By contrast, the registration of FUSSBALL WM 2006 was cancelled by the German Supreme Court who found it to be descriptive with regard to some goods. The court observed that the addition of the word FIFA would likely have pushed the word mark over the distinctiveness threshold.126 In the FIFA v. Nike decision the ‘USA 2003’ designation was only descriptive and FIFA would have had to acquire a secondary meaning in that designation. To acquire a secondary meaning, the public would have had to recognise the ‘USA 2003’ mark as identifying FIFA as the trade source of any products bearing the mark,127 thus arousing issues similar to those considered in the Arsenal v. Reed128 decision. These are
the obstacles faced when there is an attempt to register generic terms like ‘World Cup’ or ‘Football.’

The decision in National Hockey League v. Pepsi129 was one of many involving the same litigants. The key issues to be ventilated in the case were summarised by Hardinge J as passing off, and in the alternative, trade-mark infringement or interference with contractual relations. The court relied on the House of Lords decision in General Electric130, as it found that although Pepsi’s advertising campaign did constitute ambush marketing, there was “nothing in law that could be done to protect either Coke or the NHL in its endeavours to protect Coke from its main competitor”131

Hardinge J. elucidated: “It may be that due to Coke’s failure to secure the right to advertise its product during the television broadcasts of NHIC and the securing of such rights by the defendant, the commercial value to Coke of the right to describe its product as the “Official Soft Drink of the NHL” has less commercial value than would have been the case if Coke had also obtained the right to advertise on NHIC. But that cannot diminish the defendant’s rights.”132

The decision strengthens the earlier arguments of Duthie and Leone that “saturation sponsorship” is not only practically prudent but also legally wise. Coca-Cola learned this lesson the hard way.

Decisions from the Commonwealth nations have traditionally provided persuasive precedent for fellow Commonwealth countries. A key decision was that in New Zealand Olympic and Commonwealth Games Association v. Telecom New Zealand133, in which the plaintiff’s claim against Telecom New Zealand was three-fold: infringement of the Fair Trading Act 1986, passing off and Trade Mark forgery.

The Plaintiff sought interlocutory relief in the form of an interim injunction to prevent the Defendant from publishing a contentious advertisement. Justice Mc Gedan observed that “Telecom’s conduct is certainly of concern to the Olympic movement, but there is no proven inevitability of damage… Telecom has been adventurous, perhaps unwisely so, but the Olympic Association, perhaps pushed by the competitor Bell South, may have been perhaps a little paranoid as to possible repercussions.”134

The rationale of the judge in ruling for the alleged infringer, Telecom, was that the lack of proving inevitable damage was fatal to the Olympic Association’s case. While he acknowledged concerns about Telecom’s conduct, it was not far enough to be considered unlawful. The ruling highlights the need for an event organiser or rights holder to prove the risk of actual damage, whether financial loss, damage to reputation or confusion in the public mind that leads to decreased revenue. A concern or ‘paranoia’ about possible adverse ramifications is not sufficient.

Michalos laments the inconsistencies that have arisen out of the ‘Olympic’ cases like Astral Olympic, Compulypnics, and Family Club Belmont Olympic135 in which OHIM permitted the registration of the mark “Astral Olympic” in the former case but rejected similar registrations in the latter cases. Even some judges have found it difficult to find consistency as the dissenting judgments of Justices O’Connor and Blackmun in SFAA v. USOC136 indicate. They viewed the Amateur Sports Act as “overbroad because it vested the USOC with unguided discretion” regarding the Olympic properties. This is not only indicative of the intricacies of IP law but the need for greater international harmonisation especially in Olympic-related litigation.

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Conclusions
There is little disagreement that it is difficult to quantify whether rights owners have been successful in the anti-ambush battle. Reminiscent of the anti-doping movement is the fact that as counter-measures are initiated new ways of infringement are created. This is confirmed by the continuing advance in sophistication of ambushing measures. It is submitted that the material assessed in this paper necessarily leads to the following conclusions:

The law as it relates to ambush marketing is still very unsettled due to inconsistencies in the definition of the practice and the application of the relevant law. Pertinent legal questions raised in the Australian Review remain largely unanswered, in particular the issue of how does regulation of ambush marketing operate when (a) existing law is either uncertain in its application or is very dependent on the facts of each case and (b) the law is in no way contravened.

This article also points to the fact that nations that are new to event hosting are likely to lose the battle against ambush marketers. The criticisms doled out to the Swiss government before Euro 2008 were typical for countries new to major event hosting. The accusation of compliance with governing bodies at the expense of others’ rights is reminiscent of the very backlash received by the West Indies Cricket Board and Caribbean governments during Cricket World Cup 2007. The hosting of the World Cup in the West Indies was historic given the fact that it was the first sporting event of such magnitude being held in the Caribbean region. Many in the West Indies became acquainted with the term “ambush marketing” for the first time and in keeping with modern trends of major event hosting, the nine (9) host venues were mandated by the ICC to pass event-specific “sunset” legislation.

The legislation itself was strict on its face but this, in some minds, was not by the calculated and well-planned efforts of the organisers. The new hosts may just have been happy “to be there.” Yet this is not entirely surprising given the novelty of this scale of sports event to the Caribbean region and perhaps an innate pressure to “get it right” the first time around. This relative legislative strictness, however may have been the ideal fillip for a region that is still largely unfamiliar with the full commercial landscape regarding sponsorship, image rights and intellectual property law. In this regard, Schmitz was on point when he noted that “the practice of ambush marketing encourages organizers to work harder to thwart intellectual property violations, and raises the awareness of intellectual property rights globally—a long-term benefit to all intellectual property owners.”

Thirdly, the ambushers have been more successful than the ambushed. The anti-infringement programmes reviewed have had limited success as evidenced by the continued ambushing activity at ‘mega events’. The two recommendations below will offer a few solutions:

Recommendations
Greater forethought and advance planning is needed both by sponsors and event organisers. Too many anti-ambush campaigns have been reactive leaving rights holders to play catch up. The European Sponsorship Association (ESA) believes that anti-ambush laws should provide marketers with certainty and should incorporate fair and proportionate civil sanctions. In this way the nebulous legal status of the ambusher and the ambushed will slowly receive much needed clarity.

Secondly and finally, it is submitted that there should be a move towards the creation of a “World Anti-Ambush Code” of sorts. One of the latent benefits arising from the creation of the first World Anti-Doping Code in 2003 was the consistency and harmonisation brought to the fight against doping in sport. Extensive stakeholder consultation resulted in a working document that addressed a vast spectrum of needs expressed by athletes and regulators alike. A similar movement is recommended for the sports business industry, albeit on a scaled-down basis simply because the complexity of intellectual property law will make any major global Code on ambush marketing regulation difficult to harmonise. Perhaps, regional or continental Codes encapsulating IP, commercial and advertising law will be a useful starting point. The business of sport demands as much creativity and innovation as is possible to keep thriving.
AMBUSH MARKETING: AN ANALYSIS OF ITS THREAT TO SPORTS RIGHTS HOLDERS AND THE EFFICACY OF PAST, PRESENT AND PROPOSED ANTI-INFRINGEMENT PROGRAMMES

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91 LOCOG’s worldwide partners are Coca-Cola, Acer, Atos Origin, General Electric, McDonald’s, Omega, Panasonic, Samsung and VISA. Its official partners are Adidas, British Petroleum, British Airways, NatWest, TSB, EDF and BT.

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Pilfering, piracy and prevention: Developments in combating Ambush Marketing

BY SARAH STOREY, MANAGING DIRECTOR OF MASABE SPORT ADVISORS

Introduction

Sport is indeed big business: It has been estimated that sport is worth over 3% of world trade; the International Olympic Committee (IOC) alone had revenues for 2005-2008 of just under $5.5 billion, including broadcasting, sponsorship, ticketing and licensing. Commercial entities pay significant sums to use sport’s intellectual property rights (IPRs) and the right to associate with sporting events.

Ambush marketing is defined as:

“any sort of unauthorised association by a business of its name, brand, products or services with a sports event, through any one of a range of marketing activities, in order to benefit from the goodwill that the organiser has generated in the event without paying any rights fee for the privilege.”

The purpose of ambush marketing therefore, is to create the impression that a third party is associated with a sporting event, without having paid for that right. At the root of this activity is the assumption that such association will “benefit” the ambusher because of the worldwide audiences sporting events attract.

Lewis & Taylor note that there are two kinds of ambush marketing: 1) the creation of products around an event; and 2) activities that suggest an association, sanction or endorsement by the event. Product creation might include corporate hospitality or travel packages with tickets, unofficial publications or merchandise, including items sold online and around the venues and big screen broadcasts of events. Activities suggesting associations include, for example, advertising in print, billboards, online, during broadcasts, handing out promotional material or clothing near venues, unauthorised domain names using trade marks (TMs) or confusingly similar domain names. Regardless of the type of activity, what makes something an “ambush” is to “profit in some unauthorised way from the goodwill inherent in the event.”

Ambush Marketing using IPRs

At the root of the commercial agreements between Sports Rights Owners (SRO) and their commercial partners is an inventory of IPRs. Generally, the IPRs are owned or controlled by the SRO, who then licenses those rights in association with commercial activities, on certain terms and conditions.

IPRs, particularly copyrighted works and registered TMs are protected by legislation and international convention. The Copyright, Designs and Patents Act 1988 (CDPA) protects works (logos, broadcasts, etc.) allowing SROs to take action “for relief by way of damages, injunctions, accounts or otherwise.” This provides a powerful deterrent to any would-be ambusher.

SROs also enjoy considerable protection with respect to misuse of their TMs, particularly its registered TMs. TMs are often used by ambush marketers in connection with their advertising, commercial and promotional activities and in domain names to indicate an association that does not exist with the event.

TMs are protected by national and EU legislation, but unlike copyrighted works, they must be registered in order to benefit from such legislative protection. For example, Rugby World Cup Limited (RWCL) which administers the Rugby World Cup (RWC) event for the International Rugby Board (IRB) owns a number of trade marks such as “Rugby World Cup 2007”, “RWC” and other similar marks in UK, European Union (EU) and worldwide.

The TMA grants to the registered owner “exclusive rights in the trade mark which are infringed by use of the trade mark in the United Kingdom without his consent.” The TMA further elaborates that: “[a] person infringes a registered trade mark if he uses in the course of trade a sign” that is identical or confusingly similar to that of a registered TM.

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Importantly for SROs, the term “uses” includes use in advertising as well as on the goods themselves or their packaging. The EU Directive on the CTM has similar provisions in Art. 5. These protections are useful in preventing and stopping ambush marketing activity. However, the legislation stipulates that TMs must qualify for registration and the SRO must be able to demonstrate “genuine use” of those TMs in each territory and registration class. Despite these burdens, it is wise to register TMs that are most closely associated with sporting events, as unregistered TMs provide significantly less protection:

“To be successful in a passing off action, you must prove that:
• the mark is yours
• you have built up a reputation in the mark
• you have been harmed in some way by the other person’s use of the mark
It can be very difficult, and as a result, expensive to prove a passing off action.”

In evaluating which TMs to register in which territories, a SRO can attempt to predict the nature, frequency and location of likely ambush marketing activities. For example, it is likely wise to register a wide range of TMs in the host country of a given event in order to protect against an increase in local ambush activities in the lead-up and during an event. Conversely, an SRO might opt for fewer registrations in a territory where the sport is less popular and where there are no upcoming events.

Nonetheless, certain types of ambush marketing activities using IPRs, particularly those on the internet, produce many new challenges for the SRO. The internet provides a dynamic, inexpensive and global medium for would-be ambushers to associate themselves with, or benefit from, sporting events. As the examples below demonstrate, traditional legislative measures do not always protect SROs from some very damaging forms of ambush marketing.

Online sale of counterfeit merchandise
Counterfeiting is big business and is a form of ambush marketing that has evolved exponentially using the internet as an advertising and distribution tool. David Lammy, UK Minister of State for Intellectual Property states:

“Developments in technology and communications have led to increases in intellectual property (IP) crime (counterfeiting and piracy) over the past decade, with estimates that the international trade in fake goods is worth around $200 billion - higher than the GDP of more than 150 countries. This figure is rising and doesn’t include goods that are produced and sold domestically.”

Many SROs have extensive merchandising programmes, manufacturing clothing, sports paraphernalia, souvenirs, luxury and other items that bear TMs and copyrighted works. Counterfeit goods damage the SRO and its merchandising partners in several ways: 1) by diverting revenues away from the SRO and its licenses; 2) counterfeit goods are often lower quality than the officially licensed products, thereby negatively affecting the reputation of the SRO; and 3) as the product is not licensed, the consumer has no recourse to the SRO for defective products or services.

SROs frequently work with customs officials to prevent the importation of unauthorised or counterfeit goods. The CDPA makes it an offence to import, sell or deal with materials that infringe copyright. Similarly, the TMA makes it an offence to make or have possession of goods that are or bear registered TMs (or that are likely to be mistaken for registered TMs) with a view to gain.

Such legislation and customs enforcement helps protect SROs against large-scale counterfeiting and importation operations. For example, New Zealand Customs seized over 1000 counterfeit RWC t-shirts more than 18 months prior to the RWC 2011. Unfortunately, customs officials likely will not catch counterfeit merchandise manufactured domestically or by foreign counterfeiters using the internet to sell merchandise in smaller quantities, but for distribution world-wide.
While the internet has improved the reach and efficiency of licensed merchandisers, it has also created a new marketplace for counterfeiters, thereby increasing the challenge of combating counterfeiting. Instead of having to import large quantities of goods to be sold in stores or on the streets outside the event to make a profit, counterfeiters can advertise their merchandise on the internet and reach a large international marketplace.

The internet reduces the economic barriers to trade by reducing overhead and risk of importing large quantities of goods. Indeed, websites like eBay allow merchants and individuals to trade without even setting up their own websites.

Counterfeiters can produce goods in territories where manufacturing is inexpensive or laws are lax, post photos on eBay or similar websites, and ship the items individually as ordered, thereby avoiding the attention of customs officials or police. The SRO’s licensees can therefore be faced with significant competition with a world-wide reach, and the SRO is confronted with the challenge of monitoring and enforcing its IPRs on a myriad of websites that can be updated and modified instantaneously.

To enforce their rights, SROs must then negotiate with websites like eBay and others to assist in removing counterfeit items. eBay has developed a “tool” called the eBay Verified Rights Owner (VeRO) programme to allow rights owners to notify eBay of items that infringe their IPRs for eBay to remove them. While the tool is useful, it still requires SROs to search and monitor multiple eBay sites repeatedly to ensure that counterfeit items are quickly removed by eBay.

Thus far, eBay has been unwilling to take a more active role to monitor and remove counterfeit items. Recently a number of luxury brand copyright and TM owners have brought multi-jurisdictional legal action against eBay. The rulings have been inconsistent, so there is no clear answer to the question of eBay’s liability for the sale of items bearing copyright or TMs of others.

Some European courts have been more sympathetic to IPR owners’ claims, in particular the Paris Commercial Court, which has recently awarded Louis Vuitton Moet Hennessy (LVMH) a $2.55 million fine ruling “that eBay-traded LVMH products—even authentic ones—were not being sold by an authorized reseller. As a result, eBay was ordered to remove all listings of these products.” eBay argues that the decision is inconsistent with rulings in other jurisdictions including Germany, Belgium, the US, the UK and even France.

A recent UK ruling found in favour of eBay against L’Oreal’s similar claims, but referred a question to the European Court of Justice (ECJ) to determine how eBay’s role should be interpreted under the relevant EC Directives. Perhaps this reference will provide some clarity about the role and responsibilities of eBay in Europe.

In the meantime, however, it seems that SROs will be in the position of having to monitor and enforce the unauthorised use of its copyright and TMs relying on the co-operation of the websites. Nonetheless, systems such as eBay’s VeRO do facilitate combating counterfeiting.

Domain names
Unauthorised entities often set up websites related to sporting events that can be seen worldwide. Third parties registering domain names that include SROs’ registered IPRs can constitute ambush marketing. Domain name registration using well-known TMs is not unique to sport, but domain names containing a SRO’s TM might likely give the impression that the site, including any sponsorship or advertising, is official, sanctioned by the SRO or in some way connected to the event.

“Indeed, because the Internet has so pervaded our current ways of communicating, it is not unreasonable for an Internet user to associate a website or an e-mail address that contains a tangible world trademark with the owner of that mark.”

Secondly, the domain names containing TMs can drive internet “traffic” or interest away from official websites that provide official information, often contain sponsorship properties sold to commercial partners, and sell official merchandise.

“With the emergence of e-commerce, domain names have come to be much more than mere Internet addresses. They have become the new trademarks for a new economy.”

For example, in the lead up to the 2010 FIFA World Cup the website http://www.worldcup2010southafrica.com was an unofficial website with the tag line “South Africa – the
Unauthorised entities often set up websites related to sporting events that can be seen worldwide

new home of football," but was not affiliated with the FIFA World Cup 2010 or its Organizing Committee. Regardless of the content, the domain name might give the impression that it is affiliated with and/or endorsed by FIFA or the Organizing Committee for the 2010 FIFA World Cup.

The words “World Cup 2010” are a registered TM of FIFA in 37 classifications under the CTM regime. Given the territorial nature of TM law, in order to determine whether FIFA has a remedy under TM legislation, FIFA would need to determine who owns the domain name and where it is registered.

The Internet Corporation for Assigned Names and Numbers (ICANN) co-ordinates the “domain name system” comprised of the unique identifiers that allow access to websites on the internet. ICANN requires all accredited registrar services to record and provide to the public minimum information about domain name registrants/owners.

As a result, one is able to determine that the website http://www.worldcup2010southafrica.com is registered to an individual with a Swedish address. In this circumstance, the website is registered to an individual within the EU and therefore FIFA would likely have a remedy in court for breach of its registered TM “World Cup 2010” under the CTM regime and national laws in Sweden.

However, many third parties register domain names in territories where the SRO does not have registered TMs. For example, prior to the FIFA World Cup, the domain name http://2010worldcup.com was registered to an individual in Canada where FIFA does not have “2010 World Cup” registered. As a result, FIFA would not have recourse to Canadian TM laws. Such domain name registrations demonstrate how “traditional trademark regime is clearly ill-equipped to deal with the problems of the twenty-first century.”

All ICANN accredited registrars must implement its Uniform Domain-Name Dispute Resolution Policy (UDRP) with registrants. As a result, domain name owners must submit to the UDRP’s Mandatory Administrative Proceedings for domain name disputes when a complaint is filed with an approved dispute resolution provider. The complaint must assert that:

(i) [the] domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and
(ii) [the registrant has] no rights or legitimate interests in respect of the domain name; and
(iii) [the registrant’s] domain name has been registered and is being used in bad faith.”

The UDRP sets out evidence of “Use in Bad Faith” including that:

“by using the domain name, you have intentionally attempted to attract, for commercial gain, internet users to your web site or other on-line location, by creating a likelihood of confusion with the complainant’s mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location.”

The UDRP and associated rules require timely responses and offer an efficient and inexpensive tool to deal unauthorised domain name registrations, particularly in comparison to lengthy and expensive court battles. FIFA has undertaken five UDRP disputes regarding domain names using registered TMs relating to “worldcup” that have resulted in twenty-two transfers or cancellations.

The site owner can argue that the website is not for “commercial gain” by pointing to any news and informational content or that the registrant has “Rights to and Legitimate Interests in the Domain Name in Responding to a Complaint.” If that is the case however, then it is unlikely that the site is causing much damage to the SRO’s commercial programme.

In each case, the SRO will need to consider the nature of website, the level of damage to the SRO’s commercial programme, the likelihood of success under the UDRP as well as any potential negative public reaction. If the registration warrants action, the UDRP provides an economical means of combating such ambush activity.
Notably, the UDRP only protects the SRO from the misuse of registered, not unregistered TMs, although the UDRP itself does not distinguish between registered and unregistered TMs. As a result, a comprehensive TM registration programme and strategic domain name registrations will help prevent some of the most damaging domain name ambush marketing attempts. Having taken those preventative steps, the SRO can use the UDRP to sort out any damaging domain name registrations that slip through the cracks.

Audiovisual piracy
Audiovisual piracy on the internet is also an increasing threat to SROs’ commercial programmes. In the sporting context piracy is the live or near live streaming of sporting events via the internet or the “unauthorised access to feeds … whereby footage is unlawfully accessed and streamed by unauthorised third parties, particularly online.” The threat online piracy poses to SROs like the UK’s FA Premier League (PL) has been expressed as follows:

“If consumers are able to view live PL matches free of charge instead of paying subscriptions to broadcasters, there will be little incentive for broadcasters to pay huge sums to keep competitions like the PL on their screens. Right holders are obviously extremely concerned.”

Broadcasters pay a premium for the right to broadcast sporting events live. While they also pay for delayed broadcast rights or highlights packages and other rights, live rights draw the largest audiences for broadcasters and therefore are the most valuable. These rights are sold on a territorially exclusive basis, earning huge licence fees from broadcasters in each territory.

Pirates can access footage of the event from two sources: the satellite/terrestrial TV broadcast or licensed online streaming. Most broadcasters implement the most current digital rights management technology designed to prevent or make it difficult to capture the images of the broadcast for copying or re-transmission. These technologies are an important first step in combating piracy of a feed of the sporting event.

Unfortunately, pirates always seem to be steps ahead of those trying to prevent piracy. Despite precautions, intended viewers must be able to see the footage on their TVs or online, at which point, the broadcast is vulnerable to piracy. For example, for several years inexpensive devices have been available that allow pirates to “capture” the broadcast signal and upload it near-simultaneously:

“While the biggest [piracy] services are located in China, it takes a fan, often in the United States, to upload the actual stream for distribution to the wider Internet. This is done by using a PC-tuner card, a $50 device that connects a television to a computer, or by uploading the stream from a legitimate online video subscription to a peer-to-peer network.”

While some more entrepreneurial pirates charge fees for their pirated streams of live sporting events, many offer the streams for free, and both types of piracy are problematic for SROs and broadcasters. Even the free pirates often “profit financially, commonly from advertising embedded in a website or client software.” Although any such revenues pale in comparison to the broadcasters’, piracy draws audiences away from the licensed broadcaster.

If more viewers can find the content online for less (or free), they are less likely to subscribe satellite services. Piracy draws audiences away from the licensed broadcast, diminishing audience numbers and thereby broadcast sponsorship and advertising value. If the value of the programming diminishes, so too will the exclusive licence fees broadcasters pay to the SRO, thereby threatening the SRO’s broadcast revenues.

Older piracy technologies were less threatening to SROs because either one could only start watching video after downloading an entire file (delayed) or the streams had limited capacity so highly popular feeds, such as sporting events, were either poor quality or crashed. While this is still problematic for movie and television piracy, it was less so for sport because the highest value and greatest interest in sporting events is the live event. As Ayala Deutsch, Senior Vice President and Chief Intellectual Property Counsel at the National Basketball Association put it: “We never felt that the jewel in our crown, the live games, would be vulnerable.”

However, developments in recent years have made it possible to watch live or near-live streaming of sporting events, posing a threat to SROs worldwide. The NY Times, in discussing the problem facing the American major leagues, expressed the problem as:
“The tangible effect on the leagues’ business today is small but the stakes are large: each sells the rights to its live games to broadcasters for billions of dollars. More important, each is trying to expand its revenue base by selling rights for games on mobile phones and the Web.”

The new technology is called peer-to-peer (P2P) software, a type of file sharing. Instead of using server(s) and a significant amount of cabling to transmit the data that creates the audiovisual images on computer screens, it uses “peers” or a number of computers all linked together to send and receive data simultaneously. P2P software means that the more people who access the stream, the more “peers” are involved in the system, the better the quality of the stream. Thus, the most popular sporting events with large loyal and worldwide fans (who are increasingly computer savvy) the bigger the piracy problem for the SRO and its broadcasters.

Broadcasts are protected by copyright legislation, for example, s. 1(1)(b) of the CDPA and s. 21 of the Canadian Copyright Act. The United States, on the other hand, protects “audiovisual works,” but the effect is similar to that of the UK and Canadian legislation because it prohibits them from being displayed to the public. Despite the fact that such works are protected under national legislation or even international treaty does not mean that the copyright is easy to enforce.

For one thing, live event piracy is by nature a time sensitive problem. Streams become available from the beginning of the live broadcast and often disappear at the end. Furthermore, a P2P software provider that allows the public to upload their own streams would not necessarily aware of what content is being streamed. For that reason, akin to websites such as YouTube where the public uploads content, the P2P software provider/developer is often deemed an intermediary i.e. not usually held liable for content that is uploaded by users.

However, some jurisdictions, notably the US, have enacted the US Digital Millennium Copyright Act (DMCA) to combat this problem. The DMCA limits the intermediary’s liability, unless it is made aware of the copyright infringement by notification from the copyright owner, and that thereafter it acts expeditiously to remove or disable the infringing content (among other conditions). This is a powerful tool for removing streams that originate or are transmitted through the US. Unfortunately, it requires that the SRO or its broadcasters find and track the source of the stream, determine if the DMCA applies, notify the US intermediary and have it remove the stream. By the time all this is complete, even where there is such favourable legislation, the event could be finished.

Recent changes to copyright legislation in Europe and under WIPO have attempted to deal with technological advances. The CDPA was amended to “transpose into UK law the provisions of Directive 2001/29 which, in turn, is based on international obligations set out in the 1996 WIPO Copyright Treaty…” Significantly for the fight against piracy, one of the amendments grants the copyright owner the exclusive right “to communicate the work to the public” which likely includes online transmission.

Technological advances have also led to debates about whether P2P piracy infringes copyright at all because the technology does not require copies to be made on the computers sending and receiving the stream. WIPO’s Standing Committee on Copyright and Related Rights is developing a treaty to deal with problems such as simultaneous transmission. Clearly legislative development lags behind the technology of piracy.

Practically, SROs and broadcasters must seek out and gather evidence of the source of the pirated streams; notify the intermediaries and/or source; request them to remove the streams relying on international and national copyright legislation, case law and, in some cases, simply the intermediaries’ fear of liability. Unfortunately, it seems that legal mechanisms to protect against online piracy of sporting events are both outdated and impractical.

SROs that have ongoing events, such as seasonal leagues, can take action to follow up with the intermediary and the pirate. However, for those SROs with major events every four years or even short events annually, it is logistically difficult and expensive to combat piracy and to pursue persistent infringers.

Several SROs have joined an informal group called the Sports Rights Owners Coalition (SROC) that brings together “representatives of international and national sports bodies with a particular focus on rights issues” and seems to be advocating for changes to protect its highly valuable broadcast rights fees. In the meantime many SROs are...
turning to private, expert services, such as NetResult Ltd. in the UK, that provide monitoring and enforcement services against piracy for SROs during live events. Perhaps SROC, broadcasters and other rights owners should look to a private system like ICANN’s to deal with the problem of online piracy which seems to be more dynamic and practical than legislative tools that are always lagging behind technological advances.

Ambush Marketing by association

Traditional legislation has also been insufficient to combat ambush marketing by association where ambushers do not use IPRs. Such activities can arise in a variety of ways from third parties and even from within the sporting family.

Ambush from Within: by Participants and Sponsors

There have been some notable ambush campaigns from participants and/or participants’ sponsors at major sporting events. During the 1996 Atlanta Olympics, Linford Christie wore Puma branded contact lenses at a press conference despite the fact that Reebok was the British Olympic Association’s (BOA’s) official sponsor. This was an ambush not of the SRO that was the event owner, the IOC, or the event organiser, but rather the athlete’s Olympic Committee, the BOA that provides the kit for the Olympic Games.

The solution to this problem lies not in legislation or common law, but rather in contract. It has become commonplace for SROs to require participation agreements with teams/clubs that in turn require participation agreements with their athletes. These agreements contain a number of non-commercial terms, including commitment to anti-doping, but also require the participants to respect the commercial programme of the SRO and the participating teams. These terms can be enforced by fines, disciplinary proceedings or even disqualification.

Such agreements are detailed and require compliance on and off the playing field to ensure the integrity of the SRO’s commercial programme. Athletes are now required to cease all endorsement activities during the Olympics to protect the rights associated with the Games.

Athlete agreements have been used to counter some creative ambush marketing attempts. For example, during the 2007 RWC, Tonga was sponsored by the bookmaker Paddy Power and the players undertook some creative steps to promote their sponsor in contravention of the IRB’s participation rules for the RWC: team members dyed their hair green and one player even legally changed his name to Paddy Power from Epeli Taione. In accordance with the IRB’s rules, the team had to cover their hair for a press conference and dye their hair back to normal colour for their match. In addition, the IRB did not accept Mr. Taione’s name change.

This example underscores the need for thorough athlete participation agreements detailing requirements for appearance: kit, equipment and even hair! The purpose of such agreements is to deter the teams and athletes from undertaking any ambush activities.

Similarly, participation agreements should also cover the activities of team/athlete sponsors. In many cases participants have competing sponsors to those sponsoring the event itself. For example, Heineken sponsored the RWC 2007, but many of the participating national rugby unions were sponsored by competing beer companies, for example Guinness sponsored the Irish Rugby Football Union.

Participating teams usually pay the price for breach of such terms. The SRO should ensure that sanctions are fair, but strong enough to deter ambush and to compel participants to take action if their sponsors cross the line.

Activities near and around venues

The occasion of major sporting events attracts considerable attention in the vicinity of the sporting venues. The areas immediately adjacent to the venues have been used by commercial entities to attempt to create an association with the event for which it has not paid. In Atlanta in 1996, Nike “bought up all the billboards around the arenas, handed out Nike flags and set up its own Nike village next to the Olympic Park.” This was particularly damaging because “[t]he majority of the people questioned on the issue thought that Nike was an official sponsor. It wasn’t. Reebok, however, was.”

The IOC now requires its venues and their perimeters to be “clean” of all advertising (even official IOC sponsors are not granted advertising space at venues). Specifically, Rule 51 (1)
of the Olympic Charter requires that:

“No form of advertising or other publicity shall be allowed in and above the stadia, venues and other competition areas which are considered as part of the Olympic sites.”

Other SROs also require hosts and governments to restrict activities in the perimeter of events. However, attempted ambush in the vicinity of venues is commonplace. In addition to the hair dyeing and name changing, Tonga sponsor Paddy Power also attempted an ambush by handing out thousands of green wigs to people arriving at the match between Tonga and England outside the Parc des Princes venue during the 2007 RWC.\textsuperscript{85}

In response, the IRB’s representatives took the following steps: 1) informed police who moved the wig-bearing ambushers away from the venue as they had no permits to operate in that vicinity; 2) instructed the venue gate staff to confiscate the wigs on the basis of the ticket terms and conditions; and 3) informed the host broadcaster so they could avoid broadcasting footage of people wearing the wigs.

As part the hosting agreement between the IRB and the Fédération Française de Rugby (FFR), the FFR was required to secure a “clean” 500m perimeter around each venue (i.e. no licences granted to trade, distribute pamphlets or marketing material, for political demonstrations, etc.) On that basis, the wig-distributors were therefore not permitted to operate in the vicinity of the match and police were able to move them away.

The second step relied on the ticket terms and conditions (TT&Cs) that include the event owner’s right to refuse entry to anyone who breaches the conditions. TT&Cs include the stipulation that no signs or articles that can be used for commercial, political or charitable purposes, among other actions may be brought into the venue.\textsuperscript{86}

Finally, the SRO alerted the broadcaster to limit the exposure of the green wigs on the worldwide television feed. As a result, the few wigs that were distributed and made it into the venue would only be seen by the people in attendance at the event, limiting the scale and effect of the ambush.

This example demonstrates the varied solutions, both legal and practical, that a SRO must undertake to deal with ambush marketing in and around its venues. The SRO should prepare in advance with robust participation agreements and establishing co-operation with local authorities, but must also prepare for quick action to limit the effect of any ambush in case such methods fail.

Misleading and “clever” advertising

SROs are also vulnerable to creative advertising campaigns that take care not to use the SRO’s IPRs, yet manage to create an association with the event. Where ambush marketing advertising rises to the level of misleading advertising, an SRO might have legislative remedies available, although regulation varies across jurisdictions. In Australia for example, the Trade Practices Act (TPA) makes it an offence to make misleading representations:

“A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services:

\(\ldots\)

(c) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;”\textsuperscript{87}

Ansett Airways reportedly brought an action against Qantas Airlines in 2000 over what it believed to be “misleading and deceptive conduct” as prohibited by the TPA.\textsuperscript{88} The subject of the dispute was a Qantas campaign around the 2000 Olympic Games in Sydney. The slogan of the Sydney Olympics was “Share the Spirit” and Ansett Airlines was the official sponsor in the airline category for the Games. Qantas ran a number of campaigns, among which was the slogan “Spirit of Australia”.\textsuperscript{89} While this campaign did not use any IPRs, it seems clearly intended to associate with the Olympic Games in Sydney.

Tonga sponsor Paddy Power also attempted an ambush by handing out thousands of green wigs to people arriving at the match between Tonga and England.
In Europe the EU Directive concerning misleading and comparative advertising,90 requires “Member States [to] ensure that adequate and effective means exist to combat misleading advertising...in the interests of traders and competitors.”91 The Directive requires Member States to implement legal provisions that include either the right to bring legal action or to complain to an administrative tribunal that is competent to decide disputes or take legal action itself.92

The Advertising Standards Authority (ASA) enforces media Advertising Codes93 in the UK. For example, the ASA could likely take action in cases where anambusher claims to be an official source or partner; but it is unclear what action an ASA-type administrative body could take in more subtle cases of ambush marketing.

“Clever” advertising is amore subtle category of ambush marketing activities that creates an association with the events, but avoids crossing legal lines such as misuse of IPRs and takes care not to mislead the public. As a result, there is very little SROs and their commercial partners can do to prevent or stop such activity.

In 1994 Visa was a sponsor of the IOC for the Lillehammer Winter Olympics. American Express ran a clever ad campaign in the lead-up to the Games that included “television commercials featuring the strap line: ‘If you are travelling to Norway this winter, you will need a passport, but you don’t need a visa.’”94 The campaign was a word play on the fact that no entry visa was required totravel to Norway, but it was clear that the intention was to demonstrate that the traveler did not need a VISA credit card.

The essential element of such ambush activities is that it creates an association with the SRO’s event. This campaign was particularly damaging as it was done by a competitor of an official sponsor and is a clear case of the competitor benefiting from the event without having paid for that right.

This type of activity does not use any of the SRO’s IPRs and therefore is not actionable under IPR legislation, nor is it misleading advertising because it does not make false statements or give the impression the SRO endorsed the advertiser. Nonetheless, it creates in the mind of the public an association between the event and the advertiser.

There have been other examples of “clever” ambush marketing tactics for which the courts have offered no remedy. In 1996 “Telecom New Zealand published an advertisement that featured the word ‘ring’ positioned so as to equate to the relative positions of the rings of the Olympic symbol.”95 The New Zealand Olympic Committee took Telecom New Zealand to court under “sections 9 and 13 of the New Zealand Fair Trading Act because it suggested an association or connection between Telecom New Zealand and the Olympic Movement.” The court refused to grant the injunction because it found that the “average reader” would not be misled into thinking that there was an association or connection between Telecom New Zealand and the Olympic Movement.96

In recent years some of the influential SROs (including the IOC, FIFA and the IRB) have pushed to address this problem through supplemental legislation known as Major Events Legislation (MEL). The IOC in particular has been quite successful at lobbying national governments of host cities to implement special legislation that addresses many forms of “clever” advertising and other forms of ambush marketing.

**Major events legislation**

MEL is legislation enacted in the host territory of a major event to supplement existing legislation to expand the legal protections granted to SROs. Local authorities often implement additional legislation to facilitate hosting events and to regulate activities in the immediate vicinity of the venue. MEL is the national version of such legislation, aimed at protecting the interests of SROs involved in major events hosted in a particular country.

There is often great national debate about the enactment of such MEL because of concerns regarding the limitations it poses on local businesses and the public.97 A few very powerful SROs, like the IOC, require host countries to enact additional protection, for example for Olympic and Paralympic Marks.98 In other cases, governments have enacted MEL to attract major events to its country. For example, the New Zealand government enacted its Major Events Management Act 200799 (MEMA) which:

“...was created in 2007 to provide protection for organisers and sponsors of major international events being held in New Zealand. Its aim is to prevent ambush marketing.... The MEMA will help enhance New Zealand’s reputation as a major events destination.”100
Whatever the motivation for enacting MEL, it seems to be increasing. Recently even sub-national governments have enacted such legislation. For example, in 2009 the state government of New South Wales enacted legislation to “facilitate the holding and conduct of major events” which includes provisions relating to the control of commercial activity.

There are some key provisions in recently enacted MEL that demonstrate the nature of the legislation and the level of protection the legislation offers SROs and their commercial partners.

Canada enacted the Olympic and Paralympic Marks Act, 2007 (OPMA) as host of the Vancouver 2010 Olympic Winter Games (Vancouver Olympics). The legislation essentially does three things: 1) registers a number of marks associated with the Olympic Games for the benefit of the IOC and the Canadian Olympic Committee; 2) provides temporary protection for certain marks associated particularly with the Vancouver Olympics until December 31st, 2010; and 3) prohibits the “association” of unauthorised third party commercial TMs with the Vancouver Olympics or its organisers.

The first protected category consists of “recognizable official marks of the Olympic Games, such as the motto ‘Faster, Higher, Stronger’ and the Olympic rings.” The second category, subject to Dec. 31st, 2010 sunset, protects phrases, logos and symbols including: ‘Vancouver Games’, ‘VANOC’, the names and graphic representation of the mascots, and phrases like ‘Canada 2010’. Some commentators have noted that this second category “seems to reach beyond the unique identifiers of the Olympic Movement into the realm of common phrases in order to preclude ambush marketing.”

However, this argument does not take into account the various levels of SRO’s rights that are at play in an Olympic Games; specifically the rights of the IOC and the organising committee (in this case VANOC) respectively. The IOC retains for its TOP sponsors and broadcast partners the right to use the term Olympic in the sense of “Olympic Partner” or “Olympic Broadcaster.” VANOC commercial partners may not call themselves “Olympic” sponsors or partners, rather they may use the phrases in the second category, such as “sponsor of the Vancouver Games” or “supplier for Vancouver 2010.” As a result, this category protects VANOC’s ability to undertake and protect a commercial programme that funds its hosting obligations.

Without such protections, there would be considerable opportunity for non-partners to use the terms to create an association with the Vancouver Olympics or VANOC without paying for such right, jeopardising VANOC’s ability to attract commercial support for what it must provide as host. While it might seem to the layman that the rights protected are all one and the same “Olympic” rights, the legislation protects distinct commercial rights belonging to distinct SROs.

The third right protected is a right of “association.” Section 4(1) prohibits unauthorised third parties from:

- “in association with a trade-mark or other mark, promoting or otherwise directing public attention to their business, wares or services in a manner that misleads or is likely to mislead the public into believing that

  (a) the person’s business, wares or services are approved, authorized or endorsed by an organizing committee, the COC or the CPC; or

  (b) a business association exists between the person’s business and the Olympic Games, the Paralympic Games, an organizing committee, the [Canadian Olympic Committee] or the [Canadian Paralympic Committee].”

Schedule 3 to Canada’s OPMA sets out more generic “expressions” in two lists used to determine whether a party creates an association using a combination of the expressions in Parts 1 and 2. Part 1 includes expressions such as “Games,” “2010” (in letter or numeric form), and “Medals.” Part 2 includes: “Winter, Gold, Silver, Bronze, Sponsor, Vancouver [and] Whistler.”

The concept is to prohibit third parties from these combined expressions in their commercial activities to create an association with the Vancouver Olympics or VANOC. The use of combinations such as “2010 Games”, “Games Sponsor” or “Winter Games” in connection with a third party’s TMs, is evidence that the third party is promoting or directing public attention to its business etc. in contravention of s.4(1).
This prohibition of “association” is a tool that goes beyond traditional TM legislation and the remedies in OPMA’s s. 5 can be distinguished from traditional remedies, as one author argues:

“The most striking feature of the legislation is the ability to obtain an interim injunction to stop unauthorized use of a trademark without having to show ‘irreparable harm’. ... The absence of the irreparable harm requirement in trademark protection means that there is no balancing between pure damages and the fact that the unauthorized use is creating harm greater than a financial setback.”

However, this argument overstates the impact of the legislation for two reasons. First, the Canadian Trade-Marks Act provides for injunctive relief for an infringement of its provisions, therefore it offers similar protection. Secondly, OPMA does not require the court to award, rather it states that the court “may make any order that it considers appropriate in the circumstances, including an order providing for relief by way of injunction and the recovery of damages or profits” (emphasis added). Therefore, the “balancing” still exists between the damage done to the parties in determining whether an interim injunction should be granted in any specific case.

Furthermore, it seems that OPMA’s remedy provisions are specifically designed to address the shortcomings of national TM (or copyright) legislation in combating ambush of an extremely high profile, but quite brief event. TM law is designed to deal with marks belonging to companies that trade on an ongoing basis, not those associated with major sporting events that last only weeks or even days. A well-timed ambush can have a big public impact, thereby significantly harming the SRO and its commercial partners, and every day that an ambush is allowed to continue during a major event, the harm compounds. In the case of ongoing businesses, it is more likely that damages could be sufficient to remedy the harm.

In granting to the SRO similar rights with respect to an unauthorised association as it would against the misuse of its registered TMs, the legislation seems to recognise the potentially serious threat ambush marketing poses to SROs. Notably also, s.5(1) of the OPMA allows courts to award punitive damages, corrective advertising and the destruction of goods where activities are deemed to contravene sections 3 & 4. These, in addition to injunctive relief, provide a strong deterrent to the ambush marketer. Such remedies lessen the potential benefit of ambush activity and increase the risk, making such activity less attractive to the would-be ambush. If the ambush is more likely to have its activity cut short by an injunction or have to pay punitive damages, it is less likely to undertake the activity in the first place. As a result, this type of MEL is a powerful tool to deter ambush marketers and to stop any ambush in a timely manner.

The UK government has enacted similar, but more extensive legislation for the upcoming 2012 Olympic Games in London (London Olympics), namely the London Olympic Games and Paralympic Games Act, 2006 (LOGPA). LOGPA amends the Olympic Symbol etc. (Protection) Act 1995 (OSPA) by prohibiting the unauthorised sale of Olympic tickets, granting the London Organising Committee (LOCOG) a “London Olympic Association Right” and the rights of a proprietor in relation to actions for infringement of its LOAR, namely:

“In an action for infringement, all such relief by way of damages, injunctions, accounts or otherwise shall be available to the proprietor as is available in respect of the infringement of a property right.”

A third party infringes this right if it creates an “association” which “includes any kind of contractual, commercial, corporate or structural connection.” Similar to Canada’s OMPA, the court may consider the use of a combination of expressions from two lists in determining whether there is an “association.” Unlike OMPA however, under LOGPA “infringement of … LOAR can lead to criminal proceedings against those responsible.”

Clearly LOGPA grants to both LOCOG and the UK government significant powers to protect the commercial programme of the London Olympics. While the IOC requires host governments to protect its marks, the differences between OMPA and LOGPA indicates that the means and level of protection provided, depends on the government itself.
While governments might take different approaches to combating ambush marketing, they seem to be increasingly willing to enact MEL to protect the SROs of not only the largest sporting events, but also of smaller ones.

Governments hosting other major events have enacted similar legislation, such as South Africa, which hosted the 2010 FIFA World Cup. South Africa originally amended s.9(d) of its Trade Practices Amendment Act in anticipation of the Cricket World Cup in 2003, making it an offence to:

“In connection with a sponsored event, make, publish or display any false or misleading statement, communication or advertisement which represents, implies or suggests a contractual or other connection or association between that person and the event, or the person sponsoring the event, or cause such statement, communication or advertisement to be made, published or displayed.”

It further enacted the Merchandise Marks Amendment Act allowing the National Minister of Trade and Industry to designate certain events as protected events. While an event is a designated event, “nobody may use a trademark in relation to such event in a manner which is calculated to achieve publicity for that trademark and thereby to derive special promotional benefit from the event, without the prior authority of the organiser of such event.”

The South African approach differs from that for recent Olympic MEL legislation because it passed general legislation that can be activated by designating an event as protected. This allows the government to provide SROs with additional protection from ambush marketing without having to implement new legislation. Rather, the Minister of Trade and Industry need only designate an event as protected by notice, which it did for the 2010 FIFA World Cup.

New Zealand has taken a combined approach with its MEMA which protects both the Olympic and Commonwealth marks and provides a facility whereby it can designate a major event that will benefit from the legislative protection. MEMA’s section 10 prohibits:

“during a major event’s protection period, mak[ing] any representation in a way likely to suggest to a reasonable person that there is an association between the major event and (a) goods or services; or (b) a brand of goods or services; or (c) a person who provides goods or services.”

New Zealand has designated a number of protected events under the legislation, including the 2009 FIBA, U19 World Championship, the 2010 World Rowing Championships and the 2011 RWC.

While governments might take different approaches to combating ambush marketing, they seem to be increasingly willing to enact MEL to protect the SROs of not only the largest sporting events, but also of smaller ones. These MEL might not stop all kinds of ambush activity, but they do provide a significant deterrent against ambush marketing and more and more powerful tools to deal with any ambush activity that does occur.

Conclusion

There is a variety of methods a would-be ambush marketer might use to associate itself with a major sporting event or SRO. The most damaging activities are those threatening the biggest revenue streams for SROs, particularly live broadcast rights and sponsorship fees. Often ambush activities, like piracy or the Tongan green wigs, arise immediately prior to or during events. In order to protect the integrity of commercial programmes, SROs must prepare in advance to deter ambush and to be able to implement protocols to stop or limit the impact of any ambush activities in a timely manner.

In evaluating its response to ambush activity, SROs should consider the nature of the activity, its potential damage to the SRO’s commercial programme, what legal and practical tools are available, and the potential impact of the available courses of action. Where the ambush activity is likely to damage the relationship a SRO has with its commercial partners, the SRO should take action to protect the exclusive rights granted. However, a heavy-handed approach could damage
the image of the SRO, impairing the SRO’s ability to keep or attract commercial partners in the future.

It also seems wise for the SRO to encourage its partners to maximise their association with the SRO/event. The more they do to emphasise authorised associations, the less impact ambush activities will have. Furthermore, it seems prudent to manage the expectations of those partners, educating them as to what the SRO can and cannot do, legally and practically, to prevent and stop ambush marketing activities. If the commercial partner is aware of the challenges and limitations of any rights protection programme, it will be less likely to expect action where none is warranted, practical or legally viable.

Still, the foundation of IPR legislation, developments like MEL and the efficient mechanism of ICANN’s UDRP provide effective tools for SROs to deter and respond to ambush marketing. Unfortunately, sport seems to attract would-be ambushers who are always looking for new and creative ways to associate with events without paying for that right. While this remains a threat, SROs that prepare and utilise the legal and practical tools available to them in a balanced and consistent manner will be able to prevent and limit the damage of ambush marketing to maintain the integrity of their commercial programmes.

2 All $ figures are USD unless otherwise specified.
6 Supra Note 4 at p. 1087 at footnote 1.
7 Organisers of sporting events, whether they are sports governing bodies or other entities appointed by the sports governing bodies or a combination of the two, will be collectively referred to as Sports Rights Owners (SROs) for the purposes of this article.
8 Copyright Designs and Patents Act 1988 (c.48) at s. 16.
10 Ibid at s.96.
11 Trade Marks Act 1994 at s.2.
12 All $ figures are USD unless otherwise specified.
14 Ibid at s.10(1)-(3).
15 Ibid at sections 3-8 (UK) and Directive 89/104 to approximate the laws of the Member States relating to trade marks arts 5(1), 6, 7 [1989] OJ L40/1 at Arts. 3 and 4 (EUCTM regime).
17 Ibid at s.107.
18 Ibid at s.9.2.
20 eBay UK VeRO programme website: http://pages.ebay.co.uk/vero/about.html
21 For example, a US case between Tiffany & Co. and eBay found that: “trade mark owners bear the ultimate burden of protecting their trade marks, thus, eBay was not responsible for actively policing its site and removing counterfeit products, and the measures that eBay already had in place were more than adequate … use of the Tiffany mark in advertising to describe goods fell within the doctrine of fair use, which provides that use of a trade mark where it is “the only word reasonably available to describe a particular thing” is acceptable.” Bond, Robert, Business trends in virtual worlds and social networks - an overview of the legal and regulatory issues relating to intellectual property and money transactions, Ent. L.R. 2009, 20(4), 121-128.
32 Supra Note 30.
33 Fédération Internationale de Football Association (FIFA).
34 Worldcup2010southafrica.com website with the tag line “South Africa – the new home of football” at: http://www.worldcup2010southafrica.com/ This website was found by conducting a simple Google search for the term “FIFA World Cup” conducted on 21/01/2010.
35 ibid at: http://www.worldcup2010southafrica.com/announcement/ 
36 There is a disclaimer on the website under the sub-page “Announcement” that states: “This website is not affiliated, associated or connected in any way with Danny Jordaan, the World Cup 2010 Local Organising Committee (LOC), the South African Football Association (SAFA) or Federation Internationale de Football Association (FIFA).” Also the website was updated to include a prominent notice stating “100% Unofficial This website is not connected in anyway with FIFA or the LOC” checked at 21/01/2010.
37 CTM number: 005100854 found on the OAMI-ONLINE CTM registry website
38 ICANN Whois requirements: http://gnso.icann.org/issues/whois.html
39 This allows internet users to find websites using their domain names such as www.godaddy.com rather than its internet protocol (IP) address which is a series of numbers, i.e. 92.122.213.152. Internet Protocol (IP) Tracer service: http://www.ip-adress.com/ip_tracer/www/fifa.com checked 21/01/2010.
40 Some registrars do not disclose the name of the registrant, but still has mechanisms by which one can dispute the misuse of IPRs, for example Domains By Proxy Inc. see https://www.domainsbyproxy.com/policy/ShowDoc.aspx?page=trademark
day=27/01/10.
41 ICANN Whois: http://www.icann.org/whois
42 A whois website: www.whois.com provides the registrant’s information in case of illegal file-sharing, Canada is not a party to the Madrid System of International Marks, Canada is not a signatory to the Madrid Protocol (1989).
43 The domain name 2010worldcup.com was registered (at 26/01/2010) to Kurt Joll with an address in Markham, Ontario Canada. The registration at 01/12/2010 is listed as for sale by a “Private Registration” with Buffalo, NY address and contact information for Domain Names Registry of America (a registrar company) – see www.whois.com.
44 Furthermore, although FIFA has registered the TM “World Cup” under the Madrid System of International Marks, Canada is not a signatory to the Madrid Protocol (1989).
46 Supra Note 30.
47 ICANN Uniform Domain-Name Dispute Resolution Policy information page: http://www.icann.org/en/udrp/udrp-policy.html at s. 4.
48 ICANN Approved Providers for Uniform Domain-Name Dispute Resolution Policy (UDRP) at: http://www.icann.org/en/udrp/approved-providers.html
49 Supra Note 46 at s.4(a).
50 Supra Note 46 at s.4(b)(iv)
52 Supra Note 30 The administrative system is quasi-legal and designed to cost less than $3000 for the entire dispute resolution process and to take days rather than months or years.
54 Supra Note 46 at s.4(c) under s.4(c), specifically: “(iii) you are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.”
55 Supra Note 30.
56 Supra Note 4 at s.G4.497 at p.1232.
60 Supra Note 56.
61 Supra Note 57.
62 Often delayed by seconds or even fractions of seconds.
63 Supra Note 57.
64 Supra Note 10 at s.101(b).
65 Copyright Act (R.S. 1985, C. C-42) at Note 21.
67 ibid at § 106.
69 ibid at § 202 adding s.52 to Chapter 5 of Title 17, United States Code.
69 Larussos, Hafidi Kristjan, Uncertainty in the scope of copyright: the implications in case of illegal file-sharing, Canada is not a party to the Madrid System of International Marks, Canada is not a signatory to the Madrid Protocol (1989).
70 Ibid at s.102 adding s.512 to Chapter 5 of title 17, United States Code.
71 Unfair Trade Practices Act 1974 (Australia) at s.53.
72 Supra Note 10 at s.16.
73 Supra Note 70.
76 Sports Rights Owners Coalition (SROC) website About Us page: http://sroc.info/about.html
77 The netresult Ltd website at: http://www.nr-online.com/
83 Ibid.
85 Supra Note 73.
86 Supra Note 4 at G2.106 on p.1148.
87 Trade Practices Act 1974 (Australia) at s. 53.
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89 Ibid.
91 Ibid.
92 Supra Note 89.
93 Advertising Standards Authority website (last checked 28/01/2010): About the ASA: http://www.asa.org.uk/About-ASA.aspx
94 Dore, Pauline, Let the games begin, I.S.L.R. 2006, 3(Aug), 77-78.
95 Curthoys, Jeremy & Kendall, Christopher, Ambush Marketing and the Sydney 2000 Games (Indicia and Images) Protection Act: A Retrospective, Murdoch University Electronic Journal of Law, Volume 8, Number 2 (June 2001) at para. 50.
96 Ibid.
98 Supra Note 83 at Bye-law to Rule 7-14.
99 Major Events Management Act 2007 No 35 (as at 01 August 2008), Public Act
101 Major Events Act 2009 - An Act to facilitate the holding and conduct of major events in New South Wales; and for other purposes, Act 73 of 2009, New South Wales, Australia.
102 Ibid at Division 4, sections 37-42.
103 Olympic and Paralympic Marks Act, 2007, c. 25 (Canada)
104 Ibid at s.3 with reference to Schedule 1.
105 Supra Note 102 at s.3 with reference to Schedule 2.
106 Supra Note 102 at s.4 with reference to Schedule 3.
107 Supra Note 102 at Schedule 1.
108 The Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games Olympic and Paralympic Games
109 Supra Note 102 at Schedule 2.
110 Supra Note 96.
111 Supra Note 102 at s.4(1).
112 Supra Note 96.
113 Supra Note 102 at s.5(1).
114 London Olympic Games and Paralympic Games Act 2006 (c.12)
115 Ibid at s.31.
116 The London Organising Committee of the Olympic Games and Paralympic Games Limited (LOCOG)
117 Supra Note 113 at s.33 and Schedule 4, s.1.
118 Supra Note 113 at s.33 and Schedule 4, s.10(1)(e) and Olympic Symbol etc. (Protection) Act 1995 at s. 6(2).
119 Supra Note 113 at s.33 and Schedule 4, s.1.
121 Supra Note 113 at s.33 and Schedule 4, s.3.
122 Trade Practices Amendment Act, 26 of 2001 at s.9.
123 Merchandise Marks Amendment Act, 61 of 2002.
124 Cornelius, Steve, South Africa: Protecting the 2010 World Cup from ambush marketing, WSLR, Volume 5 Issue 8 August 2007.
125 Notice 663 OF 2006, Final Notice, Department of Trade and Industry Merchandise Marks Act, 1941 (Act 17 of 1941) (South Africa)
126 Supra Note 98 at s.7.
127 Supra Note 98 at s.10.
128 Fédération Internationale de Basketball
The Lisbon Treaty and Sport
Although over the last 15 years or so, EU sports policy has developed at some pace with key events being case law such as Bosman in 1996 and the policy documents such as the White Paper on Sport in 2007. However, in terms of the emergence of a comprehensive EU sports law there is still little ‘hard law’ with legally binding force, but there are significant amounts of ‘soft law’, that is ‘rules of conduct which in principle have no legally binding force but which nevertheless may have a significant effect on policy and legal developments’. For example, as expressed in the White Paper, EU law will not impede ‘sporting rules that pursue a legitimate objective (such as the organisation and proper conduct of sport), ... [and] ... are indispensable (inherent) to achieve the objective and proportionate in light of the objective pursued (European Commission, White Paper on Sport (2007) COM (2007) 391. This position appears compatible with the law as developed by the ECJ in Deliège and Meca-Medina).

The Lisbon Treaty has finally provided the EU with a formal, albeit soft, competence on sport. (see ‘Lisbon Treaty gives EU a say on Sports’, http://www.euractiv.com/en/sports/lisbon-treaty-gives-eu-sports/article-187812

Article 149 TFEU states that ‘the union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function. The full text of the TFEU can be found at http://eur-lex.europa.eu/


Nationality Playing Quotas
Over the last few years, football and other European team sports have sought to re-introduce measures, which can be perceived to be new forms of protectionist nationality quotas. In football, UEFA has introduced the ‘home-grown player rule’ whereby a certain number of members of a playing squad need to have been developed by their club or by another club in the same national association for at least three years between the age of 15 and 21. FIFA has promoted the so-called ‘6+5 rule’, where a team in each match would need to field at least 6 players who are eligible to play for the national team of the country of the club (Similar proposals have been mooted in other team sports, ‘FIVB ready to fight EU labor laws on ‘4+2’ player rule’ –International Volleyball 21 May 2008, www.fivb.ch). It is necessary to address the major question as to why there has been increasing concern from the football authorities over the impact of Bosman and the subsequent case law of the ECJ. The following can be identified as the perceived problems that European law has created for football.

First, aggregation of playing talent within a small elite of clubs in European football, notably those who have been able to qualify for participation in the UEFA Champions League on a regular basis, has led to real challenge to the crucial sporting characteristic of unpredictability of outcome as a distortion of sporting competition and dominance of these clubs due to their control of the top playing talent whose nationality is largely irrelevant.

Secondly, the freedom of movement provisions have led to the top talent from EU Member States moving to the economically powerful leagues in European football, notably England’s Premier League, Spain’s La Lira and Italy’s Serie A. This influx into the economically powerful leagues has resulted in diminished opportunities for young emerging indigenous talent within those Member States. This can be supported by research that demonstrates that foreign players made up 42.4% of all players employed by English, Spanish, Italian, German and French clubs during the 2007-08 season - a 3.5% increase over the previous season. In the English Premier League, the number of foreign players reached
59.5% (Professional Football Players’ Observatory (PFPO) Annual Review of the European Football Players www.eurofootplayers.org/ This research identified that European wide, non-European players now represent 50% of the total number of foreign players). Fewer club-trained players, more expatriate footballers in the big five European leagues 2009, (see www.fifa.com/worldfootball/clubfootball/releases/newsid=1096497.html#fewer+club+trained+players+more+expatriate+footballers+five+european+leagues).

Thirdly, this migration has been at the expense of young domestic talent. Contrary to the view expressed by Attorney General Lenz in Bosman, that it was unlikely that the migration of foreign players would increase to the extent that the chances of domestic players would be seriously diminished, it is argued that, in fact, this is just what has occurred. It is also argued that young domestic players have also been unable or unwilling to move to other Member States in meaningful numbers as a balancing tendency to differing degrees in different countries.

Fourthly, this migration has manifested itself in a smaller pool of eligible-players to pick for the national teams of Member States. Consequently national teams throughout Europe have been weakened. This is a widely held belief. However, one research study suggests that over a 30-year period from 1977 to 2007, the performance of the England national team has improved in the post-Bosman years (‘Player Quotas: the Good, the Bad and the Illegal’ (2008) September, Soccer Investor.)

Lastly, Member States from which playing talent has migrated are increasingly impoverished in terms of the performance of their club teams. Beyond the new dynamic that has emerged since Bosman within the EU, the Kolpak and Simutenkov cases have applied non-discrimination provisions to a wider range of countries beyond the EU’s borders. Moreover, Europe, as the powerhouse of world football, has also become a focus for migration patterns of player talent into Europe from around the world. Subject to any quota system operated by a particular football association and national immigration rules, significant foreign non-EU national players have been able to secure employment within European football leagues. This has both caused impoverishment in national leagues worldwide and impacted adversely upon national sides. It has also created exploitation and the trafficking of playing talent away from many, mainly developing, countries.

The above arguments are regarded as undermining the rationales of Bosman and subsequent cases and, essentially, the re-introduction of playing quotas in some guise is seen as righting the wrongs of the effects of the rulings. In the context of these arguments, what is the legality of FIFA’s and UEFA’s proposals for player-quotas.
FIFA 6+5 Rule
This proposal, agreed at the FIFA Congress in May 2008, essentially provides that at the beginning of each match, each club must field at least 6 players who are eligible to play for the national team of the country of the club. However, there are no restrictions proposed on the number of non-eligible players under contract with the club (although restrictions on size of squads that may be permitted in individual leagues will have to be taken into account). This restriction applies to the starting line-up of the team, and coaches will be able to modify the ratio of national players in the team during the game with up to 3 permitted substitutions all of whom can be non-eligible players.

FIFA claims the proposal is needed for all the reasons already stated but additionally because ‘the universal development of football over the last century would not continue if there were increasing inequalities between continents, countries and protagonists in football’. There has been political support for FIFA’s proposal and significant support for it within the football family. However, most academic evaluation has been that within Europe such player quotas would clearly be contrary to Article 39 EC in terms of being a form of discrimination ruled unlawful by the ECJ decisions in Dona, Bosman, Kolpak and Simutenkov. An alternative analysis is presented by a FIFA commissioned report by the Institute for European Affairs (INEA) (Institute for European Affairs, ‘Expert Opinion regarding the Compatability of the ‘6+5 Rule’ within European Community Law’, INEA, 2008). As with the partly-UEFA funded, Independent European Sport Review (the Arnaut Report), this form of report is now a recognised way of presenting a lobbying position on the development of the EU’s sports policy. However, unlike the Arnaut Report which was the culmination of significant consultation amongst a range of stakeholders in European sport and which provides a well-argued and constructed case for greater recognition of the ‘specificity of sport’ by the EU, the INEA report is somewhat more limited. Arguably, it provides a badly structured, repetitive and somewhat simplistic justification for the 6+5 proposal. Most football fans understand the significance of the ‘hand of God’ in determining an outcome – it is not difficult to identify the ‘hand of FIFA’ in the Report’s recommendations.

Moreover, the philosophical basis of EU law on freedom of movement is that EU nationals are able to move between Member States irrespective of the perceived problems this causes for national economies or the job security of national workers. For non-EU nationals, on a global basis, the FIFA proposal underestimates the barrier to the international mobility of footballers erected by national immigration laws. In Britain, for example, work permits are effectively only available to top internationals from top national teams, and even where a player has a work permit he is still required to obtain a new one before he can transfer to another club. The idea that foreign players are swamping the English and other European Leagues seems a peculiarly European case of xenophobia.

Most academic evaluation has been that within Europe such player quotas would clearly be contrary to Article 39 EC in terms of being a form of discrimination ruled unlawful by the ECJ decisions in Dona, Bosman, Kolpak and Simutenkov.

It should be noted that the international players union, the Fédération Internationale des Associations de Footballeurs Professionnels (FifPro), although supporting the sporting aims behind the FIFA proposal, accepts that, as professional players are employees, both national and EU law provisions will be infringed. The European Parliament and the European Commission have indicated clearly that they regard the 6+5 rule as directly discriminatory and contrary to Article 39.

The announcement or perhaps it is best characterised as a murmur that was made on the 9th June 2010 at the pre-World Cup FIFA Congress in South Africa, that the 6+5 rule was to be looked at again and for the time being deferred. There is no record of this on the FIFA web site and the only record is brief mentions in the media (Fifa scraps plans for ‘home-grown’ player rule, 10 June 2010, http://news.bbc.co.uk/sport1/hi/football/8733164.stm).
Conclusion
The perceived legitimacy of this policy has led to a number of domestic leagues introducing similar restrictions to their playing squads. In England, the Football League introduced restrictions, which started in the 2009-2010 season, which require 4 players in match day squad to have been registered by a domestic club for 3 years before their 21st birthday. In fact, for most Football League clubs this will merely be reflecting the status quo that has existed for many years with clubs already complying with this requirement. The Premier League has imposed similar restrictions in season 2010-2011. On this basis, this policy seems here to stay.

It is also important to note that in addition, to team sports, restrictive nationality quotas for participation in individual sport have also been highlighted by the EU. Action no. 40 of the “Pierre de Coubertin” Action Plan accompanying the 2007 White Paper on Sport announced that the Commission would launch a study to analyse all aspects of the complex issue of access to individual competitions for non-nationals. This recent study and the subsequent Report has now been published and can be found at: http://ec.europa.eu/sport/library/doc/f_studies/study_equal_treatment_non_nationals_final_rpt%20dec_2010.pdf

Race Discrimination and Sport
‘The European Union Agency for Fundamental Rights (FRA), a body of the European Union, published a report in 2010 entitled ‘Racism, ethnic discrimination and exclusion of migrants and minorities in sport: a comparative overview of the situation in the EU’ (FRA, 2010). The aim is to inform policy makers, sports associations, athletes and the general public. The main project themes are: diversity management, equality and discrimination in national and international sports associations, sports clubs and fan associations; manifestations of racism and discrimination in the context of sporting events; positive initiatives by political actors concerning prevention of racist violence in sport.


UEFA’s Home Grown Player Rule
In comparison to FIFA’s proposal, both FIFPro and the European Commission have indicated some approval for UEFA’s rules on home grown players, though FIFPro has emphasised the need to protect young players, including those from Africa, in that the rule could have the unintended consequence of an influx of trainee players between 14 and 16 into the major European leagues. Alternatively Miettinen and Parrish have argued that the UEFA rules may offend EU law in that they cannot be justified by reference to normal principles ‘on the grounds that they are disproportionate, unfit for the purposes they are relied upon or pursue economic as well as legitimate and justifiable non-economic objectives’ (S. Miettinen and R. Parrish, ‘Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home-Grown Player Rule)’ (2007) 5(2) Entertainment and Sports Law Journal).

The UEFA plan was first proposed in 2005. The rule requires clubs participating in the Champions League and the UEFA (now Europa) Cup to have a minimum number of home grown players, i.e. players who, regardless of their nationality, have been trained by their club or by another club in the same national association for at least three years between the age of 15 and 21. This was set at 4 players in a maximum squad of 25 in the first season of application – 2006/2007. This rose to 8 out of the maximum squad of 25 players in the 2008-2009 season.

In England, the Football League introduced restrictions, which started in the 2009-2010 season, which require four players in match day squad to have been registered by a domestic club for three years before their 21st birthday.
Recent publications on EU Sports Policy

S. Weatherill, European Sports Law: Collected Papers (TMC Asser Press, 2007);

B. Bogusz, A. Cygan and E. Szyszczak, The Regulation of Sport in the European Union, (Edgar Elgar, 2007);


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1. General

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[None]

OBITUARIES

Charlie Francis
Mr. Francis, who has died from cancer at the age of 61, was the sprinting coach who infamously transformed Canadian Ben Johnson into the world’s fastest runner by fuelling him with anabolic steroids. A champion sprinter himself in his youth, he converted Johnson from an average athlete into the seemingly invincible short-distance champion who smashed the existing world records over 100 metres at the 1987 World Championships in Rome and at the subsequent Seoul Olympic Games. His protégé having tested positive for stanozol, Mr. Francis was banned for life by his national association. This did not prevent him from later acting as coach to the dope-tainted US athletes Marion Jones and Tim Montgomery (The Independent of 14/5/2010, p. 68).

Edwin Valero
During his brief but remarkable career, the Venezuelan boxer had acquired the reputation of a formidable puncher. Having won all his previous 27 bouts on a knockout, he was being widely talked of as a possible opponent for Filipino Manny Pacquiao, generally regarded as the top pound-for-pound fighter in the world. His private life, however, ultimately proved his undoing. He was reputed to have acquired a drink and drugs addiction, and matters took a very serious turn when his wife, Jennifer Viera, was reported to have been taken to hospital with broken ribs and a punctured lung. This led to the boxer’s arrest on a charge of harassing his wife and threatening hospital staff. Ms. Viera was subsequently found dead in a hotel room in the Venezuelan city of Valencia, which caused the boxer to be re-arrested – this time on suspicion of murder. Shortly afterwards he was found dead in a police cell, having apparently used his own clothes to hang himself (The Daily Telegraph of 21/4/2010, p. 29).

Juan Antonio Samaranch
The Catalan sports administrator, who has died at the age of 89, found fame as the seventh president of the International Olympic Committee (IOC) between 1980 and 2001. During his period of office, he raised the profile of the Games to that of a quasi-state and developed its commercial potential to the point where many feared that the Olympic movement could lose its independence and become vulnerable to corruption. He introduced new sports without abandoning existing disciplines, which brought the Games close to bursting point. Also throughout his stewardship, the shadow of drug abuse loomed increasingly large over the quadrennial sportfest, and the IOC always seemed behind in its attempts to eradicate these practices. Its approach towards the main suspects, particularly those from the Eastern Bloc, was never sufficiently robust, and it was only after the Ben Johnson affair, referred to earlier in this section, that the IOC was seen to have acquired the necessary determination to deal effectively with the problem through its testing procedures (The Guardian of 22/4/2010, p. 42).

During his career, Mr. Samaranch developed a remarkable sense of survival and adaptability in the face of changing political circumstances. His formative years were spent in a Spain which was under the fascist dictatorship of General Franco, and Samaranch flourished under this régime through the international success of the Spanish national roller-hockey team, of which he was the manager. He became a councillor in Catalonia responsible for sport, and later rose to become a member of the Cortes, the nation’s ruling body. When the Franco era came to an end on the dictator’s death in 1975, it seemed that Mr. Samaranch’s career could be over. However, his friendship with King Juan Carlos stood him in good stead and secured him the ambassadorship to the Soviet Union – a move which was crucial to his Olympic aspirations, enabling him as it did to woo the vital of the Eastern Bloc when the position of IOC President became vacant in 1980 (Ibid).

Once he took control of the Committee, he introduced a new style of leadership which was far removed from the somewhat relaxed approach displayed by his predecessors. He moved into the five-star Palace Hotel in Lausanne, Switzerland, which remained his home for many years, and effectively became Chairman and Chief Executive to the Games. He was faced with a major test of his diplomatic skills in the mid-1980s when the IOC nominated Seoul as the organiser of the 1988 Olympics, which occurred against the backdrop of the continuous tension with the host nation’s fractious neighbours, North Korea. The latter’s
Communist régime was not slow in demanding a share in the spoils. The IOC President realised that another politically-motivated mass boycott such as occurred at the previous three Olympics had the potential to cause irreversible damage to the Games. He accordingly used all his negotiating skills to ensure that North Korea ultimately refrained from a violent reaction, and that other members of the Eastern bloc which did not have relations with Seoul were able to take part (Ibid).

As is mentioned earlier, Samaranch presided over a period in which the commercial potential of the Games became an increasingly important factor in the entire organisational set-up surrounding the Olympic movement. He used the development of a marketing company OSL, headed by the head of sporting goods manufacturer Adidas, to raise millions marketing the IOC emblem. He even had an Olympic museum built in Switzerland which, having been initially dismissed as a white elephant, drew considerable numbers of visitors, albeit at a price which exceeded the original budget by far – however, most of the cost was met by sponsorship.

Unfortunately, his reign also coincided with the uncovering of an unsavoury corruption scandal surrounding the choice of Salt Lake City as the site for the 2002 Winter Olympics, as a result of which 10 members either resigned or were expelled from the Committee. He retired on a happy note, having overseen the 2000 Olympics in Sydney, widely regarded as one of the most successful games ever staged (Ibid).

Dennis Brutus
The South African poet, who has died aged 85, was a leading opponent of the country’s Apartheid régime and led the movement to isolate the nation from international sport whilst it practised this discriminatory system of government. His protests against apartheid earned him an 18-month prison sentence and caused him to leave the country, travelling the world in order to campaign for sporting sanctions. Best known as the founder of the South African Non-Racial Olympic Committee (SANROC), set up as an alternative to the official Committee, he became a familiar figure on the corridors of Olympic power. It was Sanroc’s brilliant campaign which persuaded both individuals and sporting federations that to compete in South Africa amounted to condoning apartheid (The Daily Telegraph of 6/3/2010, p. 33).

Manute Bol
Known to many US sports fans as “the gentle giant”, the Sudan-born basketball player has died as a result of a rare skin disease complicated by kidney failure, at the age of 47. He made the remarkable transition from his civil war-torn country to the millionaires’ playground of the US National Basketball Association (NBA), where he became one of the tallest players ever to feature in the competition. He had spent all his career earnings, amounting to some $6 million, on various campaigns for peace in his native country, which had been the scene of Africa’s longest-running civil war. After his retirement, he continued to raise funds for humanitarian causes in Sudan and won plaudits as a tireless campaigner for peace in the area. In fact, he contracted the illness that led to his premature death during one of his visits to the country in which he campaigned against the corruption which blighted the southern region’s first semi-autonomous government since the civil war ended in 2005 (The Independent of 21/6/2010, p. 31).

Bill Powell
The world of golf has always presented an element of social conservatism, which has even at times manifested itself through the pages of this Journal. In the US, this attitude expressed itself for many years through outright racial discrimination. Bill Powell, who has died at the age of 93, played an important part in removing this stigma from the game. He acquired an enthusiasm for the sport whilst he was stationed in England during World War 2 as an Army Air Corps sergeant, and even dreamed of a professional career in the sport. However, in his native land the Professional Golfers Association (PGA) was only open to whites, and when he found himself refused admission to a public course, he resolved to build his own. This he succeeded in doing by raising loans from friends and relatives and performing most of the construction work together with his wife Marcella. This it was that he was able to open, in 1948, a nine-hole course open to any and all who wanted to play, which was at the same time the first black-owned course in the US and probably also in the world (The Independent of 2/4/2010, p. 55).

This experiment proved to be a success, and Mr. Powell subsequently sponsored countless women’s and youth leagues to
expand the scope of what was still largely considered an elitist sport. His love for the sport was passed onto his family, his daughter competing on the PGA Ladies Tour between 1967 and 1980. In fullness of time, he secured recognition for his achievements – in 1992 the National Golf Foundation named the Powells as Family of the Year, and he was also issued with the Martin Luther King Cornerstone of Freedom award. In 1997 he was made an honorary member of the PGA, and two years later this membership was made retroactive to 1962, making him a life member. During this year’s US PGA Championships he received a Distinguished Service Award (Ibid).

Albert Beurick
The Belgian pub owner, who has died at the age of 72, was a prominent figure in the turbulent world of Flemish cycling who, with the help of Yorkshire-born garage owner Ken Dockray, always gave considerable support to the many British riders who crossed the Channel in the hope of succeeding at the professional level. One of his most famous protégés was Tom Simpson, the Nottinghamshire rider who became the first Briton to wear the coveted leader’s Yellow Jersey in the Tour de France (1962) and the world professional road championships (1965). Mr. Simpson unfortunately died during the 1967 Tour. Although there appeared to be ample evidence that the illegal administration of amphetamines had contributed towards this fatality, Mr. Beurick always steadfastly insisted that drugs were not a factor in his hero’s death (The Daily Telegraph of 5/1/2010, p. 29).

LAWYERS IN SPORT

Lawyers’ World Cup held in Antalya (Turkey)
The 15th Football World Cup for lawyers took place this year in Antalya, Turkey, from 28 May to 6 June. The Classic title was won by the Roman team, whereas Costa Rica carried off the Masters title.

DIGEST OF OTHER SPORTS LAW JOURNALS

Latest issues of Zeitschrift für Sport und Recht (SpuRt)
The 2010(1) issue of our German sister journal commences with an article by Jan F. Orth which welcomes the adoption of a recent law which restricts the liability of honorary club committees. Under this new legislation, the liability of such committees has been limited as regards the club’s internal relations, in the sense that they will henceforth only be liable for intentional harm and gross negligence in the performance of their duties. This Law is a reaction to the trend whereby fewer and fewer willing and qualified persons were prepared to make themselves available for such positions because of the risk of incurring liability. The author hails this legislation as a positive development for the world of sport.

In another paper, the authors Daniel Neuhöfer and Till Schmidt concern themselves with a number of issues arising from the sale of tickets for major sporting events. Even during an economic recession, ticket sales represent a significant part of sporting club’s income. One particular issue which distorts this element in the German Football League (Bundesliga) has been the black market in such tickets, a problem which has become more acute with the increasing prominence of the internet. The authors examine the possibility for the clubs of banning the subsequent sale of tickets and whether the “personalisation” of tickets is an option worth considering – the leading side Hamburg SV having already made such a move at the beginning of the current league season.

In the previous issue of this Journal ([2009] 1 Sport and the Law Journal p. 34) attention was drawn to a decision by the German Supreme Court (Bundesgerichtshof) concerning nationwide stadium bans, in which the Court acknowledged housing law as the legal basis for such banning orders. This issue of SpuRt contains a commentary on this decision by Marius Breucker. Another decision to be featured in this edition is that of the Court of Arbitration for Sport (CAS) in the dispute between the Romanian international footballer Adrian Mutu and English Premiership side Chelsea, of which more below (p. 165). This decision is annotated by Dirk Monheim, who pays particular regard to the Court’s interpretation of Article 21 of the FIFA rules in this case, and describes this interpretation as legally tenable but ultimately ill-founded.

The second issue for the year 2010 starts with a somewhat provocative piece by the author Bernhard Pfistner in which he argues that, given the current state of collapse in the finance market, the latter could learn a great deal from sport and its structures. He
argues that in the world of sport, tight controls prevail—anyone who steps out of line in this monopolistic-hierarchical system, e.g. in league football, will, in the interest of preserving the integrity of the league in question, be penalised and deprived of a licence. Why can the same not apply in the world of finance? Of more serious import is the next contribution, by Klaus Vieweg and Christoph Röhl, who, against the background of a recent increase in fatal and near-fatal accidents as a result of sporting activity, examine the various issues of liability which arise therefrom for sporting organisers and executives. The comprehensive media coverage of such incidents has raised awareness of these liability issues amongst those involved to an even higher level. The authors recommend a number of precautionary measures which event organisers could take, such as the compilation of a list of obligations and the diligent documentation of the way in which these obligations have been fulfilled. The author Christian Krähe also examines issues of liability—this time in connection with a particular incident—documented later in this survey (see below, p. 129) —in which a young bobsleigh rider lost his life at the recent Winter Olympics in Vancouver.

Yet another aspect of society which has become a focus of scholarly attention is the religious dimension. In this regard, the author Jörg-Michael Günther focuses on a recent case in which three professional footballers were issued with cautions because of their fasting during the Ramadan period. The author is of the opinion that sporting clubs have the right to ban their players from rigorous fasting during the day. In the section devoted to sporting case law, the focus is on the recent decision by the Court of Arbitration for Sport (CAS) in the Claudia Pechstein case, in which the Court banned the ice skater for two years for a doping infringement—a decision which was later confirmed by the Swiss Supreme Court (Bundesgericht). The case has not, however, been definitively closed, as an application for review has been made on the basis of an alleged hereditary anomaly in the skater’s blood which is said to have caused her doping quotient to rise.

In the 2010(3) edition, two authors, Peter König and Hans Kudlich, debate the recent legislative proposal put forward by the Bavarian Sports Minister which seeks to achieve an effective system of combating doping and corruption in sport. The former argues that this initiative represents a major step forward in taking effective penal action against doping and corruption, whereas the latter has serious reservations about the criminalisation of such practices. In another paper which deals with a highly topical issue, the author Henning Wegmann examines the various legal issues involved in the Caster Semenya controversy (already extensively documented in an earlier issue of this Journal). In the section devoted to recent case law, the focus is on the decision of the European Court of Justice in the Bernard case, which is featured later in this Journal (below, p. 138).

SPORT AND INTERNATIONAL RELATIONS

Zimbabwean question refuses to die down— but improvement seems to be on the way

The question of sporting relations with the country labouring under the dictatorial régime of Robert Mugabe is an issue which has disrupted several planned international fixtures—as readers of this survey will be only too aware. In recent months, a new dimension has been added to the reluctance of certain teams to honour the African nation with a visit—to wit, the allegedly poor state of its health services. This was the reason put forward in mid-March 2010 by the New Zealand cricket team which was due to tour Zimbabwe in June but refused to do so after consultations with their national government. The series of one-day internationals had already been postponed once before in mid-2009, for similar reasons (The Daily Telegraph of 15/3/2010, p. S15). It was not yet known at the time of writing whether the tour had been rescheduled.

In spite of this latest setback, there are signs that the state of Zimbabwean cricket is gradually becoming healthier and less susceptible to the kind of international isolation which has impaired its progress in recent years. The nation’s participation in the recent Twenty20 World Championship in May 2010 seems to bear this out. It is true that not everything has changed—thus the controversial Peter Chingoka and Oziats Bvute have remained at the top of Zimbabwe Cricket (ZC), the national controlling body, but power and finance have been devolved to five new regional...
The new Minister for Education and Sport, David Coltart, is one of the more promising figures in the current coalition government, having emanated from the Movement for Democratic Change (MDC). In addition, ZC have brought back a number of the white players from both previous and current generations in order to organise and play the game (The Observer of 2/5/2010, p. S16).

The nation’s turbulent past does, however, continue to blight its sporting relations with the outside world. In late April 2010, it was learned that an opposition group intended to demonstrate against North Korean footballers who planned to train in Zimbabwe ahead of the football World Cup. The African People’s Union party explained that the inhabitants of the country’s Western Metabeleland province had not forgiven North Korea for training troops who crushed an armed rebellion in the 1980s. Thousands of civilians in the region died during the five-year Metabele uprising. Later, it was announced that the North Koreans would train in a base near the capital Harare instead of in Metabeleland, although the Government denied that the change had been politically motivated (Associated Press, www.findlaw.com of 29/4/2010).

World Cup television coverage causes rift between the two Koreas

As the attentive reader of this column may recall, at a certain point it looked as though sporting activity might go some way towards healing the 60-year-old rift between the Communist North and the “Western” South of this Asian nation. However, this prospect has in the meantime proved to be something of a snare and delusion, judging by the difficulties experiences between the two nations in reaching agreement even on such an elementary matter as providing each other with World Cup television pictures. This was an issue which had particular significance in view of the fact that this was the first time in the history of the world tournament that the two Koreas had made it to the final stages. The imbroglio commenced in May 2010. As residents of one of the world’s most repressive countries, North Koreans must have relished the prospect of catching a rare glimpse of the world outside and the opportunity to witness their team’s progress in the tournament.

However, tensions between the two kindred nations once again queered this proposal. Just a few weeks earlier, a South Korean naval ship had sunk – allegedly as a result of a torpedo launched from North Korea, and causing the death of 46 sailors. North Korea had requested the television feed during talks in the Chinese capital Beijing earlier this year, but the South Korean authorities were reportedly concerned that agreeing to this proposal would provoke a serious backlash back home. This was in spite of the fact that, in 2006, a different administration in Seoul had agreed to provide their Northern neighbours with recorded footage of the World Cup finals in Germany (The Guardian of 12/5/2010, p. S6). The problem was ultimately solved when Asia’s broadcasting union announced that it was providing North Korea with free World Cup coverage (Associated Press, www.findlaw.com of 15/6/2010).

The unlikeliest of international cricketing fixtures – Afghanistan v US

It is a curiosity of a fixture. In fact, it is one of the more improbable ever to appear on an international schedule, i.e. the United States against Afghanistan, at cricket. This can truly be described as a game of double take which is deserving of a second glance. The handful of spectators motivated enough to be in attendance witnessed more than a World Cup qualifier – they were parties to the next step in what has been an extraordinary journey for the cricketers of Afghanistan. The look of the fixture certainly resonates beyond the field of play. However, it is the uplifting narrative of a passage from refugee camps to international cricket that is particularly striking. One of Afghanistan’s leading players, Hamid Hassan, records on his weblog that it is a great thing that cricket can bring people together “and that players from Afghanistan and the USA can play each other in an international match”.

This will be their third game of the tournament which was to produce two qualifiers to take their place alongside England, India, Australia and others in the West Indies. Afghanistan had already proved to be the team to beat, having played two, won two, against the favourites, Ireland, and against Scotland, who have played at this level for many years. Afghanistan’s experience, by contrast, is negligible. Four years ago they toured England, playing fixtures against the likes of the Royal Military Academy, Sandhurst. Two years later they beat Jersey to win Division Five of the World Cricket League, and in January 2010 they beat the Cayman Islands in Buenos Aires to win Division Three. By last April they...
had secured one-day international status and just missed out on reaching the World Cup proper, since when they have begun playing first-class games, drawing with a Zimbabwe XI and beating Ireland and the Netherlands.

Kabir Khan, the former Pakistan test player who now manages the Afghan team, describes the way in which they have come through the last year as “phenomenal.” Khan himself hails from Peshawar in the North-West Frontier province and it was around its dusty streets that many of his players too were raised, as displaced victims first of the Russian invaders and then of the Taliban. They grew up in refugee camps and while there took happily to the game that entrance the their host nation. Mr. Khan went on to explain: "Many were born in the refugee camps in Pakistan. There was no cricket culture in Afghanistan. They started playing in the schools and streets of Pakistan, and now a cricket culture has developed. There is a younger generation that follows the game hugely. Our Under-19 side reached the World Cup and our Under-16 and -17 sides have won tournaments in Asia. There is a lot of talent out there, a hunger for cricket that can be developed. President Karzai is the figurehead of the cricket board, which shows how far the sport has come" (The Independent of 11/2/2010, p. 58).

Mr. Khan also stated that no other sport is as popular as cricket in Afghanistan. However, he could not blame the government for a lack of support because they obviously had “other priorities”. He also believed that the increasing popularity of cricket was important in that it could play a part in fostering peace in the country, bringing normality (Ibid).

As yet they do not play in Afghanistan, and the search for places to play and practise is never-ending. According to Khan, there is one proper ground in Kabul but conditions there are not brilliant and the security level is a considerable concern. He feared that his cricketers could be an easy target, therefore until such time as more stable conditions apply more stable the training camps would remain outside the country. Some players have been placed in first-class competitions in Sri Lanka, and Pakistan and India have also been asked to help. They are even exploring playing as a team in one of the Indian domestic competitions (Ibid).

The Afghans started as firm favourites to win the US fixture – and they confirmed this expectation by defeating the US by 29 runs. An extremely heartening feature of the fixture was that well over 1,000 people were in attendance at the Dubai International Cricket Stadium (The Guardian of 12/2/2010, p. S6). It is firmly to be hoped that the sport can make its contribution towards securing peace in that long-suffering country.

Shahar Peer overcomes international political hurdles to play in Dubai

For some time now, the seemingly endless conflict in the Middle East has affected the world of sport – more often than not, it has to be admitted, in a negative rather than a positive manner. The first, and hitherto most serious, manifestation of this occurred during the 1972 Summer Olympics in Munich, West Germany, when eleven members of the Israeli Olympic Team were taken hostage and eventually murdered by a group of eight Palestinian terrorists, also known as the Black September Guerrillas.

As the conflict intensified, many of Israel’s neighbouring countries waged a vociferous campaign during the 1970s for their expulsion from any Asian-orientated events. These tactics prevented Israel from competing in the 1978 Asian Games; as a result of this rejection, Israel was compelled to seek outlets for its competitive sport elsewhere. Eventually they were accepted into the European sporting federations, enabling the country to compete in many of the world’s most prestigious competitions such as the European Athletics Championships, the European Swimming Championships, the UEFA football competitions, the European Basketball cups and all other major European tournaments. However, this does not mean that Israel’s sporting representatives no longer have any obstacles to international competition placed in their path.

This has certainly been the case with promising tennis player Shahar Peer. She does not see herself as a trailblazer for closer understanding between her country and its neighbours; however the 22-year-old did pass a significant milestone in mid-February 2010 when she played in the Barclays Dubai Tennis Championships. Already the first Israeli ever to compete in a professional women’s tennis event in a Gulf state – having played in the Qatar Open in Doha two years ago – Ms. Peer did actually appear in Dubai approximately one year after her exclusion from the tournament caused a furore throughout the sport. The Women’s Tennis
1. GENERAL

Association (WTA) fined Dubai a record $300,000 after the United Arab Emirates, which has no diplomatic ties with Israel, failed to grant Peer a visa last year. The WTA said it had been given earlier indications that Ms. Peer would be allowed into the country, but the UAE government appeared to have changed its mind in the wake of Israel’s military offensive in Gaza in January.

Tournament organisers commented at the time that the Israeli player’s presence would have “antagonised our fans who have watched live television coverage of recent attacks in Gaza” and warned that the entire tournament could have been boycotted by protesters. Ms. Peer, who received her visa for this year’s tournament several weeks previously, said that she had learnt of her exclusion last year two hours before she was due to board a plane for Dubai. She said:

“I was in the draw already, but the WTA called to tell me that they would not let me in the country. I’m very happy to be able to go this year. It’s a $2m tournament, a big tournament, and I’m really looking forward to it. Sport should be outside of politics, so obviously I want to go and play there. I think we all need to be equal. (Last year’s experience) hurt mentally and professionally, because I was playing very well. I was on a good run and I was ready for the tournament. It was a big tournament and I couldn’t go, so it really stopped my momentum. To be barred from a country is not a nice feeling. I think there’s no place for that in sport. I actually think that sport can make it better and help political situations, not make it worse.” (The Independent of 12/2/2010, p. 53).

As Ms. Peer returned home, her exclusion was condemned by various players and officials. The WTA imposed more than double its previous record fine on the tournament, ordered Dubai to post a $2m (£1.28m) financial performance guarantee to ensure its inclusion in the 2010 calendar, and insisted that in future qualifying Israeli players should be given visas at least eight weeks beforehand. Peer was awarded $44,250 (£28,400) and 130 ranking points by way of compensation.

With sport having played such a big part in Dubai’s emergence on the world stage (including, as many a reader of this journal will know, the world of cricket), the controversy briefly threatened to have major implications for the UAE. Another Israeli, Andy Ram, was eventually granted a visa to play in the men’s event the following week, after the Association of Tennis Professionals made it clear that Dubai would lose its place in the calendar if he was not allowed into the country. Top US professional Andy Roddick, who withdrew from the tournament, was among those who expressed his disapproval of Peer’s exclusion, saying “I really didn’t agree with what went on over there – I don’t think you make political statements through sports” (Ibid).

Dubai is not the only tournament where Ms. Peer’s presence has been controversial. She has been the subject of protests in support of Palestinians at the pre-Australian Open tournament in Auckland, New Zealand, for the last two years.

OTHER ISSUES

Overview of major German sports law decisions since European Football Championships 2008

In the context of the impending football World Cup taking place in South Africa this year, the German professional journal Neue Juristische Wochenschrift provides an overview of the major decisions by the German courts in the various areas of sports law. These areas include:

Sporting injury: here attention is drawn more specifically to a recent case by the Court of Appeal of Munich in which €15,000 was awarded to a footballer whose leg was broken in two places as a result of a tackle. The Court ruled that the player making this tackle had done so from behind and without any realistic chance of reaching the ball. Closely related to such cases are those involving disputes about the insurance schemes entered into by clubs which make provision for disabilities incurred as a result of a tackle. The Court ruled that the player making this tackle had done so from behind and without any realistic chance of reaching the ball. Closely related to such cases are those involving disputes about the insurance schemes entered into by clubs which make provision for disabilities incurred as a result of a tackle. The Court ruled that the player making this tackle had done so from behind and without any realistic chance of reaching the ball.

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Disorder outside the stadiums: here, the survey focuses on some of the leading decisions on stadium bans, including that issued by the Supreme Court in the case cited above, which was featured in the Zeitschrift für Sport und Recht (see above p. 000).

Black market in tickets: here again, there have been a number of key decisions – such as that of the Supreme Court which held that the direct purchase of match tickets from football clubs by unauthorised internet traders constituted an infringement of competition law.

Sports marketing: here, the issue of media rights has played a prominent part. In a decision which is currently the subject-matter of an appeal to the Supreme Court (Bundesgerichtshof), the Appeal Court of Stuttgart ruled that a regional football federation had the right to prohibit an internet portal from relaying pictures of certain amateur matches coming within the federation’s jurisdiction. The Court had held that this prohibition was fully justified, since there was a competitive relationship between the contending parties, even where the federation in question marketed the broadcasting of the games within its jurisdiction, not for direct financial gain, but in order to meet its statutory obligations.

Transfer issues: here, a number of fiscal issues had recently been raised in the courts in this regard. Thus the Supreme Fiscal Court (Bundesfinanzgericht) has ruled that foreign clubs are not liable for payment of the tax levied on payments relating to the loan of players, since they are not subject to the domestic system of tax deduction at source.
Indian Premier League embroiled in alleged corruption scandal

Hitherto, the issue of corruption in cricket has concerned mainly allegations and revelations of players succumbing to the temptation of bribery and match-fixing. However, a new dimension has recently been added to this problem in the shape of the various shady proceedings in the recently-formed Indian Premier League (IPL), which has threatened not only the cricket establishment in the subcontinent, but also the nation’s very government.

The season had started full of promise in mid-March, with ticket sales for the matches involving the League’s eight franchises forging ahead, and ambitious talk of expanding the format of the League to ten franchises the following season. Yet amid all the euphoria and bombast there were those who were quick to sound a cautionary note as to the competition’s future. Former Indian Test all-rounder Kapil Dev – a man who in his pomp would doubtless have been prime IPL material – pronounced himself impressed by the initial impact of the IPL, but cautioned that it was too early to pass judgment, and advised the International Cricket Council, the game’s world governing body, to “watch very carefully” that it does not go too far and spoil the game. Some of the reservations expressed concerned the impact of the man behind the entire enterprise, Lalit Modi. Here was a man who had succeeded in persuading the cream of India’s Rich List and Bollywood stars to invest some $700 million in the enterprise, with only one of the eight franchises contriving to break even, and had achieved a world-wide audience of 450 million. Yet he had already been described as a man who “could divide the Red Sea” by some commentators – with former Australian test captain Steve Waugh adding ominously that “nobody is bigger than the game” (The Independent of 12/3/2010, p. 65).

Exactly how prescient this cautionary note turned out to be began to emerge barely a month later, when it was learned that a prominent Indian Government minister had come under intense pressure to resign amid allegations concerning the ownership of a new team in the IPL. The politician in question, Junior Foreign Minister Shashi Tharoor, was accused of using his personal position to assist a consortium of friends to buy a new team in the highly popular competition. What had given additional spice to the allegations was the claim that one of the consortium members, a businesswoman resident in Dubai called Sunanda Pushkar, was the minister’s secret girlfriend and that she had been given a free and lucrative stake in the team. The person who leaked these allegations on the social network site Twitter was none other than Mr. Modi, who also claimed that the minister had cautioned him to refrain from probing the ownership of the consortium – and especially the position of Ms. Pushkar. This led to calls for Mr. Tharoor’s resignation by the opposition party BJP, one of whose spokesmen described the affair as a case of impropriety, of a minister “who is using his official position to patronise his friends” – and hinting that “there may be things that have not yet come out” (The Independent of 15/4/2010, p. 31). A few days later, it was learned that Mr. Tharoor had in fact resigned, after it had become clear that there was little appetite in the ruling Congress Party to defend a man whose latest escapade had merely added to a series of controversies in which he had become enmeshed (The Independent of 20/4/2010, p. 31).

However, it soon appeared that this episode had the potential to backfire on Mr. Modi in a very big way, since, in the wake of Mr. Tharoor’s resignation, it was announced that the affairs of the IPL were to become the subject-matter of a Government enquiry, amid Parliamentary allegations that the competition was being used for money-laundering purposes. This became clear when Pranab Mukherjee, the nation’s Finance Minister, made the following statement to the Lok Sabha (the Indian Parliament’s Lower House):

“The concerned department has already started the investigation process. I can assure the honourable Members that all aspects of IPL, including its source of funding, from where the funds were routed, how they have been invested, etc, are being looked into and the appropriate action as per law will be taken. No guilty or wrongdoers will be spared” (The Guardian of 20/4/2010, p. S1).

It also emerged that, a few days earlier, the IPL offices were raided by tax officials. They were reported to have
spent seven hours questioning staff, including Mr. Modi. The latter subsequently issued a statement denying all allegations of wrongdoing. It thus appeared that the potential scandal surrounding the League had risen from an individual case of impropriety to allegations that the IPL was being used in order to perpetrate serious financial crime, with MP Lalu Prasad Yadav, a former railways minister, informing the lower house that stakeholders in the tournament “get money from Swiss bank accounts and make it white money here”. In addition, there were claims that the links between the IPL and India’s political elite ran deep, and that this had hitherto hampered investigations into the IPL’s financial affairs (Ibid).

Further details of alleged financial malpractice on Mr. Modi’s part began to emerge as the crisis unfolded. It emerged that his business affairs had been the subject of a six-month investigation by the Indian Income Tax Department (I-T), which had tapped both the Indian magnate’s email account and a UK cellphone in his name, as well as examining regulatory filings from many parts of the world, including Mauritius and Ireland. The I-T report was also said to include claims that Mr. Modi was a silent partner in three of the IPL teams – the Kolkata Knight Riders, Rajasthan Royals and Kings XI Punjab (although the latter two have denied this). It was also being alleged that Modi was involved in betting on IPL fixtures through an intermediary, and that companies with whom he had previous business dealings had been awarded IPL contracts. Once again. Mr. Modi denied these allegations, claiming that they were “politically motivated” (The Daily Telegraph of 20/4/2010, p. S9).

Coming as they did on top of the terrorist incident in which two bombs exploded outside the Bangalore stadium where a major IPL fixture was about to start, and in which ten people were injured, these developments did not augur well for India’s new-found status as the powerhouse of world cricket (The Independent of 20/4/2010, p. 62).

Naturally, these developments caused a good deal of concern within the nation’s official cricketing authority, the Board of Control for Cricket in India (BCCI). Its president, Shashank Manohar lost no time in meeting Sharad Pawar, the ICC Vice-President, in order to discuss the affair, with the latter making it clear afterwards that Mr. Modi’s position was in danger. The ICC’s trepidation was understandable, given that Mr. Pawar had hitherto been a consistent supporter of Mr. Modi, but was expected to succeed David Morgan as ICC President and therefore keen to avoid any of the flak flying at the IPL to stick to him. Mr. Modi, for his part, made it clear that he vowed to remain as the IPL Chairman and Commissioner, pledging to “present all the facts against the allegations” (The Daily Telegraph of 21/4/2010, p. S4).

As the crisis unfolded, the scope of the allegations continuously widened in scope – both as to the nature of the alleged misdemeanours and the personalities involved. As to the latter, the affair was beginning to lay bare the business dealings of some of the most powerful men and women in India. Even Shah Rukh Khan, the nation’s most recognisable Bollywood actor, found himself involved in the imbroglio through his part-ownership of the Kolkata Knight Riders team, when the respected national daily, The Times of India, gave details of the manner in which tax inspectors were scrutinising the off-shore holdings of the Knight Riders’ parent company. However, it was the accusations of match-fixing – believed to stretch back to the second IPL held in South Africa the previous year – which made the most profound impact, since it was allegedly stated in a report by the relevant income tax officials that, in the course of the IPL’s existence, “the match-fixing and betting racket has scaled new heights”. The source in question was quick to add that the “princes” of Indian cricket, i.e. Rahul Dravid, Sachin Tendulkar and Sourav Ganguly – were not involved, and that the emphasis had been placed on the league’s overseas players. The tax authorities’ investigations had in fact focused on the alleged betting activities of individuals who had enjoyed access to VIP areas at IPL stadiums during the aforesaid second IPL season in South Africa (The Daily Telegraph of 24/4/2010, p. S16).

One particular source informed a leading British newspaper that some of those investigated by the Indian authorities had featured on a “watch list” of individuals having links to the betting world which was compiled by the ICC’s Anti-Corruption and Security Unit (ACSU). They are known to have enjoyed access to senior figures in the IPL organisation during the South African season, although their background was unknown to many of those with whom they mixed. One of the individuals investigated was understood to have links to the cricketing community in Sharjah, where cricket was played regularly in
All these allegations and rumours were constantly increasing the pressure on Mr Modi, and almost inevitably he was stripped of all his positions in Indian cricket as well as being suspended by the BCCI. The relevant papers were served on him by a Board official who attended the IPL final. Mr. Modi, who had 15 days in which to appeal, responded by vowing to “take full responsibility” if any rules had been infringed or any other financial irregularity had taken place (The Guardian of 24/4/2010, p. S12). Immediately, an investigation began into the various allegations of impropriety, with the most pressing questions for Mr. Modi being the whereabouts of documentation concerning an $80 million “facilitation fee” said to have been paid to settle a complex legal tussle over IPL television rights. He was also to answer charges of manipulating bidding for the IPL’s two newest franchises, located in Pune and Kochi. He was also expected to be castigated over his unorthodox business practices. Amid this flurry of investigative activity, however, commentators were observing that the allegations made against Modi should be viewed not in isolation, but as being symptomatic of the inadequacies of the BCCI said to be awash with political involvement and had not been sufficiently modernised to regulate the big business interests that now permeate the game (The Guardian of 27/4/2010, p. S7).

It should be mentioned at this point that the television rights dispute was largely of Mr. Modi’s own making. Worldwide rights for the IPL games had been sold to the World Sports Group (WSG), based in Mauritius, and Indian rights to Multi Screen Media (MSM) (Singapore), on a sub-licence from WSG. However, the arrangement with MSM was cancelled before the second IPL campaign started, for breach of contract. A legal dispute followed, with the Bombay High Court ruling that the Indian Board was within its rights to renegotiate the arrangement. MSM put in a new bid, but want to bid directly rather than as an offshoot of WSG. It was awarded the rights but only if it paid the $80 million facility fee referred to above to free itself. It is this fee which was the subject-matter of the Indian authorities’ investigation. To this should be added the continued inquiries being made by the Indian tax authorities into the complex ownership of some of the IPL franchises, in particular Rajasthan Royals, whose initial front man was Manoj Badale, owner of Emerging Media, a UK company, but whose consortium subsequently expanded to include Modi’s son-in-law, Suresh Chelaram, Lachlan Murdoch, the eldest son of the redoubtable Rupert, and Raj Kundra, husband of the Bollywood star Shilpa Shetty (Ibid).

Shortly after these dramatic developments, fresh allegations were made against Mr. Modi – this time of attempting to set up a parallel Twenty20 competition in England. This came after Giles Clarke, the Chairman of the England and Wales Cricket Board (CB) claimed that Mr. Modi had, at a meeting in Delhi, made proposals to representatives of the Test-playing countries which were “detrimental to Indian cricket, English cricket and world cricket at large”. The BCCI alleged that these meetings discussed the establishment of a parallel IPL in England in which the existing Indian franchises would bid for English counties, with Mr. Modi proposing a deal in which would guarantee each county a minimum of $3-5 million per year, as well as a staging fee of $1.5 million. In addition, according to the accusatory BCCI statement issued to Mr. Modi:

“You offered inducement to gather the rest of the county members to support your ideas and goad them to overpower their own governing bodies (…) you have allegedly planted a seed of thought of players’ revolt if the governing bodies of respective boards do not allow them to participate in this extended version of IPL (The Guardian of 7/5/2010, p. S7).

One of those involved in the meeting, Colin Graves, the Yorkshire Chairman who also chairs Test match country pressure group seeking an elite Twenty20 competition in England,
hotly denied that Mr. Modi and his group had been involved in any secret and destructive negotiations, and insisted that Mr. Clarke had been given notice of the meeting. He rejected accusations that the game was about to be “hi-jacked”, and described the meeting as a mere “fact-finding mission” at which Modi had not put any proposals on the table (Ibid).

At the time of writing, the investigation into Mr. Modi’s affairs and conduct were continuing. However, in the meantime it has emerged that Modi has started libel proceedings against Giles Clarke concerning the allegations stated above. He has also given notice that he has “no intention” of walking away from his post (The Guardian of 17/6/2010, p. S12). Clearly, this is a saga which promises to continue for some time, and in respect of which the present writer pledged, as ever, to keep his readership fully informed…

Essex players accused of match-fixing

Thus far, English cricket has been relatively free from corruption, real or alleged, and the possibility of it being thus tainted seemed to have diminished almost to vanishing point with the establishment of the Anti-Corruption Unit. However, recent events have shaken any complacency which the domestic game might have acquired with the news that two Essex players have been the subject-matter of police investigations into allegations of match irregularities during a one-day fixture.

Somewhat ironically, during the months preceding the 2010 season English players had been issued with informal warnings about the dangers of being exposed to match-fixing temptations – not, however, in any domestic competition but on the occasion of their participation in a string of fixtures in the United Arab Emirates (UAE), the very region where the first manifestations of large-scale cricket corruption were discovered over a decade ago. The venue which was initially tarnished by the spectre of illegal bookmakers operating in this region was the Sharjah stadium which has largely fallen into disuse, but has been replaced by impressive locations in Abu Dhabi and Dubai, which have become the unofficial home grounds of the Pakistan national team because of the ever-present danger of terrorist attacks on their home territory (Journals passim). Tim May, the former Australian Test spinner who is now heads FICA, the international players’ union, warned that the players involved could once again be targeted by bookmakers. He cautioned that Twenty20 cricket was particularly ripe for corruption because, the shorter the game, the greater influence each individual incident can have on the outcome. The previous year, as was reported in this organ, there were reports that known illegal bookmakers were attempting to operate in and around the World Twenty20 tournament held in London (Daily Mail of 17/2/2010, p. 75).

However, it was not the Arab Gulf, but the more prosaic setting of Durham CCC’s Riverside ground, that was to become the focal point of an investigation into “spot-fixing”, whereby the outcome of a specific event in a match is fixed. English cricket was faced with one of its most serious potential scandals when, with the new season hardly under way, Essex police announced that an investigation had commenced into the actions of two Essex players during a fixture in the NatWest Pro-40 fixture between their county and Durham during the closing stages of the previous season (The Daily Telegraph of 10/4/2010, p. S28). It was reported that the ECB, as well as the ACSU, had been informed immediately upon suspicions being raised, but had chosen to entrust the matter to the county constabulary. Several players were interviewed, as a result of which it emerged that it was the young English fast bowler, Mervyn Westfield, and the Pakistan Test spinner Danish Kaneria on whom the investigations would be concentrated. The away side had won that fixture, but in Durham’s total of 276, Mr. Westfield had bowled seven wicketless overs for 60 runs, whereas his Pakistani team-mate had returned figures of 2-58 with two wides (The Observer of 11/4/2010, p. S18).

It soon became clear that the county club’s authorities had been aware of the allegations for several weeks beforehand, although they had maintained a strict code of silence on the matter other than to reject as incorrect reports made in various Sunday newspapers that the club Chairman, Nigel Hilliard, had been interviewed by police. Mr. Kaneria, who at the time of the investigation was still in Pakistan, denied all impropriety and claimed that his “cricketing career is completely unstained”. Although he had missed the first few weeks of the new season, he was still expected to compete for Essex as their overseas player (The Guardian of 12/4/2010, p. S12). Mr. Westfield, for his part, declined to make any comment (The Daily Telegraph of 13/4/2010, p. S15).
No further action has been taken against Mr. Kaneria. Mr. Westfield has been charged with conspiracy to defraud charges (The Guardian of 28/11/2010).

Any notion that this was merely an isolated case was soon undermined by the news, which came two weeks after the Essex arrest, that, according to an experienced county player, various attempts were being made to fix matches in English domestic cricket. The cricketer in question claimed that he had been told by an Indian businessman to "name his own price" in order to influence a one-day game this season, and that the person in question alleged that other counties were already involved. He added his concern that there could arise a situation whereby two of the smaller counties could play each other in a televised game, come to some kind of agreement, and earn about five times their salary from one match. A few days later, another county player alleged that he too had been approached by an Indian businessman and offered the chance to earn "up to £5 million" by fixing the outcome of a televised fixture (The Daily Telegraph of 30/5/2010, p. S13). To emphasise the seriousness of the situation beyond the integrity of the sport, the players in question had been advised to remain anonymous, given that match-fixing has close links to organised crime, which means that the players' safety could be endangered if they went public on the issue (The Guardian of 26/5/2010, p. S4). No such inhibitions attached to former England test captain Michael Vaughan, who claimed that he too knew of a player who had been approached in order to take part in match-fixing practices, although he did not regard it as a widespread problem in the game (The Independent of 31/5/2010, p. 40). Adam Gilchrist, the former Australian wicketkeeper/batsman, who has played in the Indian Premier League also commented that it would be "naive" to think that corruption was not taking place in cricket, as players had become "easy targets" (The Daily Telegraph of 3/6/2010, p. S11).

ACSU investigates Pakistan tour fixtures
As if having to play the forthcoming Test series against Australia and England during the 2010 summer season were not enough, the Pakistan team learned, in late May, that the ICC's Anti-Corruption and Security Unit (ACSU) was conducting an investigation into the question whether the team's performance during their tour of Australia the previous winter was caused by "dysfunctionality" or a "financial fix". This followed a string of results in which the visiting team had been "whitewashed" in the Test and one-day series. A video had been leaked shortly beforehand, revealing footage which shed light on the level of in-fighting and distrust which apparently prevailed during the tour. In fact, the Pakistan Cricket Board (PCB) took action after the tour, banning Mohammad Yousuf and Younis Khan indefinitely, and issuing one-year suspensions to Rana Naved-ul-Hasan and Shoaib Malik. Nevertheless, the Chairman of the ACSU stated that he had sufficient concerns that there may have been other, more corrupting, factors at work (The Daily Telegraph of 21/5/2010, p. S16).

All four have won appeals against their bans.

Cairns goes to law over match-fixing allegations
Chris Cairns, the former New Zealand test all rounder (no relation), is one of the players who had hoped to see out his playing career in one of the lucrative Indian cricket leagues. However, his application to join the Indian Premier League (IPL) was unsuccessful, having been rejected by IPL chairman Lalit Modi, who intimated that the reason for this rejection was that the New Zealander had been dismissed from the rival Indian Cricket League (ICL) because of match-fixing. Mr. Cairns responded by issuing a writ for libel in the English High Court in late January 2010. He said that he had no alternative but to do so, because otherwise his name would always "be tainted with the cheat label". He claims his dismissal from the ICL was due to lack of fitness. Before the tournament in question, Mr. Cairns, whose sister Louise died in a train accident in 1993, had walked 1,000 km for his own foundation, which raised money for rail-safety awareness (The Daily Telegraph of 24/1/2010, p. S14).

The case had not yet come to trial at the time of writing

Pakistan Parliament opens inquiry into alleged misappropriation of funds
In late March 2010, it was learned that a Pakistan parliamentary committee had ordered an inquiry into alleged misappropriation of more than $3.5 million of the nation's cricket funds. A spokesman explained that the irregularities were "highlighted in an audit report for the period of 2003 to 2008" (The Daily Telegraph of
Cricket match involved in fuel price-fixing trial
It seems that, nowadays, the game of cricket cannot stay out of the corruption headlines – even where this has nothing whatsoever to do with match-fixing or crooked bookmakers. In early May 2010, the trial took place of four British Airways (BA) executives accused of dishonestly colluding with staff at the Virgin Atlantic (VA) airline to fix the price of fuel surcharges. Richard Latham, prosecuting for the Office of Fair Trading (OFT), Britain’s “competition watchdog”, drew attention to a match between BA and VA staff which took place at the home of VA chief Sir Richard Branson only two days before VA increased its surcharge from £24 to £30, with BA following suit two days later. In court, Mr. Latham claimed that it was the understanding of William Boulter, VA’s former commercial director and one of the prosecution witnesses, that “Richard Branson wanted to speak to Sir Rod Eddington (the former BA Chief Executive) at the cricket match”.

What had aroused suspicion was the fact that photographs of the match were not released at the time, but held back for a few weeks and then sent out undated. Mr. Latham claims that the reason for this was Paul Moore, the former VA corporate affairs chief and a prosecution witness, and Ian Burns, the airline’s former communications chief who is one of the defendants in the case: “thought it wouldn’t look too clever if there was an announcement of a matching (sic) increase to the PFS (passenger fuel surcharge) at the same time as the senior management of the two airlines were to be seen having relaxed fun together. All a bit too cosy, you may think, would be the impression, wouldn’t it” (The Daily Telegraph of 4/5/2010, p. B2).

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

Tennis corruption scandal – an update
Since the first cases of alleged match-fixing in the sport came to light two years ago, as reported in these columns, unstinting efforts have been made by the tennis authorities to reduce to a minimum the opportunities for corruption – which has found its expression in, inter alia, the establishment of the Tennis Integrity Unit (TIU). The investigations conducted by the Unit have led to the imposition of penalties on a number of little-known players for minor betting offences. One of the rules issued by this body is that players must report any approach made to them to influence the outcome of matches. It appears that one such approach was made to Ekaterina Bychkova, a 24-year-old modestly-ranked player, who failed to report this incident to the authorities, who only discovered the incident after an investigation. This caused her to be fined $5,000 and banned for 30 days. The unit stressed, however, that it had found no evidence that the Russian player had contrived or accepted any compensation to contrive the outcome or any other aspect of a tennis match (The Independent of 12/1/2010, p. 50).

Ms. Bychkova did, however, find a staunch defender in the person of former Wimbledon champion John McEnroe. Although conceding that match-fixing was a “huge concern” for tennis, he expressed the view that the Russian player’s punishment would deter other players from being honest. He mooted the possibility that Ms. Bychkova may have failed to report the approach because she was afraid, which he described as a “legitimate concern”. More generally, he added that the rule obliging players to report such incidents made little sense, opining that this gave the impression of being “more worried about the gamblers than the athletes” (Ibid).

Allegations of corruption in snooker
Hitherto the words “snooker” and “corruption” have made very uneasy bedfellows. It is true that, five years ago, top performer Quinten Hann was banned for eight years and fined £10,000 following allegations that he agreed to accept cash in return for losing to Ken Doherty in the China Open – as was reported in this organ at the time – but this was seen as a once-only aberration in a sport largely untainted by the spectre of corruption. However, this rose-tinted aura may soon be dispelled if the current allegations being made against at least one leading player are vindicated – and, worse still, if the claims that this is not an isolated case of match-fixing in the sport also turn out to be correct.

In early May 2010, the British media trumpeted the allegation that John Higgins, the former world champion in the sport, had been caught agreeing to a £261,000 bribe to fix a series of high-profile matches. More particularly the News of the World claimed that the player made this offer during a meeting.
with an undercover reporter in Ukraine, having travelled there following his defeat in this year’s world tournament to Steve Davis. According to the newspaper, Mr. Higgins agreed to lose four frames in four matches deliberately in order to assist a number of illegal betting syndicates, and informed the reporter that it was “easy” to arrange such an outcome. The deal had apparently been set up and agreed with Pat Mooney, the player’s agent, a Board member of the World Professional Snooker and Billiards Association (WPSBA) and one of the game’s top four officials charged with policing the sport. The newspaper also claimed to have met Mr. Mooney to discuss match-fixing prior to the meeting with Higgins. Apparently its reporters posed as businessmen interested in organising a series of events linked to the World Snooker Series (The Sunday Telegraph of 2/5/2010, p.S1).

Within hours of these revelations, Mr. Higgins was suspended and Mr. Mooney resigned from the WPSBA Board. The player then embarked on a desperate campaign to save his career, stating:

“I have built my career on honesty and integrity. Sadly other have now damaged that reputation and it is now left to me to clear my name. I have never been involved in any form of snooker match-fixing. In my 18 years playing professional snooker, I have never deliberately missed a shot, never mind intentionally lost a frame or a match. In all honesty, I became very worried at the way the conversation developed in Kiev. When it was suggested I throw frames for large sums of money I was really spooked and just wanted out of the hotel and on the plane home. At that stage I felt the best course of action was just to play along with these guys and get out of Ukraine” (Daily Mail of 3/5/2010, p. 65).

The initial reaction by the WPSBA was suitably robust and ominous. Barry Hearn, the Chairman of the world governing body, immediately issued an uncompromising message to Higgins and other players who might find themselves tempted by financial offers that if they crossed that line, he would be “the worst enemy” they had ever encountered. In the particular case of Mr. Higgins, the latter’s defence, as it emerged from his comments stated above, that he and his agent Pat Mooney felt intimidated into accepting the offer made by the undercover team, whom they believed to be Russian gangsters, was met with some scepticism from Mr. Hearn, who responded by asking one simple question: why did neither of the two men attempt to contact him by telephone? That comment was the last from Mr. Hearn for some time, since he immediately handed over the investigation to a disciplinary panel led by former police detective superintendent David Douglas. However, he did promise a verdict “within days and weeks rather than months and years” (The Daily Telegraph of 4/5/2010, p. S10). This proved a somewhat optimistic assessment, since no concrete outcome had yet emerged at the time of writing. The prospect of an early decision receded even further when it was learned that, in the meantime, fresh allegations were made against Higgins, in that, according to the same newspaper which had set up the Kiev undercover operation, he attempted to bet against himself during the 2009 World Championship final. It was claimed that the Scottish player telephoned a bookmaker during a break in the final requesting odds on him losing to opponent Shaun Murphy at some stage in the match. The bookmaker is reported to have refused to take the bet (The Observer of 9/5/2010, p. S16).

Nevertheless, the WPSBA did take a number of immediate measures aimed at minimizing the possibilities of corruption in the game. Henceforth, leading players were to be banned from any form of snooker betting. Players are already prohibited from betting on their own fixtures under the WPSBA code of conduct, but so-called “insurance bets” on the highest break were permitted. This means that, where a player is on course for a cash prize for the highest break in the tournament, he is allowed to take out insurance by betting on his break being bettered. However, the day after the Higgins story broke, Barry Hearn confirmed that even this form of betting would soon be outlawed and that players would be notified by letter that all snooker gambling was now prohibited. This clampdown will, in fact, bring snooker into line with the recommendations made earlier this year by the British Sports Betting Integrity panel, established by the then sports minister Gerry Sutcliffe (The Daily Telegraph of 3/5/2010, p. S15).

On 8 September 2010 Ian Mill QC sitting as the WPSBA Disciplinary Board found Higgins account to be “a truthful one” and cleared him of agreeing to fix matches or any other fraudulent conduct or dishonesty, although he admitted discussing
betting and failing to report an approach about it to the authorities, for which he was banned for six months (backdated) and fined £75,000. Pat Mooney admitted the same offences, for which he was permanently banned from the WPSBA (and ordered to pay £25,000 costs). The other charges against him were withdrawn.

As is usually the case, one incident of alleged corruption not only highlights the various ways in which the sport in question can be vulnerable to such practices, but also brings to light other allegations and speculation about match-fixing. As an individual sport in which those taking part have total control over the variables when they are at the table, snooker is almost uniquely exposed to manipulation. Accordingly, it did not come as a complete surprise to learn, as the Higgins story broke, that three players ranked among the top 50 in the game were the subject of police investigation into suspected corruption. World No.2 Stephen Maguire and Jamie Burnett were under investigation by police in Strathclyde, Scotland, following a fixture in 2008, won by Maguire 9-3, in which unusually large amounts of money were bet on the result. Mr. Maguire later called on bookmakers not to take wagers on his matches in order to end the speculation. Three months prior to the Higgins investigation, the former World No. 5, Stephen Lee, was arrested and questioned on suspicion of cheating, following a joint operation by West Midlands police and the Gambling Commission (although no charges have been made and he denied any involvement with cheating or betting irregularities). In September 2008, the latter investigated Liang Wenbo’s 5-0 defeat of Peter Ebdon after numerous bets were placed on precisely that outcome, but again the investigation ended without findings against either player (The Daily Telegraph of 3/5/2010, p. S15).

Although the allegations and investigations referred to above have come as a shock to the sporting world at large, it would seem that at least some top players have known about, or at least suspected such goings-on for a number of years. One such former champion is, coincidentally, John Higgins’s namesake Alex, known in his heyday some three decades ago as “Hurricane”. He warned that corruption is rife in the sport, and believed that match-fixing was quite prevalent. He himself denied ever taking a bribe, but claimed he had been offered £18,000 to lose a quarter-final at the Benson & Hedges masters in 1979, and £20,000 to cheat at the Irish Masters. He told the Sunday Life, a Belfast newspaper: "I'm still in touch with top agents in the game and the only thing they've said about this is 'How greedy do you want to be?' I know of at least four pros who have taken big bribes to chuck games. The names would shock the public if it was proved they were on the take. Just because they wear crisp white shirts it doesn't make them clean” (Daily Mail of 10/5/2010, p. 72).

This column naturally pledged to continue following this saga with keen interest.

Top bidders in World Cup 2018 bribery allegations
One of the more unedifying spectacles thrown up by the various global sporting tournaments is the bidding process which precedes them and too often degenerates into an undignified and ruthless struggle in which no stratagem seems low enough for the prospective organisers to employ. The reader will recall the raucous and unscrupulous shenanigans – so uncivilised that the International Olympic Committee president had to intervene – which accompanied the campaign to win the organisation of the 2012 Olympics. It would appear that this unseemly scramble will appear to have been a model of Coubertinesque fair play compared to the goings – on which are threatening to disfigure the bidding process for the next two football World Cup in 2018 and 2022.

Earlier issue of this Journal have already detailed some of the opening shots in the bidding war, which already hinted at the battles to come. In early March 2010, two of the favourites to host these tournaments, Russia and Qatar, became the focus of bribery accusations at the “Soccerex” summit, which took place in Manchester, England. Various claims, hitherto unsubstantiated, were made that Qatar’s bid budget, believed to be $180 million, could “buy” them the 2022 World Cup, whereas Russia would be prominent in the queue to hand out bribes to the voting executive committee of world governing body FIFA. Not unexpectedly, these claims were vigorously rebutted by the nations in question. Russia’s 2018 operations director, Alexander Djordjadze – whose £60,000 expenditure on the Soccerex exhibition stand was apparently
exceeded only by Qatar’s even more sumptuous unit – commented that “no amount of money was enough to deliver a World Cup”, whereas their communications chief Andreas Herren said that FIFA would be merely concerned with picking the right venue for the right reasons. Qatar, for their part, claimed that their campaigning success had prompted highly exaggerated figures about their spending. Rivals had estimated their funding for exclusive access to the recent African Football Congress at $3 million, whereas Qatar claimed the figure was $2 million. Either way, this contrasted sharply with the £25,000 spent by the English Football Association (FA) on hosting a reception at the Manchester Town Hall during the summit (Daily Mail of 3/3/2010, p. 79).

Not that the latter was immune from controversy in the bidding process. Two months later, its Chairman, Lord Triesman, was compelled to resign after having been secretly tape-recorded by a tabloid newspaper suggesting that Russia was prepared to assist Spain in bribing World Cup referees during the 2010 tournament in return for the latter’s support in the race to host the 2018 tournament. This was predictably enough followed by hot denials by both countries involved. Aleksey Sorokin, the head of the Russian bid, called for FIFA to take appropriate measures over these claims, particularly since this was not “the first time we hear something absurd being directed towards us”, adding that, in the process, the English – also prominent bidders for the 2018 Cup – had “punished themselves”. Mr. Sorokin was joined by officials in Spain and Portugal (who have submitted a joint bid for the event), and within football’s governing body, in expressing astonishment and disbelief at His Lordship’s claims. Gilberto Madaíl, the president of the Portuguese FA, suggested that this kind of innuendo was “indicative of an uneasiness” on England’s part, calling the allegations “absurd and unfounded” (The Daily Telegraph of 17/5/2010, p. S5).

England, meanwhile, attempted as best it could to draw the sting from the entire affair and thereby limit the damage that stood to be caused to its own bid for the tournament. Lord Triesman’s swift resignation was followed by a series of placatory emails, followed by several telephone calls and faxes. Hugh Robertson, the UK’s new Sports Minister, stated his conviction that the affair need not fatally undermine England’s chances and urged the FA to use Lord Triesman’s departure as a spur for fundamental reform. However, there was no denying that the entire affair had dealt a serious blow to England’s chances. This was particularly in evidence with the news that Jérôme Valcke, the FIFA General Secretary, had referred the issue to the governing body’s ethics committee, which in turn would request the FA to provide a report on the matter, “including Lord Triesman’s position” – thus making England’s bid the first to be examined in this manner. This, together with the fact that Triesman’s remarks had been delivered 48 hours after the “candidate book” had been delivered in Zürich, conveyed the impression that the affair had in fact done considerable damage to England’s cause. One influential member of FIFA’s Executive Committee, who wished to remain anonymous, went so far as to claim that England’s candidacy had been “destroyed” (The Guardian of 18/5/2010, p. S1).

However, in spite of the various attempts made to cast Lord Triesman exclusively as the villain of the piece, Mr. Valcke disclosed a few days later that FIFA was working with Interpol to investigate the corruption claims. He explained this decision in the following terms:

“It is regrettable, it is sad, but we will go through everything that (Lord Triesman) has said to see if there is any truth in his words. The Ethics Committee must find out if there are any grounds to these allegations, to investigate what is said about Russia, Spain and match-fixing. We will study it, both in content and in form. (…) We are working with Interpol to check what is behind this story; you could never say that FIFA are doing nothing about match-fixing. We cannot go to the World Cup with the feeling that something is going on there. We will do everything to have a system where every player and every coach can call a number to say that a player has been approached or that money has been offered” (The Daily Telegraph of 21/5/2010, p. S5).

At the time of writing, the outcome of the various investigations, including that by Interpol, was as yet unknown. Watch this space for further developments.

**Italian football corruption suspicions resurface**

Few countries have seen the reputation for probity of their footballing world subjected to more damage than Italy, as the various accusations – some justified and proven, others justified but unproven – of bribery and corruption
have accumulated over the past few decades. The most recent of these scandals, fully reported in this Journal, resulted in a swathe of penalties being inflicted on a wide variety of clubs and administrators at the very pinnacle of the domestic sport by the Italian authorities themselves – an imbroglio (sic) from which “the beautiful game” has found it hard to recover in the Mediterranean nation. However, it may be that Italian football will yet again be compelled to take action in order to safeguard its integrity, judging by certain developments which became apparent as the 2009-2010 season was drawing to a close.

In late March 2010, it was announced that the European governing body in the sport, UEFA, were studying “unusual” betting patterns and outcomes in four recent fixtures as part of a new probe into a match-fixing ring which the relevant investigators believed had its roots in Italy, but could have links to Asia. This came amidst an extremely busy period for the UEFA authorities in this field, the governing body being already involved in an attempt to eliminate a Croatia-based pan-European match-fixing ring. Only a few days before the latest suspicions erupted, this purge had led to 46 arrests in Turkey – which included those of players and coaches. However, informed sources in the bookmaking industry had informed a leading British newspaper that four Italian fixtures were being examined as part of a separate investigation into match-fixing. It is a fact that, the previous weekend, bookmakers suspended wagers on the Serie A game between Chievo and Catania after more than £2 million had been staked on a draw, and hundreds of thousands of pounds had been bet specifically on a 1-1 draw. The result was 1-1, with a dubious penalty being one of several irregularities (The Independent of 26/3/2010, p. 75).

Subsequently both UEFA and the Italian authorities focused their attention on three other matches, all played in the Serie B (Second Division) the previous month. UEFA had been informed by bookmakers after suspect betting patterns had arisen on the game, played the previous February, between Gallipoli and Grosseto, Grosseto v. Citadella, and Salernitana v Triestina. The Italian investigators in question were operating on the assumption that the Serie A and Serie B games were “Italian business”, and therefore not linked in any way to a pan-European pattern in match-fixing. However, it appeared that considerable amounts of money had been traded on Asian markets – mainly on the Chievo game. Therefore, it would appear that it was known in Asia that the game was destined for a 1-1 draw. This has to give cause for concern (Ibid).

Football corruption in China

“Footballers paid bribes to play in national team” claims newspaper

In late January 2010, a Shanghai newspaper alleged that Chinese footballers paid considerable sums in order to compete in international fixtures. This news came as the country’s sports minister claimed that the roots of corruption ran deep in the game. They also arrived hard on the heels of the news that the head of the Chinese Football Association, as well as two other officials, were dismissed and questioned by police over match-fixing claims. In spite of various areas in which the country has displayed sporting excellence – as witness the medals haul at the 2008 Olympics – the country’s football team ranks 97th in the world. This is hardly surprising when, according to the Oriental Morning Post, a payment of £18,000 could win a player a place in the national squad. The newspaper did not state who received the bribes, although officials of the football association have considerable control over staff and coaching decisions (The Guardian of 28/1/2010, p. 16).

As has been mentioned earlier, this fresh report of impropriety comes at a time when the Sports Minister, Liu Peng, said that the increasing sponsorship and advertising income could create new opportunities for corruption. The 16-team China Super League enjoyed a record average attendance of 16,300 the previous season, and sports firms Nike and Pirelli have made a combined commitment of $22 million to sponsor the league. According to the state newspaper Xinhua, Mr. Liu informed a meeting of sports chiefs that the relevant authorities had “a long way to go to rule out corruption amongst sports officials”. Lang Xiaonong, a former football official, informed the China Daily News that the problems were structural, given that a small number of top officials make all the decisions regarding Chinese football and determine the destiny of the sport (Ibid).
2. CRIMINAL LAW

Sheffield United caught up in Chinese match-fixing scandal
The English Championship side has enjoyed but little contact with international football of late, and such involvement with the game abroad does not appear to have been of the most desirable kind. In late February 2010, it was learned that the “Blades” had become enmeshed in a match-fixing affair in the Far-East, less than a year after ending a bitter disagreement over the role played by Carlos Tevez in the club’s relegation from the English Premier League. The Sheffield club purchased a controlling interest in the Chengdu Blades side four years ago, but were shocked to learn that the team have been relegated from the Chinese Super League for match-fixing. The scandal has toppled China’s Football Association chief, Nan Yong, and the repercussion reached South Yorkshire when it was revealed that Chengdu Blades and Guangzhou GPC had lost their places in the top division after a month-long investigation. Both sides were implicated in findings which included match results being fixed, referees bribed and, as mentioned in the previous section, players paying for inclusion in the national team. However, it should be stressed that there is no evidence to link anyone from Sheffield United to any participation in the scandal (Daily Mail of 23/2/2010, p. 75).

Referees arrested on suspicion of corruption
The spate of incidents of corruption in the Chinese game continued its sorry procession in late March 2010 when it was learned that police had arrested three referees on suspicion of match-fixing, including one official who took part in the 2002 World Cup in South Korea and Japan. Although at the time of writing it was not clear whether the three officials had actually been charged with the offence, and what sentences they could expect if found guilty, it should be recalled, that, as was reported in this Journal at the time, another referee, Gong Jianping, was sentenced to 10 years’ imprisonment in 2002 for taking bribes (The Observer of 21/3/2010, p. S20).

Five arrested in Hong Kong match-fixing investigation
In early May 2010, it was learned that Hong Kong anti-corruption authorities had arrested five players for allegedly attempting to fix a top division game in the former British colony in the course of 2009. The territory’s Independent Commission against Corruption subsequently charged one of the suspects, mainland China player Yu Yang, with the offence of offering an inducement to an agent. The Commission said that the four other suspects, who were not identified, were to be released on bail later. Mr. Yu, a former defender for the Happy Valley side, allegedly paid a fellow player for helping to fix a First Division game the previous October (Associated Press, www.findlaw.com of 6/5/2010).

South Korean medallists issued with three-year ban
In early May 2010, it was announced that two South Korean Olympic medallists in the short-track speedskating event had been banned from the competition for three years for their alleged involvement in a race-fixing scandal. The Korea Skating Union suspended Lee Jung-Su and Kway Yoon-Gy from all competitions until April 2013 as a penalty for allegedly helping to fix competitions and national team trials two months earlier. The three-year ban is more severe than the punishment proposed by a special joint commission of inquiry which convened the previous month and which had proposed a one-year suspension (Associated Press, www.findlaw.com of 6/5/2010).

The affair came to light when Lee, a double gold medallist at the Vancouver Olympics earlier this year, failed to qualify for the national team trials in March for the world short track championships in Bulgaria, pleading a knee injury. The Commission’s preliminary investigation found that Jeon Jae-mok, a national team coach, had forced Mr. Lee to give up his place in the championships in favour of Mr. Kwak. Jeon was banned from the sport for life for having manipulated the results of the national team trials to benefit selected skaters. Mr. Lee, for his part, denied all accusations of acting as Jeon’s accomplice and claimed to have been the victim “of deep-rooted and wrongful practices on the local sports scene”. Mr. Kwak has admitted being part of the alleged fixing attempt (Ibid).

The skaters had seven days in which to appeal – which they did, shortly before the time of writing. If that appeal should fail, they may appeal to the Korean Olympic Committee (Associated Press, www.findlaw.com of 11/5/2010).
Oklahoma University athletic department confirms basketball probe (US)

In early April 2010, it was learned that the Oklahoma University's athletic department had opened an investigation following reports that basketball player Tiny Gallon received money from a Florida financial adviser. Spokesman Kenny Mossman confirmed, in an email to Associated Press, that Oklahoma was “investigating matters that the public may be aware of through recent reports in the media”. Earlier, the website TMZ.com had reported that Mr. Gallon had received a $3,000 bank transfer from financial adviser Jeffrey Hausinger (Associated Press, www.findlaw.com of 1/4/2010).

Oklahoma remains on probation for major infringements of the rules issued by the NCAA, the University sports monitoring body, committed by its football and men’s basketball programmes in recent years. The (American) football violations involved players, including starting quarterback Rhett Bomar, receiving payment for work they did not perform at a car dealership. The basketball infringements stem from hundreds of impermissible telephone calls made by former coach Kelvin Sampson (Ibid).

Hooliganism and related issues

French government tackles hooliganism – with mixed results

It is an unfortunate fact that France, like so many other countries, has experienced the unwelcome attentions of hooligans at its professional football matches. Naturally, its authorities have considered and implemented various ways of dealing with this problem. However, the French government’s latest attempt to eradicate football hooliganism has been highly controversial and represents one of thistattempts in this direction ever taken by a public authority. The national daily Le Parisien described as “a measure that is unprecedented in French sport” the announcement by the national commission for the prevention of, in early May 2010, of the immediate “dissolution” of seven fans’ groups which it accuses of fomenting much of the fighting that has become endemic in and around some grounds, most notably the Parc des Princes, home of Paris Saint-Germain.

It came as no surprise that five of the seven disbanded “supporters’ associations” were of PSG fans (the other two being from Lyon and Nice), since the most ferocious confrontations in recent years have been between PSG fans and, well, other PSG fans. The catalyst for the commission’s decision were the blood-stained events that preceded the PSG v Marseille match in February, during which rival PSG fans engaged in clashes that left a 37-year-old man, Yann Lorence, dead. However, the problem has been festering for years. Through weakness and what many commentators believe to have been misguided policies, PSG has allowed its ground to become a theatre in which the social and racial tensions that afflict its city’s suburbs are enflamed.

Indeed, it is fair to say that PSG took the wrong path almost from its outset. Set up in 1970 amid dreams of grandeur, the club did not immediately attract mass support. In 1978, in a bid to foster popular fervour, the club owners dubbed one end of the stadium the “Boulogne Kop” and offered cut-price tickets. Fans duly flocked in, but among them were many Neo-Nazis, whose presence deterred many other would-be supporters, especially those from the ethnic minorities. Rather than root out the racists, the club tried, in the early 1990s, to attract non-whites to the opposite end of the ground, the Auteuil stand. According to an unnamed former club director, speaking to the influential France Football magazine, this was a “mistake” since it amounted to tacit acceptance that the Boulogne was a white-only stand (The Observer of 2/5/2010, p. S20).

Not only was it dangerous for non-whites to venture into the Boulogne end, it also became a no-go area for law enforcers, as three riot policemen discovered in 1993 when they chased a pitch invader back into the stand and received beatings. As the violence and racism escalated, the club again chose appeasement, attempting to co-opt the extremists in the Boulogne end by employing some of the heads of their supporters’ associations as stewards. That infuriated fans at the Auteuil end, who interpreted the move as just another endorsement of racism by the French establishment.

The rivalry between the two ends of the Parc offers a caricature of the debate on immigration. While the Auteuil associations insist they are affirming their right to participate in public life on equal terms, the Boulogne extremists view them as unwelcome immigrants intent on usurping their club just as they want to take their women and jobs and so on.
Symptomatic of this is the fact that one of the milestones on the descent into disorder occurred in 2003 when one of the Auteuil fan groups, the now defunct Tigris Mystic, held aloft a banner declaring “The Future Belongs to Us” – many in the Boulogne end insisting that this was a declaration of war. Since then the clashes have been more frequent and more brutal, and have not been restricted to the French capital, as confrontations tend to break out on away trips as well. In 2006, for example, extremists from Tigris Mystic and the Boulogne ran into each other on the way to Nantes, and the ensuing hostilities left several people seriously injured and a motorway service station in flames. Francis Graille, who was president of PSG from 2003 to 2005, claimed in France Football last month that when he announced his intention to clamp down on the supporters’ associations he received death threats and, ultimately, lost the backing of his bosses, who replaced him. This has prompted Mr. Graille to opine that the man who died in the incident described above [Lorence] “was killed by everyone” (Ibid).

Even though, as was reported in these columns, a PSG fan was shot dead by police in 2006 after fighting following a UEFA Cup defeat by Hapoel Tel Aviv, Mr. Lorence’s death represented the first time that a PSG fan has been killed by a supporter of the same club. The club reacted with uncharacteristic firmness, immediately banning all its fans from travelling to away games. A host of other measures have been introduced and there is much talk of ID cards or following “the English model” by improving surveillance and policing, as well as increasing ticket prices. The dissolutions, however, may not achieve much other than deprive the supporters of official status, since they remain able to attend matches and stand where they have always stood. One official even described the move as “window dressing”, with the government merely wishing “to be seen to be doing something”.

Nevertheless, the dissolutions drew predictably hostile reaction from the fans, many of whom demonstrated against the decision before the French Cup final between PSG and Monaco. Christophe Uldry, spokesman for the Supras Auteuil group, described the move as “another reflection of the pervasive racism and violence that has surrounded PSG for the last 30 years”. The group distributed a video to the media which purports to prove they were merely defending themselves from attacks by Boulogne hooligans on the night on which Mr. Lorence was killed. He added that the clubs would be better served keeping the supporters’ association “so that they have an official relay with the fans, otherwise the stadiums will fall prey to informal gangs”.

Others are also opposed to dissolution, but this time because it is not radical enough. According to L’Express” journalist Christopher Barbier:

“To put an end to the violence that almost systematically mars PSG matches now, it is not enough to dissolve such and such supporters’ association. PSG itself must be dissolved. An example must be set for the whole country – the club must be quashed” (Ibid)

At the time of writing, rumours were running wild. The latest one is that, whether PSG is quashed or not, a new club will be created in Paris to accommodate all the football fans who are turned off by the violence. Ironically, the mastermind supposedly behind this new club is reputed to be none other than the disgraced former president of PSG’s arch-rivals, Marseille, the convicted match-fixer Bernard Tapie.

As if the PSG fans had not caused sufficient damage to their country’s image already, they seemed intent on tarnishing it even further, to the point of damaging its chances of hosting an international football tournament. France’s bid to stage Euro 2016 was seriously undermined because of rowdy sabotage by – who else – Paris Saint-Germain fans. As Frédéric Thiriez, the president of the Ligue de Football Professionnel, was speaking at a press conference to explain why the country would be the perfect hosts, dozens of PSG fans stormed the auditorium and started to chant “Our taxes aren’t for the Euros!” before moving on to the real reason for their intrusion: to protest against the perceived bias of the authorities when it comes to clamping down on hooliganism in Paris. The intruders were all regulars in the Auteuil end of the Parc des Princes and are convinced that they have been more harshly dealt with than the neo-Nazis that gather at the opposite end (The Observer of 23/5/2010, p. 18).

Serbian football hooliganism continues

Hooliganism in Eastern Europe has been a worrying phenomenon for some considerable time now, and Serbia in particular has had its problems in this regard recently. In mid-April 2010, it was reported that a fan of top football
side Red Star Belgrade had been shot and seriously injured in an altercation during a game against a rival club. Serbian police said that 21-year-old Igor Vreljic was shot in the abdomen during a local derby with OFK Beograd. He was later said to be in a stable condition (Associated Press, www.findlaw.com of 15/4/2010).

In the meantime, however, the legal repercussions of the fatal beating of a French football fan in September 2009 continued. It will be recalled from a previous issue of this Journal ([2009] 1 Sport and the Law Journal p. 74) that, ahead of a Europea League game between Partizan Belgrade and French side Toulouse, 28-year-old Brice Taton was attacked in a café of the Serbian capital and died several days later. The subsequent investigation led to 14 hooligans being charged with first-degree murder. Two of the suspects remain at large and will be judged in absentia. The trial opened in the Belgrade High Court, but had not been concluded at the time of writing (Associated Press, www.findlaw.com of 21/4/2010).

Football fan loses extradition appeal
The disturbances which marred the 2004 Euro Championship finals in Portugal continue to produce legal repercussions. In early May 2010, an England football fan who was sent home following an altercation lost a last-ditch appeal against his extradition to serve a two-year prison sentence abroad. Gerry Mann pronounced himself “devastated” after the English High Court held that there was no legal barrier to returning the former firefighter to Portugal. This decision marks the end of a series of legal challenges aimed at keeping Mr. Mann in Britain. Edward Fitzgerald QC, appearing for Mann, informed the court that there was new evidence from the Foreign Office to support his case and that allowing the extradition to proceed violated his human rights. Mr. Mann was apparently involved in a fight in Albufeira (The Independent of 8/5/2010, p. 30).

Taser gun used on baseball fan invading pitch (US)
In early May 2010, it was reported that a police officer used a taser gun in order to apprehend a fan who ran onto the field during a top baseball fixture between the Phillies and St. Louis Cardinals. The fan, wearing a baseball cap, red T-shirt and khaki shorts, hopped over a fence and scurried around the outfield, evading two security officers during the eighth innings of the game. One officer used a Taser gun and the fan collapsed. Later, an investigation was commenced to determine whether the use of this device was appropriate in the circumstances (Associated Press, www.findlaw.com of 4/5/2010). The fan himself has been charged with trespass, disorderly conduct and resisting arrest (The Times of 6/5/2010, p. 39).

The Netherlands. In mid-April, it was learned that the bus carrying the Twente FC football team was pelted with stones whilst travelling to their First Division (Eredivisie) match at AZ Alkmaar. The vehicle was bombarded from a viaduct and caused damage to the rear of the vehicle. The matter was being investigated by police (The Independent of 15/4/2010, p. 64).

Combating hooliganism at the European level. Articles in legal journals
In “Combating football crowd disorder at the European level: an ongoing institutionalisation of the control of deviance” ([2009] E&S LJ 7), the author, Anastassia Tsoukala, examines to what extent the measures adopted by the EU Council against football hooliganism have led to the institutionalisation of the control and punishment of deviant behaviour and the failure to provide a legal definition of “hooliganism”. She also presents an overview of the regulatory framework currently governing football crowd disorder and explains why the EU-wide control and punishment of deviant behaviour causes concern, particularly

In a paper which appeared in the French legal journal La Semaine Juridique (1-2/2010, p. 132-133) the author, Joseph Jehl, examines the new regulatory framework which governs this process in Switzerland. There is much in this approach which he finds fit to commend, with measures such as replacing “football specials” run by the Swiss national railway by chartered journeys operated by football fan associations themselves; a hardening in the rules regarding the consumption of alcohol, improved rules regarding body searches by security staff, etc. He also praises the regular monitoring and evaluation of the effectiveness of these measures which has been built into the system.

“ON-FIELD” CRIME

Basketball star Arenas penalised for introducing gun into locker room (US)

In late March 2010, it was learned that Gilbert Arenas, a star basketball player with the Washington Wizards, had been ordered by a US judge to spend 30 days in a halfway house on gun charges stemming from a confrontation with a team-mate which took place in the locker-room. Prosecutors had recommended that Mr. Arenas should serve a three-month sentence in jail. However, the player’s defence lawyers argued that what they described as a misguided prank did not merit a jail sentence. Arenas pleaded guilty to an infringement of Washington’s gun laws on 21 December at the Verizon Centre. Following an argument over an unpaid gambling debt, Arenas had brought several guns to the Wizards’ locker room and put them in front of the locker of the team mate concerned, with a sign instructing the latter to “PICK 1”. In court papers, prosecutors claimed that the team-mate concerned, Javaris Crittenton, had legitimate reasons to believe the threat to be a genuine one (Associated Press, www.findlaw.com of 26/3/2010). His sentence also included two years’ probation, a fine of $5,000, and 400 hours of community service which cannot be performed at basketball clinics. He was discharged after serving only part of his halfway house sentence (Associated Press, www.findlaw.com of 7/5/2010).

What the player describes as a harmless piece of fun has re-ignited a national debate on sport and the macho culture that underpins it, and turned the spotlight on the anguished history of guns, murder and Washington DC. Making matters worse, another player who was said to be in a dispute over gambling debts with Arenas also brought a gun into the locker room that evening. As it so happened, at the time of the Arenas affair figures were announced indicating that Washington’s homicide rate dropped by 25 per cent in 2009 to the lowest level since the mid-1960s. However, memories are still raw of the bad old days of 1991, when 479 people were killed in a city of barely 600,000 people, and the capital of the free world became the murder capital of the USA, thanks to the gang wars raging on its streets (The Independent of 13/11/2010, p. 31).

As a result, Washington introduced some of the toughest gun laws in the US, including a ban on handgun ownership which was only reversed last year when the Supreme Court ruled that it violated the second amendment of the constitution enshrining the citizen’s right to bear arms. The rampant crime wave also led to a change in the name of the local basketball team, until 1997 known as the Washington Bullets. Abe Pollin, the owner, understandably felt that enough real bullets were flying with deadly effect without seeming to glorify the mayhem in a local sports franchise. The last straw came in 1995, when a religious fanatic shot dead Pollin’s friend Yitzhak Rabin, the Israeli Prime Minister. And so the Bullets became the Wizards. Now, however, thanks to Mr. Arenas’s latest prank, the Bullets are back, in spirit if not flesh. The guns he took to the Verizon Centre were apparently empty. Not so however the weapon brought by Javaris Crittenton, another Wizard, according to the Washington Post; that one was loaded (Ibid). The latter has, in the meantime, pleaded guilty to a misdemeanour gun charge, more particularly the possession of an unregistered firearm (Associated Press, www.findlaw.com of 25/1/2010).

At the time of writing, Mr. Crittenton’s case had yet to be adjudicated.

As is mentioned above, Mr. Arenas and his lawyers have insisted that the entire incident was just another prank. But it has focussed attention on the undertows of crime and violence that haunt US sport, especially basketball and American football. The link is obvious – many NBA and NFL players come from poor inner city backgrounds, where guns are part of the culture; some of these players
become very rich, very quickly. Not surprisingly, they may feel the need to protect themselves. One NBA player is on record as saying that three-quarters of his colleagues own guns. True or not, unpleasant things have been happening in the last few years. A couple of NBA players were robbed at home at gunpoint in 2007. A Washington Redskins football player was shot dead at his Florida home, and Plaxico Burress, a star of the New York Giants football team, is currently serving a two-year jail sentence after accidentally firing a gun he had brought to a New York nightclub in 2008. Small wonder then that the Arenas affair has struck a raw nerve – and not only in Washington (Ibid).

US swimming scene rocked by sexual abuse allegations

Over the past year, top-class swimming in the US has been rocked by allegations, some of them resulting in court proceedings, of sexual abuse committed by prominent coaches. In March 2010, Deena Dearduff Schmidt, a 1972 Olympic champion, disclosed she was molested by her coach while training in the 1960s. Despite telling officials at the national governing body, USA Swimming, years later, she said, the coach – whom she declined to name – went on to train more young swimmers and was inducted into the International Swimming Hall of Fame. At least three other lawsuits have been brought against USA Swimming, including a case in Kansas City, where a suburban coach is accused of having a sexual relationship with a teenage swimmer. Another court action was brought in Santa Clara County, California in which it is alleged that more than 30 coaches nationwide have engaged in sexual misconduct with young females. Also, the ABC network’s “20/20” television programme reported that at least 36 coaches have been banned for life.

USA Swimming has more than 300,000 members and has experienced rapid growth over the past decade, largely due to the popularity of 14-time Olympic gold medalist Michael Phelps. It has come under increasingly intense scrutiny for its handling of sexual abuse, with some critics claiming that it has covered up wrongdoing by prominent coaches and fostered an environment which allowed youth swimmers to be harmed. This is why the governing body has unveiled a plan to make it easier for athletes to report abuse while addressing some of the concerns raised by several lawsuits around the country. The seven-point plan was detailed in an open letter from USA Swimming president Jim Wood and executive director Chuck Wiegelus, who said the organization has “a responsibility to help create a safe and positive environment for children and young adults who are our members”. Mr. Wiegelus expressed his “regret is that any family has had to go through this terrible experience” (Associated Press, www.findlaw.com of 22/4/2010).

Jonathan Little, an Indianapolis lawyer who filed one of at least four ongoing sexual abuse cases against USA Swimming, expressed some scepticism about these plans. He commented:

“This was a rash, rushed reaction from USA Swimming. Since its inception, USA Swimming has been trying to police itself. They know that coaches have sex with athletes. Everyone knows it, but no one does anything about it (….). This is an opportunity for us to change youth sports and USA Swimming. You can already see that USA Swimming knows they have to change. We are starting to see that happen. But until they are willing to remove the bad apples from their midst, they’re not serious.” (Ibid)

Mr. Little represents Brooke Taflinger, an All-American swimmer at Indiana University who came forward with allegations against her coach, Brian Hindson. In 2008, Hindson was sentenced to up to 35 years in federal prison for secretly videotaping young female swimmers showering.

USA Swimming said it will develop comprehensive guidelines for acceptable coaching behaviour, enhance the system for reporting sexual abuse to the organization and law enforcement, determine whether improvements need to be made in the current system of background checks, and develop stronger ties with local clubs that are responsible for hiring coaches. The plan also calls for a review of USA Swimming’s code of conduct and the process for sharing coaches’ records with member clubs and other youth organizations. Finally, the governing body said it must educate athletes, parents, coaches and club leaders on what they can do to help.

The USA Swimming board of directors will meet soon to define the timeline and procedures for implementing the plan, according to Mr. Wiegelus. It also will share the key findings in its report with other youth organizations, within and outside the Olympic movement. Since 2006, USA Swimming has required background checks for all
coaches every two years. However, Mr. Little said the checks should be more thorough and incorporate the FBI database, not just focus on cases that reach the criminal justice system. He says that those concerned “need to have real background checks” (Ibid).

All these unsavoury developments have aroused various reactions from some of the swimmers directly affected. Margaret Hoelzer, for example, has expressed mixed feelings on the matter. On the one hand, the three times Olympic medallist does not believe the problem is more widespread in swimming than it is in other sports – or indeed society in general. Then again, as a victim herself, she has expressed satisfaction that more and more swimmers are coming forward with their stories of abuse, knowing that anything to raise awareness of the issue will surely reduce the number of predators taking advantage of young athletes. Ms. Hoelzer, who won two silver medals and a bronze at the 2008 Beijing Olympics, came forward shortly after those games with her story of being sexually abused as a child by a playmate’s father. She was consulted a few weeks ago by USA Swimming as it was working out its new policy. However, she has also expressed her disappointment that some have tried to portray the problem as being especially widespread within USA Swimming. She pointed to general statistics showing one in four girls and one out of seven boys will be victims of sexual abuse. She described it as “a problem in any avenue where adults work with children”, adding that, since going public with her own abuse, many people in life had come forward and told her their stories – she could not think of even one who was a swimmer (Ibid).

The very next month, the sexual abuse scandal at USA Swimming revealed its biggest name yet – the former director of the national team. Everett Uchiyama was on a list released Tuesday by the governing body showing 46 people who have received lifetime bans or permanently quit the organization, most for sex-related offences. According to USA Swimming, Uchiyama received his suspension on 31/1/2006. The oldest ban on the list was handed out in 1991, but most occurred in the past decade, including 11 since the beginning of 2009. Mr. Uchiyama had hastily resigned as national team director a few days before his suspension, without explanation. He began his career at USA Swimming in 1999 as the national team coordinator, and moved up to national team director on an interim basis in December 2002. The interim title was removed in April 2004, just a few months before the Athens Olympics. Uchiyama was banned for infringing a section in the code of conduct which prohibits “any sexual conduct, advance or other inappropriate sexually oriented behaviour or action directed towards an athlete by a coach”. The provision also forbids “any non-consensual physical sexual conduct, or pattern of unwelcome advances or other sexual harassment in connection with or incidental to a USA Swimming-related activity” (Associated Press, www.findlaw.com of 26/5/2010).

Of the 46 names released by the organization, 36 were punished for sexual misconduct or inappropriate sexual behaviour. Two were banned for fraud, deception or dishonesty, two for unspecified felonies, and another for illegal drugs or substances. No offence was listed in five cases, either because they occurred before the code of conduct went into effect, no section applied to their infringement, or because the details were not available (Ibid).

**War on sporting counterfeiters**

The counterfeiting of sporting goods and merchandise seems to be a growing problem in many sporting disciplines. In the US, this problem appears to gain in intensity at the time of the annual American football Superbowl. This year, the relevant authorities ensured that preventative action was taken to minimise these practices, with federal agents visiting stores, street vendors and mall kiosks looking for illegal hats, T-shirts, jerseys, and more (Associated Press, www.findlaw.com of 4/2/2010).

The entries under this heading concern, in the vast majority of cases, instances where leading sporting figures are alleged, of have been found, to have crossed the border into criminality, so it is heartening to learn of a former sporting great who now lends his full energies to fighting crime. Randal Hill, after seven years spent in the National Football League (NFL), has now become a federal agent working to prevent criminals from defrauding fans and the League at this famous event. He is in fact part of the US Immigration and Customs Enforcement team which, inter alia, has scoured South Florida for counterfeit merchandise, and arresting the people who market it (Associated Press, www.findlaw.com of 4/2/2010).

It will hardly come as a surprise to learn that this has also been an issue at the football World Cup. Just before the tournament in South Africa
commenced, it was learned that fake World Cup souvenirs were costing the official suppliers of world governing body FIFA millions of dollars in lost sales, according to an anti-counterfeit organisation. It emerged that South African customs officials and police have found stashes of fake goods at Johannesburg airport and elsewhere – including $2.5 million worth of national team shirts (The Daily Telegraph of 27/5/2010, p. S7).

Italy too has had its problems with this phenomenon. It would appear that fraudsters had sunk to a new low faking football stickers. In late March 2010, tax police in Latina, situated south of Rome, seized 20,000 fake stickers and investigated eight people, among them a distributor and newsagents, suspected of preying on Italian children’s passion for filling folders with pictures of footballers’ faces and swapping doubles in the playground. Adult collectors raised the alarm after noticing a tiny change in the sponsor’s name on the shirt of Milan striker Alexander Pato, one of the stars featured (The Guardian of 29/3/2010, p. 22).

New Jersey man “purposely vomited on baseball fans (US)

In mid-April 2010, it was learned that a New Jersey man was facing charges after police claimed that he intentionally vomitted on an 11-year-old girl and her father in the stands during a Phillies game. Matthew Clemmens was arraigned on charges arising from his behaviour during the fixture. Police allege that Mr. Clemmens made himself vomit on an off-duty police captain and his daughter after a companion had been removed from the ground for unruly behaviour. The police also claimed that he punched the police captain in question and vomited on an arresting officer (Associated Press, www.findlaw.com of 16/4/2010). The outcome of this case was not yet known at the time of writing.

Lawyers urge release of “wreck” Stanford (US)

The saga of financier Sir Allen Stanford has been extensively documented both in these columns and elsewhere. He came to the attention of the sporting public through his attempt to establish a separate limited-overs cricket competition in Antigua, before suspicions began to surround his various business ventures. Last year, he was charged with soliciting investments from US bank customers under false pretences, claiming that so-called certificates of deposit represented safe investments in low-risk securities, whilst using the money thus raised to finance a lavish lifestyle. Stanford denies any wrongdoing, alleging that any fraudulent activity was carried out by underlings unknown to him. The government of Antigua has formally rescinded a knighthood bestowed upon him in 2006 for his contribution to the country’s economy.

Lawyers for the accused have now appealed to a US judge to release the former billionaire from his Texas prison, describing him as “a wreck of a man” whose prolonged imprisonment pending trial could be considered as unconstitutional. In a motion lodged at a Houston courting mid-May 2010, defence lawyers said Stanford’s condition had worsened alarmingly since he was beaten up by a fellow inmate in September – a fight which landed him in hospital. The document said Stanford had lost all feeling in the right side of his face and had partially lost vision in his right eye. He has been treated for a heart condition, dangerous blood pressure, ulcers and severe depression.

Considered a flight risk because of his overseas homes, he has been in jail since June last year and his trial, due to begin next January, is scheduled to last six months. According to his defence counsel, Robert Bennett:

“Mr Stanford, a man who is presumed to be innocent, is being, and has been, subjected to substantial and undeniable punishment long before the trial of his case has even begun. He has been physically assaulted, he has suffered significant medical injury and psychological debilitation; he was held in solitary confinement two separate times for a total of 40 days; he has been subjected to 335 days of pre-trial incarceration as of May 18 2010; and before his scheduled trial concludes, he will predictably serve another non-speculative 439 days” (The Guardian of 19/5/2010, p. 17).

A doctor treating Stanford diagnosed abnormal liver function. He was said to be malnourished, underweight, depressed, dishevelled, unable to sleep, unable to concentrate and struggling to concentrate on constructing a defence. Mr. Stanford has made several previous attempts to obtain bail on compassionate grounds. He argues that he never fled or resisted arrest and that it is virtually impossible, in a high security prison, to get access to the 8m pages of evidence for his forthcoming trial (Ibid). No further details are available at the time of writing.
2. CRIMINAL LAW

The perfect footballing crime? Swedish keeper caught moving goalposts

Diego Maradona may have used the hand of God on that infamous occasion in Mexico 25 years ago, but at least he refrained from trying to move the goalposts in order to improve his chances. This is the accusation facing a goalkeeper for the top-flight Swedish team, who has been caught on camera committing perhaps the perfect footballing crime, i.e. literally moving the two posts a few inches closer together.

In a bid to defeat opponents Örebro in a Swedish top-division match which took place in late September 2010, Kim Christensen was pictured nudging the goalposts out of position before the game to make his goal less than the regulation eight yards in width. It appears that Mr. Christensen has made a habit of this unusual tactic, which had gone unnoticed for some time. He claims that he received this tip from a goalkeeping friend a few years ago, and since then he had “done it from time to time”, in an interview with the Aftonbladet newspaper. In Swedish football, goalposts rest on top of the playing field, making them prime targets for cheaters. The referee, Stefan Johansson, noticed the irregularity and moved the goalposts back to their positions, but Christensen was allowed to continue playing because his guilt had not been discovered. Had Johansson noticed at the time, the correct procedure would have been to offer a penalty kick to Örebro, who finished the game with a 0-0 draw (The Guardian of 20/9/2010, p. 22).

Mr. Christensen has been reported to the Swedish Football Association and faces a large fine and suspension.

Jail for racketeering betting executive (US)

In mid-January 2010 it was learned that David Carruthers, the former chief executive of online sports wagering company BetOnSports, had been jailed for 33 months after pleading guilty to racketeering and conspiracy charges, according to the US Justice Department. The charges, linked to the company’s operations in the US, where internet gambling is illegal, followed a government crackdown on offshore online gambling sites which infringe US laws by taking wagers from Americans. BetOnSports took in $3.5bn (£2.2bn) between 2002 and 2004, with 98pc of that revenue coming from bets by US-based clients, according to court documents. The Edinburgh-born Mr. Carruthers has spent the past three years under house arrest in a hotel in Missouri after he was apprehended by FBI agents at Dallas Airport while en route to the company base in Costa Rica. He led BetOnSports.com to a listing on the London Stock Exchange’s Aim, after being employed in 2000. He was named director of the parent company, BetOnSports plc in 2004. Steven Holtshouser, Assistant US Attorney, said:

“Previously, executives, owners and investors believed that they were immune from the reach of US law enforcement. Both the conviction of, and sentence handed down against Mr Carruthers should send a message to any foreign business conducting illegal activities in the United States, that geography does not render it untouchable.” (The Daily Telegraph of 11/1/2010, p. B1).

Last year, Gary Kaplan, the founder of BetOnSports, was sentenced to more than four years in prison after agreeing to forfeit more than £43m (Ibid).

Shooting deaths at Mexican football match

In mid-May 2010, it was reported that armed men shot dead two football coaches and a pregnant woman during a youth fixture close to Mexico’s border with the US. It was the third attack on an amateur team that week. Three spectators had been killed during a game the previous Sunday (The Times of 6/5/2010, p. 37).

Bomb kills 88 at Pakistan volleyball match

The sad list of sporting events which fall victim to terrorism in the Indian subcontinent continues. In early January 2010, at least 88 people were killed when a suicide car bomber blew up himself and his vehicle as people gathered to watch a football game in the village of Shah Hasan Khan, in the North-West Bannu district, with dozens more being injured. It appears that the villagers were watching the match between two local teams when the driver drew up his double-cabin pick-up vehicle, drove it into the audience and blew it up. Police later stated that the attack was possibly a retaliation against residents who had set up a militia aimed at expelling Taliban fighters from the area. The village is located near South Waziristan, where, the previous month, the army had completed a military offensive against extremists sheltering in the lawless territory (The Daily Telegraph of 2/1/2010, p. 15).
Threat of imprisonment for skiers who venture too far off-piste (Italy)

Those who make irresponsible use of ski pistes are a danger not only to themselves. In early February 2010, following the deadliest weekend of the winter in the Italian mountains, ministers rushed through legislation introducing large fines and possible jail sentences for skiers and climbers who flout avalanche warnings. Eight people died and 10 were seriously injured in five incidents across the Italian Alps. Some of the victims had chosen to ignore official advice and entered areas which were marked as dangerous. Subsequently, in an attempt to reduce the Alpine death toll, the Italian Government has adopted an amendment to civil protection legislation which will enable the courts to issue jail sentences to people found to have triggered deadly avalanches, and £4,000 fines for those who disregard warnings and venture off-piste (The Independent of 9/2/2010, p. 26).

This development follows calls from experts, including Guido Bertolaso, who heads Italy’s civil protection unit, for stronger deterrents against reckless off-piste activity. He called for stricter regulation last year when four rescuers died after going to the assistance of two tourists who had ignored avalanche warnings to go climbing in the Italian Dolomites. During the weekend referred to above, hundreds of mountain rescuers and several helicopters were in action again following a series of incidents in the Italian Alps. On the Monte Baldo, in the Veneto area, a 250m avalanche killed two skiers and seriously injured a third. A 56-year-old man and a woman aged 62 died after a large sheet of ice fell on them whilst they were out walking in Valle Natigorio – once again in an area which had been declared unsafe (Ibid).

The introduction of jail sentences and fines has made Italian resorts the most strictly regulated in Europe, Austria and Switzerland having hitherto been regarded as the toughest. However, the Swiss authorities have warned that criminal convictions are also possible under their existing laws. Recently, six people were reported to the Valais canton prosecutor for allegedly having triggered avalanches which swept onto the “safe” pistes in Anzère and Zermatt. However, penalties specifically designed to reduce the number of avalanches constitute a new development (Ibid).

“OFF-FIELD” CRIME

American footballer Shaun Rogers faces weapons charge (US)

In an uncomfortable echo of the Gilbert Arenas affair detailed above, but this time taking place outside the stadium, in early April 2010 Cleveland Browns player Shaun Rogers was charged with carrying a concealed weapon after he allegedly attempted to take a handgun through airport security. A Cleveland city prosecutor filed the fourth-degree felony charge, which claims that Mr. Rogers carried a .45-caliber Kimber semi-automatic with eight rounds in his luggage at Cleveland Hopkins International Airport. Authorities say a .45-caliber handgun was found in his carry-on luggage at a security checkpoint. He was arrested “without incident”, according to police. After participating in the Browns’ voluntary off-season programme, Mr. Rogers was on his way back home to Houston when he was stopped with the weapon. His agent, Kennard McGuire, said his client made a mistake he deeply regrets, saying:

“Shaun is from a tremendous family that knows right from wrong. He is completely remorseful and sorry. While he does have a permit to carry a weapon, carrying it into the airport was an unintentional mistake. He will fully cooperate with all the authorities.” (Associated Press, www.findlaw.com of 2/4/2010)

The outcome of this case was not yet known at the time of writing. However, the arrest could put the player’s future with the Browns in jeopardy. Even if he is not convicted, Rogers could face suspension from the league for infringing its strict personal-conduct policy for players. He was suspended for four games in 2006 whilst playing with Detroit for violating the substance-abuse policy (Ibid).

Kerrigan once again visited by despair borne out of violence (US)

Nancy Kerrigan, the athlete who was once the unwitting victim of one of the great scandals in Olympic history, recently found herself revisited by pain and tragedy with her brother now implicated in the violent death of their father. Ms. Kerrigan must have thought she had had sufficient sadness and scandal visited upon her to last a lifetime. Sixteen years ago, she was
America’s figure skating princess, a heart-rending figure who was seen wailing to the world “Why, why?” after a mystery assailant had clubbed her right knee with an iron rod during practice for the US Championships in Detroit, a month before the Winter Games in Lillehammer. A subsequent investigation revealed that her main domestic rival, Tonya Harding, had knowledge of the planning of the attack in what became enshrined as one of sport’s most poisonous feuds. Yet 16 years on, and just weeks ahead of the Games in Vancouver, by some strange quirk of fate is Ms. Harding, who has always protested her innocence regarding the 1994 episode, should be among the first to send her condolences after the shocking death at the weekend of Kerrigan’s father, Daniel (The Daily Telegraph of 11/2/2010, p. S15).

Kerrigan’s brother, Mark, has pleaded not guilty to assaulting his 70-year-old father, who died over the weekend after being embroiled in a struggle with his reportedly drunk son at the family’s home in a Boston suburb. The 45 year-old, described by his lawyer as an unemployed plumber, put his head in his hands and wept in court before he was put on $10,000 cash bail. It was reported by Elizabeth Healey, an assistant Middlesex County district attorney, that the accused had a “violent argument and struggle at the home”, as a result of which Kerrigan Sr. either fell or collapsed on the kitchen floor. It was reported that a simple row had escalated over the use of the house telephone. Ms. Kerrigan was very close to her father, a welder who took out a second mortgage on the family home when Nancy was a girl just so he could afford her skating lessons. He, famously, was the one who picked up and carried his sobbing daughter from the arena to the locker room after the 1994 attack by a hitman in the plot orchestrated by Harding’s associates (Ibid).

Kerrigan had largely kept a low, uneventful profile since her heroics of 1994. After missing the US Championships that year because of the attack – an event Harding went on to win – she became the toast of a nation by defying injuries and winning a silver medal in Lillehammer. Harding could only finish eighth in what became known as the “Beauty and the Beastliness” saga. Ms. Harding has had a chequered career ever since, with spells as a professional boxer, a part in a celebrity sex video, as well as suffering several altercations with the law. However, on hearing the news of Daniel Kerrigan’s death, Harding, who was banned for life by US Figure Skating after it ruled she had displayed “a clear disregard for fairness, good sportsmanship and ethical behaviour” in covering up the attack, issued a message through her agent:

“Tonya feels very sad for Nancy and her family and extends her deepest sympathy and condolences to them. Tonya’s beloved dad, Al Harding, passed away in April, so she understands the grief Nancy and her family are feeling at this time.” (Ibid)

The trial had not yet been held at the time of writing.

**Allegations of child prostitution hit French footballers**

The French national football team has hitherto remained reasonably immune from scandals, whether financial or otherwise. However, a serious threat to this relatively wholesome image loomed on the horizon in mid-April 2010, when two of its leading players were questioned about alleged dealings with under-age prostitutes. Franck Ribéry and Sidney Govou were summoned to appear before an examining judge following claims that a Paris nightclub employed prostitutes, some of them under the age of 18. The two top players were questioned as “witnesses”. Later, a judicial official claimed that Mr. Ribéry had admitted to sexual relations with a prostitute, but denied any knowledge that she was under 18. Two other French internationals were also due to be interviewed by police in Paris. A man accused of pimping activities, and referred to as “Abou”, had been arrested the previous week.
The head of the Café Zaman nightclub in France, and two other intermediaries were also arrested (The Daily Telegraph of 20/4/2010, p. 13).

A few days later, it transpired that the other two footballers in question were Karim Benzema, a forward who plays for Real Madrid, and Hatem Ben Arfa, a striker with Olympique Marseille. It also emerged that around 20 women had been arrested in a swoop on the nightclub concerned – which has subsequently been closed by the authorities. Four men alleged to have been involved with a prostitution ring were also arrested and charged.

Prostitution is legal in France, but those offering sex for money must be aged at least 18. Having sexual relations with an under-age prostitute is an offence which carries a maximum sentence of three years' imprisonment and a £40,000 fine. Lawyers for all those accused denied any wrongdoing on the part of their clients (The Daily Telegraph of 21/4/2010, p. 17).

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

**Lacrosse player accused of murdering fellow-player and girlfriend (US)**

In early May 2010, it was learned that a lacrosse player at the University of Virginia was charged with the murder of a girlfriend – who was herself a leading member of the women’s lacrosse team. Timothy Longo, the police chief of Charlottesville, where the university is located, stated that the victim in question, Yeardley Love, had returned to their apartment at around 2.15 and had called police when she found her friend unconscious, as she was concerned that she might have been suffering from alcohol poisoning. Officers discovered Ms Love motionless on the bed with obvious personal injuries. George Huguely, quickly became a suspect on account of, inter alia the fact that he had previously been in a relationship with the victim (The Daily Telegraph of 5/5/2010, p. 14).

The investigation was still proceeding at the time of writing.

**Pittsburgh footballer not charged following accusations of sexual assault (US)**

In mid-March 2010, it was learned that Ben Roethlisberger, a quarterback playing for the Pittsburgh Steelers, had become the subject of a police investigation after a 20-year-old college student had accused him of sexual assault in a nightclub (Associated Press, www.findlaw.com of 11/3/2010). In a statement to police, the woman in question claimed that the American footballer had encouraged her, and her friends, to consume numerous shots of alcohol. Then one of his bodyguards allegedly escorted her to a hallway, sat her on a stool, and left. She claims that Mr. Roethlisberger then walked down the hallway and exposed himself. In an attempt to flee this unwelcome attention, she made for the first door which led to a bathroom. According to the statement, the footballer then followed her into the bathroom and shut the door, after which he had sex with her in spite of her protest (Associated Press, www.findlaw.com of 22/3/2010).

Eventually, the police decided not to charge Mr. Roethlisberger. However, Roger Goodell, the National Football League Commissioner, subsequently suspended the quarterback for six games (subsequently reduced to four) for infringing the League’s personal conduct policy, and ordered him to undergo a “comprehensive behavioural evaluation by professionals” (Associated Press, www.findlaw.com of 22/4/2010).

US sporting figures involved in drink-driving incidents (all months quoted refer to 2010 unless stated otherwise)

**Ronnie Brown.** In mid-March, a police report showed that Miami Dolphins running back Ronnie Brown had a blood alcohol level which was almost twice the legal limit when he was arrested on a DUI (driving under influence) charge in suburban Atlanta (Associated Press, www.findlaw.com of 25/3/2010). No further details are available at the time of writing.

**Mateen Cleaves.** The former Michigan basketball star and Detroit Pistons footballer was arrested on suspicion of drunken driving in mid-March. He was first jailed, then released. His lawyer, Frank Manley, claimed that his client drove because of an emergency involving his son (Associated Press, www.findlaw.com of 23/3/2010). No further details are available at the time of writing.

**Dorell Wright.** In mid-March the Miami Heat backup forward was cited for driving under the influence and for riding with a suspended licence following a traffic stop in Miami beach. He was suspended for two games by his team, but at the time of writing his case had not yet gone to trial (Associated Press, www.findlaw.com of 12/3/2010).
Rey Maualuga. In late January, the Bengals linebacker was arrested by Kentucky police on a charge of drunken and careless driving. Spokesman Spike Jones said that the footballer hit a parking meter and two parked cars in the process, causing minor damage (Associated Press, www.findlaw.com of 29/1/2010). No further details are available at the time of writing.

Matt Fratin. In early February, the University of Dakota hockey player was acquitted of drunken driving by a jury (Associated Press, www.findlaw.com of 3/2/2010).

Ronald Moore. In mid-April, the Siena senior guard was charged with drunken driving after failing to stop at a red light. (Associated Press, www.findlaw.com of 19/4/2010). No further details are available at the time of writing.

Hamilton arrested for “boy racer stunt” (Australia)

There are few areas of human endeavour in which everyday life merges into sport, and car racing is certainly one of them – to the extent that one of its most celebrated exponents clearly forgot or ignored the dividing line. This appears to have been the case with F1 driver Lewis Hamilton, when, in late March 2010, the news broke that he was arrested by Melbourne police on suspicion of committing serious driving offences. He had left the Albert Park racing circuit after setting the fastest time in practice for the Australian Grand Prix, scheduled for the very next day, when he was stopped. It was alleged that he had driven his silver Mercedes sports car onto a part of the street circuit in order to perform manoeuvres known as “burnout” and “fishtail”. The smoking tyres of his car were noted by police and he was pulled over (The Times of 27/3/2010, p. 11).

Although the trial had not been held at the time of writing, it would seem that any penalty imposed would be a very light one, i.e. a fine which could be paid by his lawyer on his behalf. Mr. Hamilton will therefore not have to travel to Australia in order to put in a court appearance (The Daily Telegraph of 24/5/2010, p. S16).

Jerome Taylor charged with assaulting policeman (Jamaica)

In early January 2010, it was learned that the West Indies fast bowler Jerome Taylor had been charged with assaulting a police officer in a Jamaican bar, and resisting arrest. The alleged incident took place when a police officer attempted to remove Mr. Taylor from the premises (The Guardian of 2/1/2010, p. S12). Apparently he was trying to prevent police from closing a Kingston bar in which he was drinking after licensing hours (Daily Mail of 2/1/2010, p. 115). No further details are available at the time of writing.

Footballer shot in Mexican nightclub

In late January 2010, it was announced that police were looking for suspects after the attempted murder of a footballer who was shot in the head inside a Mexico City nightclub just before dawn. The Paraguayan striker Salvador Cabanas survived the incident after a six-hour operation stopped the internal bleeding. Two suspects were captured on a security camera walking out of the nightclub toilet where Mr. Cabanas was found. Another camera filmed them leaving the building less than a minute later and driving away in a car without number plates. With robbery having been ruled out by the authorities, the motive for the attempted killing remains a mystery (The Guardian of 27/1/2010, p. 22). It was not known at the time of writing whether any suspects had been apprehended.

Darren Williams killer convicted (US)

It will be recalled from a previous issue of this Journal ([2007] 2 Sport and the Law Journal p. 56) that, on New Year’s Day 2007, Denver Broncos cornerback Darren Williams was shot dead. He and some friends had just left a nightclub where, it is alleged, Mr. Williams’s group became involved in an altercation with a group which included the accused, Willie Clark. It is only in the course of this year that the matter came to trial, one of the reasons being that those who witnessed the shooting were part of a gang drug ring that was under federal investigation, with a code of silence preventing those witnesses from giving evidence. In the event, some of the gang members testified against Mr. Clark in exchange for lighter sentences on unrelated crimes. Two witnesses refused to testify against the accused, claiming that their families might suffer if they spoke out against a gang member. A third witness spent a night in jail before changing his mind and agreeing to tell the jury that Clark had confessed to the shooting (Associated Press, www.findlaw.com of 12/3/2010).
Naturally, security was very tight at the trial. Thirteen armed officers stood in the courtroom as the verdict was read. Officers were also stationed along a hallway outside the courtroom. As for Mr. Clarke, he declined to testify against himself, pleading threats to himself and his family. Defence attorney Darren Cantor had said that gang members had threatened to turn the accused into "Swiss cheese" if he said anything in court. Another defence lawyer described Clark as a "scapegoat". He also attempted to undermine the credibility of five prosecution witnesses who received shorter prison sentences in return for testifying (Ibid).

Campus fight American footballers face charges (US)
On 22/11/2009, it was reported that a fight broke out among the members of a campus fraternity at Michigan State University. Initially, 11 current or former members of the University’s American football team were charged with assault arising from the incident. However, two more players were later charged and pleaded guilty (Associated Press, www.findlaw.com of 28/11/2010). No further details are available at the time of writing.

Baseball player charged in prostitution case (US)
In late March 2010, it was alleged by police in Florida that a minor league pitcher in the Atlanta Braves youth system had been charged with two prostitution-related misdemeanours following a "sting" operation conducted not far from the team’s spring training facility. The player in question, Deunte Heath, was later released on bail. He had been arrested after having allegedly responded to Internet prostitution advertisements and agreed to pay $75 for a sex act (Associated Press, www.findlaw.com of 26/3/2010). No further details are available at the time of writing.

One of the charges against Tommie Boyd dismissed (US)
In late March 2010, a US judge dismissed one of the criminal sexual conduct charges made against former Detroit Lions wide receiver Tommie Boyd. He had been accused of forcing a girl to have sex at Fraser High School, where he was a supply teacher and track coach. However, the judge ruled that there was insufficient evidence to support the charge of third-degree criminal sexual conduct. Nevertheless, Mr. Boyd still faces a charge involving a girl who testified that he offered her $5,000 but only gave her $200. In this case, he has been charged with first and second-degree criminal sexual conduct, and accosting a minor for immoral purposes (Associated Press, www.findlaw.com of 25/3/2010). No further details are available at the time of writing.

Kournikova mother charged with child neglect (US)
In mid-January 2010, it was learned that the mother of tennis star Anna Kournikova had been charged with child neglect in Florida after the player’s five-year-old half-brother was allegedly left unattended at his home. According to a Palm Beach police report, Alla Kournikova left her son whilst she ran errands. Someone passing by the house found the boy outside and alerted the police. The boy informed the latter that he had jumped out of a second-storey window, but did not suffer serious injury. He is thought to have landed on rocks and subsequently walked to the footpath, where neighbours found him in a state of distress. The police were initially unable to contact the mother, but she returned to the house after police elft a message on her mobile telephone. She was arrested and later released on bail (The Daily Telegraph of 22/1/2010, p. 22). The outcome of this case was not yet known at the time of writing.

Wife accused of murdering Olympic medallist (US)
In August 2009, it was learned that Dave Laut, who won a bronze medal for the US in the shot put event, died after being shot four times in the head in his back garden in Los Angeles by what was believed at the time to have been a burglar. However, Jane, his wife of 29 years, was later arrested and charged with his murder. She has since claimed that she acted in self-defence following many years of domestic abuse. Her lawyer, Ron Bamily, stated
that Mr. Laut had grabbed a gun and threatened to kill the couple’s son, Michael, aged 11, after which the wife seized the gun and shot him. Prosecutors in Ventura County, California, however, claim that she killed him in cold blood. Mr. Laut has pleaded not guilty to murder and released on bail (The Daily Telegraph of 23/2/2010, p. 16).

Hitmen alleged to have shot dead Thai boxing champion (Russia)
In late December 2009, it was learned that a former world champion in Thai boxing had been shot in Moscow, in what appears to have been a contract killing. It is believed that two people attacked the boxer following a training session. The RIA-Novosti news agency claimed that he was hit over the head before being shot. Subsequently, investigators were said to be examining the victim’s connections, and whether he had been involved in any conflicts. Oleg Terekhov, the deputy head of the Russian Thai Boxing Federation, said that the victim, Muslim Abdullayev, had been involved in an unpleasant conflict, possibly with members of the Russian national team. The boxer hailed from the northern Caucasus region of Dagestan, had friends mainly from that region, who said that they had been experiencing problems living in Russia (The Times of 26/12/2009, p. 9).

Mike Tyson escapes charges (US)
The former world heavyweight champion has become as well-known for his altercations with the forces of law and order than for the many titles he won during his career, and it seemed that this reputation was about to be confirmed yet again in November 2009, when he was arrested following a scuffle with a reporter at Los Angeles airport. Mr. Tyson claimed that he and his wife and child felt threatened by a photographer, whom he allegedly floored with a single punch. However, the City Attorney of Los Angeles rejected the assault prosecution against the former boxer, citing “insufficient evidence” (Daily Mail of 2/1/2010, p. 115).

Sumo star Asashoryu bows out after “drunken rampage” in Tokyo bar
The ancient Japanese sport of sumo wrestling has seldom been in turmoil as in recent years as a result of a number of scandals, some of them reported in these columns. Thus there were calls for training camps to be reformed after a 17-year-old sumo hopeful died in 2007 after his tutor assaulted him with a beer bottle and other wrestlers hit him with baseball bats. The Hawaiian wrestler Konishiki provoked protests in 1992 when he accused the sport’s governing body of racism when he was denied promotion to the top rank of yokozuna. He however denied making such allegations. In addition, match-fixing claims surfaced in the 1990s when the authors of a “whistle-blowing” book, the former wrestler Seichiro Hashimoto and ex-stable master Onaruto, died of the same disease within 15 hours of each other.

Now, one of its leading exponents has tainted the sport after claims that he drunkenly attacked a man outside a Tokyo nightclub (The Independent of 5/2/2010, p. 25).

In early February 2010, Asashoryu, the 23 stone Mongolian enfant terrible of the sport, submitted his resignation to the Japan Sumo Association (JSA) after being summoned to explain the incident, which reportedly left the man with serious injuries including a broken nose. News that the sport’s biggest draw was stepping down was the top story on many Japanese television networks and dominated the media in his native Mongolia, where he is a national hero. Police have dropped charges against the wrestler, who has reportedly reached a settlement with his victim. However, the JSA took a dim view of the nightclub fight, the latest in a string of scandals that have plagued him and the sport (Ibid).

The third most successful sumo wrestler of all time in terms of tournament wins, Asashoryu – real name Dolgorsuren Dagvadorj – has by turns thrilled and divided fans with his antics inside and outside the ring. Soon after reaching the rank of yokozuna (grand champion) in 2003, he was disqualified in a bout for pulling the topknot of hair of an opponent, a serious breach of sumo etiquette. He later allegedly followed the wrestler to a dressing room and punched him. In 2007, the JSA handed Asashoryu one of the toughest punishments in the sport’s history after he took sick leave to return home and play in a charity football match, suspending him and slashing his ¥2.8m (£20,000) monthly salary by 30 per cent.
The same year the wrestler had to fight allegations in a magazine that he paid opponents to take a dive, but was later vindicated when a court dismissed the claims and ordered the magazine to pay damages. Asashoryu went on to answer his critics in the most emphatic way possible, winning a total of 25 top division titles, including his final victory last month when he clinched the prestigious Emperor’s Cup. Though plagued recently by injuries, he was still expected to continue wrestling for several years (Ibid).

SECURITY ISSUES
(INCLUDING SPORT AND TERRORISM)

Terrorist attack on Togo football team bus in Angola
Terrorist activity has at all times favoured the targeting of celebrities and events enjoying widespread media coverage and popular attention, so it is not surprising to observe the manner in which the world of sport is increasingly becoming the butt of this nefarious activity. Also, since the sport of football has increased its appeal and status in Africa, it was tragically inevitable that it would sooner or later come in for the unwelcome attentions of the terrorists, just as cricket is being increasingly targeted in Asia. The Africa Cup of Nations was the sporting background for the latest atrocity, which took place in Angola when a machine gun attack was staged on the Togo team bus, killing one man and injuring several others. The assault took place as the bus was crossing the border between the Congo and the Angolan province of Cabinda for the team’s first match in the tournament. The players and accompanying staff were trapped in the coach by a 20-minute hail of bullets from Angolan rebels. As a result, the driver was killed and several players injured. Thomas Dossevi, the striker who plays for French side Nantes, said that the occupants were machine-gunned “like dogs” and had to remain hidden under the seats (Daily Mail of 9/1/2010, p. 120).

Obviously the tournament would be profoundly marked by this horrific event – indeed, initially it was deemed unlikely that it would go ahead at all. This was not only out of respect for the victims, but also because of the potential for further disruption. Cabinda is an oil-rich area of Angola, separated from the rest of the nation by the Democratic Republic of Congo, and has been embroiled for some time in a bitter struggle for independence. Seven matches were due to be played in the area, starting with the fixture between Togo and Ghana (The Daily Telegraph of 9/1/2010, p. S2). The latter was cancelled when it was announced that he Togo team had been withdrawn from the tournament following instructions issued by their government. This announcement was made as it was learned that in fact not one, but three people had been killed in the attack (The Sunday Telegraph of 10/1/2010, p. S1). However, the authorities of the Confederation of African Football (CAF), following an extraordinary meeting at the Cabinda airport, decided that the remaining games in question would go ahead as planned – despite the fact that the area’s 20,000-capacity stadium was thought to be in jeopardy for the competition. The Angolan Prime Minister, Paolo Kassoma, had met CAF officials in order to reassure them of the safety of the players (Ibid, p. S5). This was in spite of the terrorists who claimed responsibility for the attack threatened to strike again during the remainder of the tournament.

Although the Togo team immediately flew home, they tried to keep their options open as regards the rest of the tournament, with the country’s sports minister, Christophe Tchou, stating that they would seek to return after a three-day period of mourning. That would have involved a reordering of the tournament schedule and, in view of the sacrifices that other teams would...
have been faced with, and the effect on television rights, this was not truly a realistic option. It was therefore not surprising to learn that CAF declined this request (The Independent of 12/1/2010, p. 56). What was less sympathetically viewed was the decision, three weeks later, by the CAF to ban Togo from the next two Africa Cup of Nations tournaments because of their withdrawal. This decision was based on the fact that the Togo withdrawal had been caused by political interference, the team having been recalled by their Government. The CAF also issued Togo with a $50,000 fine (The Observer of 31/1/2010, p. S12). Earlier, it was announced that two rebels had been arrested in connection with the attack (The Independent of 12/1/2010, p. 26).

Terrorism on the Indian subcontinent and sport

It is in this part of the world that the potential for sporting disruption through terrorist activity is at its highest. As the majority of readers will be aware, the situation in Pakistan has become so critical that the national cricket team can no longer play its home fixtures there, which is why they have been compelled to schedule their Test and One Day International programme in England this summer. However, the other nations in the subcontinent are also affected. A chilling reminder of the constant danger that lies in wait for high-profile events in that region came in mid-February, when the Pakistan wing of terrorist group Al-Qaeda made specific threats against the Commonwealth Games, due to take place in Delhi later this year, the Indian Premier League (cricket) and the hockey World Cup, scheduled for March 2010 in India. In a message issued after a bomb attack on the Indian city of Pune the previous weekend, the 313 Brigade, an affiliate of al-Qaeda, warned that athletes and spectators attending these events would face “consequences”. More particularly, Ilyas Kashmiri, the head of the Brigade, was quoted by the Asian Times Online as saying:

“We warn the international community not to send their people to the 2010 Hockey World Cup, IPL and Commonwealth Games. Nor should their people visit India – if they do, they will be responsible for the consequences” (The Daily Telegraph of 17/2/2010, p. S20).

Even before this threat was issued, fears for competitors’ safety had begun to act as a potential deterrent for competitors. A number of English and Australian cricketers were seriously considering a boycott of the IPL, in spite of the lucrative terms on offer. Particularly the Australian camp showed signs of distinct nervousness after a specific threat had emanated, not from al-Qaeda, but from the militant right-wing Hindu organisation Shiv Sena. The latter’s leader, Bal Thackeray, had stated that “kangaroo cricketers” would not be welcome following a spate of attacks on Indian students in Australia. Since then, the perception had grown that all IPL competitors, whether Indian or not, would be in danger from Muslim terrorist groups such as that which attacked Mumbai in November 2008, killing nearly 200 people. It will be recalled that one of their main targets was the Taj Mahal Hotel, where officials had gathered ahead of the inaugural Champions League Twenty20, which had then to be called off. A private security firm used by the Australians had estimated the level of risk to cricketers in India to be the same at the start of the IPL season as it was during the month after the Mumbai attack, when England returned for a two-test series in Madras and Mohali (The Sunday Telegraph of 31/1/2010, p. S14). The security firm pinpointed the Taliban as the source of potential disruption, because of the group’s desire to instigate a conflict between India and Pakistan which would relieve the pressure on their forces fighting the Pakistan army (The Daily Telegraph of 5/2/2010, p. S16).

In order to assist the English, Australian and South African players in reaching a decision on whether to take part or not, the players’ unions in these countries had commissioned Reg Dickason, the England team’s security expert, to provide a report on the advisability of their participation. This report was issued towards the end of February, and it advised the players not to travel to India for the tournament, due to start three weeks later. It showed satisfaction with the plans put in place by the IPL’s security firm, but wanted to see proof that these could be implemented on the ground by the vast network of Indian government agencies which would be involved in ensuring the players’ safety across the 12 cities involved. However, Lalit Modi, the increasingly beleaguered Chairman of the League (see above, p. 70 et seq) stressed that security was the most immediate concern of the IPL, and that the tournament would go ahead even in the event of a mass withdrawal of overseas players (The Daily Telegraph of 24/2/2010, p. S20).

In the event, England players Kevin Pietersen, Paul Collingwood, Eoin
Morgan and Ravi Bopara did travel to India to take part (The Mail on Sunday of 18/4/2010, p. 95). During the first month of the tournament, nothing untoward occurred; however, there was a brutal reminder of the ever-present security danger when at least eight people were injured by a bomb blast in Bangalore shortly before the scheduled start of the game between Royal Challengers Bangalore (Mr. Pietersen’s team) and the Mumbai Indians. Three policemen, a security guard and a spectator were all taken to hospital, while three other people received minor injuries. The bomb was planted in a wall beside one of the entrances to the Chinnaswamy stadium, which is particularly vulnerable because it has a road running around its perimeter. The bomb, along with another which exploded several hundred yards from the stadium, was described as “low intensity” by the police. However, it exacerbated the fears entertained by the International Cricket Council the game’s world governing body, about the World Cup which is due to be staged in India, Sri Lanka and Bangladesh next February. The match itself got underway with only half an hour’s delay. Later, an Islamist group in Pakistan claimed responsibility (The Sunday Telegraph of 18/4/2010, p. S10).

Although the game in question was not cancelled as a result of the bomb, it was decided to move the IPL semi-finals from Bangalore to Mumbai, following discussions between security advisers and the Board of Control for Cricket in India (BCCI) (The Independent of 19/4/2010, p. S16). However, two days later the IPL was hit by a fresh security scare when the Bangalore team bus carrying, inter alia, Mr. Pietersen travelled to the airport without an armed guard, despite passing the site of the previous weekend’s bomb blasts – making them in the words of one source, “sitting ducks”. This was despite assurances given by the IPL authorities that security for the teams had been intensified. The professional Cricketers’ Association (PCA) lost no time in seeking further guarantees from the IPL organisers and its security firm, Nicholls Steyn Associates, that full armed escorts would be provided in Mumbai. The failure to provide the armed guards was blamed on security services in Bangalore rather than on the IPL, but it highlighted what, as is indicated above, has always been one of the main concerns about security, which is that of co-ordinating security operations across various Indian cities (The Daily Telegraph of 20/4/2010, p. S9).

The other impending major event which was potentially a target for terrorist activity was, as is indicated above, the Commonwealth Games, scheduled for the autumn of 2010. Here again, competitors have expressed reservations about their participation, and as early as late December 2009, it was announced that any decision on England’s participation would be delayed until September – even though the team had no major security concerns about the Delhi event (The Independent of 31/12/2009, p. 47) This was in spite of the visit to the Games sites, which took place a few weeks earlier, by Sir Paul Stephenson, the Metropolitan Police Commissioner, who was said to entertain “serious concerns” about security arrangements (The Daily Telegraph of 31/12/2009, p. S24). Obviously concerns increased in the wake of the al-Qaeda warning referred to earlier. This caused David Davies, a silver medallist at the Beijing Olympics in 2008, to announce that he would cut his participation to the strict minimum necessary, and that he would discourage his parents from travelling there to witness his performance. Others, such as heptathlon world champion Jessica Ennis and her rival, Kelly Sotherton, flatly ruled themselves out of travelling – as indeed did reigning 100m champion Usain Bolt (The Mail on Sunday of 19/4/2010, p. S10).

Naturally, all this was of great concern to the Commonwealth games organisers and the Indian forces of law and order. However, Indian sports officials and police insisted that the Delhi Games would be safe for both performers and spectators. In so doing, they cited the incident-free Hockey World Cup which had taken place the previous month as evidence. However, the Australian cricketers, due to play a series of one-day internationals during the same month as the Games, announced that they were keeping a close eye on the security situation, with the chief executive of the Australian Cricketers’ Association saying that it was “hard to imagine” how the Bangalore bombings could have been allowed to occur against the background of various security concerns raised beforehand (The Guardian of 19/4/2010, p. S13).

In the meantime, almost unnoticed, but serving as an ominous and horrific counterpoint to the security concerns raised above, there was a brutal reminder how the more mundane levels of sport could also fall victim to terrorist violence, in the shape of the bomb attack which killed 96 people at a village volleyball match just two days into the New Year 2010, as is reported.
earlier (p. 88). It also served as a reality check for the top sporting performers expounding their security concerns on the manner described above, reminding them that they were a relatively privileged breed when it comes to ensuring competitors’ safety from terrorism.

Other cases
(all months quoted refer to 2010 unless stated otherwise)

Jamaica. In late May, it was learned that the West Indies cricket team had moved their final one-day international and first Test against South Africa from Jamaica to Trinidad following the violence in Kingston which killed 44 people. A state of emergency was declared in the capital after serious rioting broke out, involving supporters of a local drug baron whom Jamaican officials were seeking to extradite to the US (Daily Mail of 28/5/2010, p. 115).

Dubai. The trials and tribulations surrounding Israeli tennis player Shahar Peer’s eventual participation in this year’s Dubai Open, described in detail above (p. 67), also had repercussions at the security level. She was escorted everywhere by bodyguards, and every match in which she played – even the semi-final – was played on an outside court (The Independent of 19/2/2010, p. 55).

OTHER ISSUES

North London coach uses cricket to assist Jamaica’s young offenders
These columns have related a number of instances where sport can be instrumental in the fight against crime, and the example given here is a particularly heart-warming one of courage and commitment. The central personality here is Mikey Thompson, an English fast bowler with Caribbean heritage, whose vocation as a mentor and coach has taken him to the playing fields of Mona, a notorious suburb of the Jamaican capital Kingston, where he often performs his duties whilst gunfire rings round the streets. One of life’s unsung heroes, Mr. Thompson works with young offenders, confused teenagers who grew up as familiar with knives and guns as more fortunate children are with iPods and PlayStations.

Cricket is in fact one of the last phenomena one would expect to find, winding one’s way down Mona’s twisting lane. The field is actually a concrete basketball court, whilst the sound of leather-on-willow is often drowned out by the wail of police sirens. Yet the level of enthusiasm among Thompson’s charges tends to be quite high because cricket represents a break from grim reality. He maintains that cricket is more suited to this kind of environment than football – as he says, it would only take a mistimed sliding tackle to make matters blow up. The experiment appears to be successful and yielding results in people such as Rocardo Hamilton, a juvenile offender who has now been released from the Rio Cobre correction centre, be returns every week in order to assist with coaching sessions (The Daily Telegraph of 13/1/2010, p. S12).

Islamists kill Somalis for watching World Cup
During the first week of the 2010 World Cup, it was learned that two Somali football fans were killed by Islamic militants after being caught watching the tournament’s matches. The deaths happened near the capital Mogadishu as members of the Hizbul Islam group stormed a house where people were watching the Nigeria v Argentina fixture. A further 10 people were arrested by the group, which has imposed a strict version of Islam in the regions which it controls in Southern and central Somalia. The following night, a further 30 people were arrested as they watched the Germany v Australia match in the town of Afgoye. Sheikh Mohamed Abdi, for the militant group, said that Somalia should observe their ban on the World Cup and focus on pursuing the Jihad (The Daily Telegraph of 15/6/2010, p. 14).
MEDIA RIGHTS AGREEMENTS

Setanta now ceases US broadcasts
The sorry saga of Setanta, the sports broadcaster of which so much was expected, has been extensively documented in this journal and elsewhere. It will be recalled that the company’s British division applied for bankruptcy protection during the summer of 2009 and discontinued all its broadcasts in the UK, where it had ceased to pay its Premier League (football) rights. Setanta has now also ceased broadcasting in the US and the Caribbean as from 28/2/2010 and has turned over many of its rights to bootball and rugby events to the Fox network, which has now launched its second all-football network in the US (Associated Press, at www.findlaw.com of 27/1/2010).

LEGAL ISSUES ARISING FROM TRANSFER DEALS

European football clubs in dispute with English Premier League sides over transfers
Udinese take Portsmouth to court over Sulley Muntari
Portsmouth are one of the many top English football teams who have succeeded in making considerable headway thanks in no small measure to the success of players transferred from European clubs. However, the club’s fortunes have taken a dive recently, chiefly because of the dire state of its finances. The club’s crisis deepened in mid-January 2010, when Italian side Udinese took them to the Court of Arbitration for Sport (CAS) concerning debts owed in respect of the transfer of Sulley Muntari three years previously. The Italian club maintained that they were still owed 50 per cent of the reported 7 million fee for the midfielder, who moved from Portsmouth to Internazionale Milan for 12.7 million in 2008 (The Independent of 22/1/2010, p.66). The Court’s decision was not yet known at the time of writing.

Manchester City executive blamed for collapse of Gago deal (UK/Spain)
Manchester City are yet another club which have recently invested heavily in the transfer market in order to promote their chances in the Premier League. One of the top players targeted by City manager Roberto Mancini was Real Madrid’s Argentinian international Fernando Gago. However, the proposed transfer had to be abandoned when the two clubs ran out of time to process the transfer prior to the transfer deadline. Real blamed this failure on City’s Chief Executive, Garry Cook, for being insufficiently prepared, also claiming that the delay was caused in part by the need to obtain formal sanction for the deal from the Manchester club’s owner, Sheikh Mansour bin Zayed al-Nahyan. However, although City appeared reluctant to become engaged in a war of words with the Spanish side, their feeling, according to some insiders, was that the deal could have been sealed had Real not overpriced the player initially (The Guardian of 4/2/2010, p.S3).

Chelsea settle Kakuta dispute with Lens out of court
It will be recalled from a previous issue of this Journal (2009) 1 Sport and the Law Journal p. 65) that Premiership side Chelsea and French club Lens had become locked in a dispute over the transfer of promising player Gabriel Kakuta. At a meeting in late August 2009, the Dispute Resolution Chamber of the game’s word governing body, FIFA, found Mr. Kakuta guilty of breaching his contract with Lens as a 15-year-old, and found Chelsea guilty of inducing that breach. As a result, FIFA banned the London club from concluding any transactions for two transfer “windows”. Chelsea subsequently appealed to the Court of Arbitration for Sport, but the latter was ultimately spared a decision when, in early February 2010, it was learned that the Premiership side had arrived at an amicable settlement with Lens, whom they agreed to pay £793,000 by way of compensation in respect of the training from which the player benefited when playing for the French side. Bruce Buck, the Chelsea Chairman, claimed that this payment had merely been made as a matter of goodwill and did not amount to an admission of having broken any rules (The Independent of 5/2/2010, p. 61).

EMPLOYMENT LAW

Various issues concerning the availability of rugby internationals (France – United Kingdom – Argentina)
“Club v Country” is a long-running controversy with which followers of football are already quite familiar, but has until recently been alien to the world of rugby union. However, this state of relative serenity may be about to change if the recent dispute between certain French clubs and the England
national squad proves to be a pointer to the future. In early March, as the battle for honours in the Six Nations Championship and the various European club competitions was reaching its climax, a disagreement broke out between the management of the English national squad and top French side Stade Français over the availability of key England player James Haskell, of whom the club demanded that he be released for the Top 14 fixture against Toulouse. The England team manager, Martin Johnson, had intended to keep the team together for a training session following their defeat to Ireland a few days earlier. However, Max Guazzini, the Stade president, claimed that flanker James Haskell was not covered by the Elite Player Squad (EPS) agreement between the Rugby Football Union and English clubs on the question of player release. On the other hand, an RFU spokesman insisted that England has concluded an agreement with the French club the previous summer that Mr. Haskell would be available for all the EPS, as that, in fact, a clause to that effect had been inserted in the player’s contract (The Daily Telegraph of 2/3/2010, p. S15).

The tug-of-war over Haskell assumed wider implications only a few days later, when it was revealed that another French side, Brive, had requested the release of another key England player, Riki Flutey, for their Top 14 match against Castres. This request was also refused by the England management. Then another Top 14 club, Toulon, described the unavailability of top fly-half Jonny Wilkinson for their forthcoming fixture against Biarritz “frustrating”, adding that Mr. Wilkinson would have benefited from playing for the club after having incurred a good deal of criticism for his performance thus far in the Six Nations tournament. These disputes appeared to have a broader context than the specific matches involved, coming as they did amid speculation that the England rugby authorities had adopted this uncompromising stance in order to deter English players from playing their club rugby in France (The Daily Telegraph of 4/3/2010, p. S13). The dispute reached a feverish pitch when Mr. Guazzini accused the English authorities of “shameful blackmail” over the Haskell affair, and even suggested that legal action could be started not only against England, but also against the player himself, for breach of contract (The Daily Telegraph of 5/3/2010, p. S10). At the time of writing, it was not yet known whether such action had been taken – or indeed if any other disciplinary action had been taken by the French club against Mr. Haskell, as the latter had appeared to intimate (The Guardian of 6/3/2010, p. S1).

The developments described above have only served to highlight the unsatisfactory state of the rules which govern this aspect of the game’s labour relations. However, in mid-May 2010 the world governing body in the sport, the International Rugby Board (IRB), introduced a rule change which may well increase the game’s international competitiveness. The Board’s Council have now approved an amendment to Regulation Nine, which governs player release for international duty. The change opens a revised Test “window” from late August to early October. This means that the Argentinian national side will be able to call in those of their leading players who compete in the French and English leagues for the duration of the new Four Nations tournament – involving Australia, New Zealand, South Africa and Argentina – which will start in 2012. This will be possible even though the European club season commences in late August/early September. This will therefore be a very positive development for Argentina, since this change will bring them within touching distance of meaningful annual competition (Daily Mail of 14/5/2010, p. 86).

Melbourne Storm stripped of title over salary cap infringement (Rugby League)

One of the measures adopted by the various Rugby League competitions throughout the world in order to prevent a few sides from capturing all the honours is the imposition in competing clubs of a salary cap. The strictness with which this rule is applied by the relevant authorities was revealed in all its starkness in late April 2010, when it was learned that Melbourne Storm, the game’s greatest recent success story had been stripped of the Australian National Rugby League (NRL) titles they had won in 2007 and 2009 after having been found guilty of an “elaborate” and “extraordinary” breach of the salary cap rules. A protracted investigation by the NRL had followed a tip-off issued by a former Storm employee, which revealed details of illegal payments totalling £1,025 million to players over the past five years that had been hidden in a secret file and had been disguised as superfluous payments for the hire of a marquee for corporate entertainment at each of the team’s home matches. Without this, the club would have been unable to maintain a squad which included many of the world’s leading players (The Guardian of 23/4/2010, p. S6).
In addition to being stripped of the NRL honours, the Storm have been ordered to repay prize money to the amount of A$500,000, and they were docked all the competition points they had accumulated during the current season, effectively leaving them with nothing to play for the remainder of the season. The draconian scale of the penalties imposed – which was more severe even than that administered to Canterbury for the previous major salary-cap transgression – was a reaction to the blatant and highly-organised nature of the deception. The club operated parallel sets of accounts, one for public consumption which complied with the NRL salary cap rules, and the secret set showing the actual, higher, payments to players. The affair also has other overtones of corruption, since at a certain point bookmakers noticed a series of bets on the Storm, then in the League's top four, finishing bottom – which they did as a result of their punishment. Clearly, news of the NRL's audit of the club's accounts had leaked out beforehand (The Independent of 23/4/2010, p. 66).

Mr. Smith said the NFL would receive $5 billion from its network television deals even if no games are played in 2011. He regarded that as proof owners are preparing for a lockout. However, NFL commissioner Roger Goodell denied Smith's assertions, stating that the notion that the owners wished to lock out and not play football was "absolutely not the case. That's just not good for anybody". Some of Mr. Smith's question-and-answer session during Super Bowl week was spent reiterating past claims, such as team values increasing by "almost 500 percent" over the previous 15 years. There was also a call to have all 32 NFL teams open their books to show who was losing money and how much. Smith also said he wanted teams to contribute what would ultimately turn out to be millions into what he called "a legacy fund", which would give better support to retired players. Most of his focus, however, was on getting a new collective bargaining agreement (CBA).

The League’s response was, in part, to state that teams such as the — whose audited financial statements are the only ones which the Union said it has seen – have experienced a 40 per cent decline in profits. According to Jeff Pash, the NFL's executive vice president and chief counsel this would be a serious cause for concern in most businesses, and would “indicate a serious issue that has to be dealt with”. In so doing, it would be necessary to look at the single largest item of expenditure, which is player costs. On the players' side, Indianapolis quarterback, whom the Colts were, at the time of writing, planning to award a new contract which would make him the League's highest-paid player, acknowledged that he has concerns about this development. He said:

"I think as a player, I feel we have a pretty good thing going right now in the NFL. It would a shame for something to have to change along those lines. I understand kind of like when a player is holding out or a player contract, there is a business side of this that can be tough. It is not always pretty." (Ibid)

Mr. Smith said the latest NFL offer to the players would reduce their share to 41 per cent of applied revenues from about 59 per cent. He emphasized that the teams take $1 billion off the top of the estimated $8 billion which the League generates. Mr Pash, for his part, has argued that the $1 billion reflects actual costs incurred, money:

"invested in things like NFL Network, NFL.com, putting games on overseas, all of which is intended to and has in fact had the effect of generating substantial additional revenues, 50 percent of which go to NFL players. And the union knows that's true, because the union has absolute rights to audit those expenses" (Ibid).

Echoing Mr. Goodell's statement, Pash said that Mr. Smith's assertion that players are being asked to accept an 18 percent pay cut – the $340,000 per-
player-average figure – was one of the “misrepresentations of what our proposal is”. He denied ever having said that this would result in players having to take a reduction, the entire point being to generate a “pool of resources” to have continued investment and continued growth, which would lead to higher salaries and benefits for players.

For the present, some players have admitted that they are bracing themselves for problems in this area. Players association president Kevin Mawae said that he had even recommended that players save 25 per cent of their salary next season “in the event of a lockout,” though he also noted that “we can’t make all 1,900 players save their money”. Messrs. Smith and Mawae have stated that if next season goes forward with no salary cap, it would be highly unlikely to have a new CBA with a cap reinstated. As ked about the owners’ assertion that the 18 per cent pay cut request was false, Mawae said did not hold back, claiming that it was “absolutely true they’ve asked for 18 per cent.” In the meantime, the players’ union is increasing its membership contributions with the intention of returning the money as income to players, should this be needed, during a lockout (Ibid).

NFL starts career transition scheme (US)

Although there is no suggestion of a link between the industrial issues referred to in the previous section, concern for the future of American football and its practitioners has prompted the game’s authorities to give greater consideration to the players’ future when – forgive the cliché – they hang up their boots. This is why the National Football league (NFL) has created a career transition scheme for retired players which started in June 2010, with the League financing the cost of tuition and accommodation. Participating players will learn about personal finance, launching a new career with realistic expectations, developing a personal brand, communication skills, and the importance of health and well-being. The League hopes eventually to be able to accommodate 45 ex-players per session (Associated Press, www.findlaw.com of 20/5/2010).

Dispute between players’ unions and IOC over European labour legislation

At the time of writing, major political battle was shaping up between professional players’ unions and the various sporting governing bodies over attempts being made by the (IOC) to secure an opt-out for sport from European labour legislation. The unions believe that an IOC-endorsed strategy document reflects a move to restrict their members’ ability to change clubs. They even claim the famous Bosman rule – which permits footballers to move for free once a contract ends – will become a target for the governing bodies. The strategy paper was prepared for submission to the EU in early February 2010. As part of the “specificity of sport” drive, the IOC was the lead signatory, alongside sporting bodies which include football’s governing body FIFA and the International Rugby Board (IRB). The paper maintains that the principle of the free movement of persons “should not be assessed exclusively in accordance with EU principles concerning free movement of workers or persons.” However, the various governing bodies have countered this by saying that the move is an attempt to protect current contractual stability measures from further attack through the courts by player bodies (The Guardian of 17/3/2010, p. S2).

Thus far it seems the IOC and its partners have gained a better foothold in the argument with the EU. It has been offered bilateral discussions with the European Commission without any input in the talks from the players’ unions. However, player representatives did hold a meeting on Monday with the sports minister of Spain, which currently has the EU presidency, in an effort to counter a powerful and wealthy lobby of sports governing bodies (Ibid). Clearly, there will be some interesting developments on this issue in the not too distant future.

SPORTING AGENCIES

Sporting agency is “common interest agency agreement”, rules French Court of Appeal

In the case under review, Mr. Douchez, a professional footballer had concluded a contract with Mr. Mongai, a sporting agent, for the duration of two years. This agreement, which was described as an exclusive mandate, conferred on the sporting agent the obligation to assist the player in negotiating all the various agreements which related to his professional activity. Several months later, the player made another agreement with a different agent, Mr. Krstic, after which he proceeded to terminate unilaterally the contract made with Mr. Mongai. Subsequently the player renewed his contract of employment
with top club Toulouse without Mr. Mongai’s assistance. The latter took the player to court, claiming abusive breach of contract. The court dismissed the action, stating that the contract in question did not constitute a common interest agency agreement, which meant that the player was entitled to terminate the contract without having to compensate the agent. However, the Toulouse Court of Appeal overturned this decision. It held that the contract in question was in fact a common interest agency agreement. Since there was no clause in this agreement which allowed its unilateral termination, and since the player had failed to prove that there was any legitimate reason for breaching its terms, the Court ruled that Mr. Douchez was liable and ordered him to pay the sum of €100,000 to Mr. Mongai by way of damages (Decision of 1/12/2009 in Case No. 08/00966, La Semaine Juridique – Edition Générale of 29/3/2010).

This case appears to highlight a lack of clarity in French law regarding the legal status of sporting agencies. The essential question to be resolved was whether the agency agreement entitled the agent to represent his client for the purpose of not only negotiating, but also concluding, contracts for and on behalf of the client. The Court of Appeal clearly placed the sporting agency agreement in the latter category. This meant that the player could only terminate the contract unilaterally if he could provide evidence of serious professional shortcomings on the part of the agent. The author Fabrice Rizzo disagrees with this assessment. He claims that, in everyday sporting practice, the duties of the agent consist in taking measures which relate essentially to the preparation and negotiation of contractual obligations on behalf of his principal. These duties do not extend to actually substituting himself for his client for the purpose of concluding contracts which bind the client (Ibid).

**Academic article on footballers’ agents**

In “Players’ agents, past present… future” (ISLJ 2009, 3/4 Supp (Special Addendum: Players’ agents) I-10) the author, Roberto Blanco Martins, discusses the regulation of professional footballers’s agents by the European Union and individual member states, explaining the background to, and current position of, the relevant legislation. He notes a proposal by world governing body FIFA to deregulate agents and concentrate on rules governing transfers, contracts and conflicts of interest. He considers the possibility of an EU directive on sporting agents, the policy reasons for such legislation and the option of self-regulation in Europe (reviewed in [2010] 3 European Current Law p. 83).

**SPONSORSHIP AGREEMENTS**

[None]

**OTHER ISSUES**

**Court dismisses university golf club action brought by Giuliani Jr (US)**

In late March 2010, it was learned that a federal US judge had dismissed a court action which was brought after the son of former New York mayor Rudy Giuliani was dismissed from the golf team of Duke University. District Judge William Osteen Jr ruled that the offers used to induce Andrew Giuliani into joining the University did not constitute an enforceable contract. The previous year, a magistrate judge had also recommended that the action be dismissed. Mr. Giuliani had argued that a former golf coach had promised him an opportunity to compete and a right to gain access to Duke University’s athletic facilities. He claimed that the University's golf coach had manufactured accusations against Giuliani in order to justify the latter’s removal from the team in 2008 (Associated Press, www.findlaw.com of 30/3/2010).

**Los Angeles Dodgers resolve contractual dispute with actor Lovitz (US)**

In early June 2010, the US National Football League (NFL) club Los Angeles Dodgers announced that they had resolved their dispute with comedian and actor Jon Lovitz concerning allegedly unpaid latch tickets amounting to almost $100,000. The club had started a court action against Mr. Lovitz and others over non-payment for prime seats during the 2010 season. However, in a statement the club later announced that the issue had been resolved “very quickly, very amicably and to the satisfaction of both parties” (Associated Press, www.findlaw.com of 4/6/2010).
SPORTING INJURY

**No intention of wrongful injury, rules court in German tort action**

During a German football game, one of the players was seriously injured by another, but the referee decided that no foul play was involved. The injured player brought an action for damages under Article 823 of the German Civil Code, which regulates tort liability. He claimed compensation for current and future material injuries, including loss of income and immaterial damages such as pain and suffering. The defendant had the benefit of third party liability insurance. Both the claimant and the defendant gave conflicting accounts of the accident, each claiming that the other party was to blame for the outcome. Two lower courts dismissed the action.

The matter landed before the German Supreme Court (Bundesgerichtshof), which also rejected the action. It ruled that, in principle, it was likely and foreseeable, in the course of all sporting events involving competing and opposing teams such as football games, that a player would sustain injuries, even as a result of another player’s intervention. This fact alone did not constitute a breach of that other player’s duty of care. Only in cases where the referee decided that the injury had been caused by a clear breach of the rules, amounting to foul play by one of the players involved, was the injured party entitled to bring an action in damages, regardless of whether the player having caused the damage held third party insurance, since the basic legal decision on the existence or absence of tort liability could not be decided by reference to this issue. In the instant case, the defendant had neither intentionally nor wrongfully injured the other player, with the result that the fundamental criterion for liability under Article 823 had not been met (Decision of 27/10/2009, reported in European Current Law 7-2010, p. 68).

**Sliding tackle in football constitutes tortious action and engages insurer’s liability. Belgian court decision**

In the game of football, a sliding tackle, in the sense of a sliding forward movement aimed at obtaining possession of the ball, is in principle a lawful manoeuvre. However, where this action is carried out without the ball being played, and results in the opposing player being upended, the player carrying it out commits a foul. If in addition this foul is committed with full physical force, with the leg stretched outwards and the player’s boot landing just underneath the opponent’s knee, this action not only constitutes a foul, but also a fault within the meaning of Article 1382 of the Belgian Civil Code, which regulates the principle of tort liability. This was the ruling of the Court of Appeal in Antwerp, Belgium as a result of an action brought by a footballer who had incurred serious injury as a result of such a sliding tackle.

The defendant in the main action, who was the appellant in this decision, had claimed on his insurance policy for this incident. However, the relevant insurance company refused to make payment on the basis that the damage in question had been deliberately caused by the appellant – which had been the finding of the Court of First Instance against whose ruling the appeal was brought. The appellant questioned this finding, and the Court of Appeal upheld this challenge. It was true that the appellant was perfectly aware that, if he missed the ball whilst making the sliding tackle, he would upend the player and that this action would be adjudged to be a foul. However, it was uncertain whether in so doing the appellant had the intention of performing the action which caused the serious injury, i.e. bringing his boot into contact with the bone located underneath the victim’s knee, and so could not reasonably foresee the outcome of this action. The court refused to be swayed on this issue by the statements made by certain eyewitnesses who had exceeded the scope of their actual powers of perception and had ventured into the realms of pure speculation.

The insurance company had also attempted to evade liability by entering a plea which relied on a clause in the policy which excluded from its scope injury caused by “grievous bodily harm” against the victim. The appellant challenged this plea, and the Court of Appeal upheld this challenge. It held that a game of football will always involve certain degree of physical force. The appellant had succeeded in proving that his action, whilst constituting a foul and causing serious injury to the player, had occurred as a result of an action which could be said to be an inherent part of the game of football, so that there could be no question of grievous bodily harm having been committed (Decision of 22/3/2006, Rechtskundig Weekblad of 23/1/2010, p.872).

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4. Torts and insurance
Riding school and victim of riding accident held equally liable for injuries caused by fall. Belgian Court of Appeal decision

In the case under review, the original claimant was a client of a riding school. At a certain point, she was riding one of the school’s horses well versed in having beginners in the saddle; however, at a given moment the horse turned left, causing the claimant to lose her balance and falling to the ground, sustaining various injuries. The victim of this incident considered that the riding school was liable for this accident, and brought a court action against it for damages amounting to €50,000. The claimant’s action was based on Article 1385 of the Belgian Civil Code, which regulates vicarious liability for the actions of animals under a person’s control. The defendant disputed this claim, inter alia on the ground that, because of the agreement under which the victim was undergoing tuition by the riding school, this matter was governed by contractual, rather than tort, liability. However, the Antwerp Court of Appeal ruled that the existence of this contractual link did not exclude the applicability of Article 1385. The latter seeks to regulate the liability which may arise from the autonomous actions of an animal, even where such action occurred in the course of the performance of a contract. Accordingly, the riding school incurred liability for the personal injuries sustained by the rider.

However, this did not prevent the possibility of the original defendant’s liability being mitigated by contributory negligence on the part of the victim. The court held that, even though the victim was relatively inexperienced, it could reasonably be expected of the latter that she should be expected to remain in an upright position where the horse on which she is mounted takes a step leftwards. This prompted the conclusion that the victim was seated negligently on the horse whilst the latter was merely ambling around. In addition, it has emerged that, when the horse in question turned leftwards, the claimant slid from the saddle and remained in a suspended condition whilst the horse in question remained motionless, after which the victim continued to slide and fell on top the sand from a height of approximately 70 cm. It was clear to the Court that the claimant had suffered the fall because she failed to ride the horse with due alertness – as might be expected from a reasonable and diligent riding pupil. Therefore the court considered that the victim had incurred contributory negligence. The resulting ruling was that both parties were guilty of negligence, and were accordingly ordered to pay half the damages due (Decision of 21/3/2007, [2010] Rechskundig Weekblad p. 1355).

DEFAMATION ISSUES

Former junior cycling ace wind defamation action (Australia)

In late April 2010, it was learned that Mark French, the former world junior cycling champion, was awarded the sum of $162,000 by way of damages following a successful court action against an Australian newspaper which had described him as a disgraced drugs cheat. Mr. French had been banned for two years in 2004 for doping offences, but had this suspension overturned on appeal the next year. The court action in question was brought against the Herald and Weekly Times before the Victorian State Supreme Court. This was not the first time the former champion had been successful in such action – on 2008 he won another defamation action against a radio station (Associated Press, www.findlaw.com of 27/4/2010).

Unsuccessful defamation action brought against Milwaukee Brewers (US)

In late January 2010, an appeal court in Wisconsin dismissed an action brought by a woman who claimed that she had been unfairly portrayed as a stalker by American Football team Milwaukee Brewers and radio announcer Bob Uecker. The court failed to give a ruling on the merits of the claimant’s action; instead, the three-judge panel stated that her allegations of defamation and invasion of privacy had either been entered after the two-year limitation period had expired or lacked a legal basis. Four years ago, Mr. Uecker had alleged a pattern of stalking and harassment by the claimant, Ann Ladd. She was charged with the felony of stalking, but the relevant prosecutor dismissed the criminal charge after a court commissioner issued an injunction barring her from contacting Mr. Uecker (Associated Press, www.findlaw.com of 27/1/2010).

US golfer threatens court action over cheating allegations

A recent controversy over a rule change concerning the use of certain golf clubs has recently threatened to find its way to the law courts. More particularly top US
player Phil Mickelson has threatened to sue for slander after the controversy over the use of his contentious wedge club intensified in early February 2010. Mr. Mickelson made the threat after fellow Tour player Scott McCarron accused him of cheating.

The imbroglio follows a new rule introduced by the governing bodies this year banning the use of clubsw ith ‘super-spinning’ U-shaped grooves. However, this ban presented a major problem. In 1990 the manufacturers, Ping, brought a court action against the United States Golf Association (USGA). This resulted in a settlement under which the USGA was not allowed to issue a retrospective ban on Ping clubs, which means that the Ping Eye-2 irons of the late 1980s remain legal. Those clubs have grooves which impart a great deal of spin to the ball. So the grooves do not comply with the new rule, but they are legal because of the outcome of the court action. Meanwhile, the PGA Tour is reported to be making strenuous efforts to defuse the controversy (Ibid).

Manny Pacquiao starts court action over doping claims (Philippines/US)

As the old year 2009 drew to a close, the news broke that Manny Pacquiao, the WBO world welterweight champion, had brought a court action against fellow-boxer Floyd Mayweather Jr and Golden Boy Promotions boss Oscar de la Hoya over claims that he has consumed performance-enhancing drugs. The Filipino fighter, a six-weight world champion, withdrew from a potentially lucrative fight against Mayweather, scheduled to take place a few months later, after the American fighter’s camp demanded that Olympic-style drug-testing procedures be organised during the lead-up to the fight. The legal action launched by Mr. Pacquiao in a Las Vegas district court cites Mayweather and his father Floyd senior, De La Hoya and fellow Golden Boy executive Richard Schaefer. The claims are that the Mayweathers, De La Hoya and Schaefer knew that Pacquiao had never taken performance-enhancing drugs, knew their statements were false, but made them anyway out of “ill-will, spite, malice, revenge, and envy” (Daily Mail Online of 31/12/2010).

Daniel Petrocelli, a lawyer acting for Pacquiao, claimed that his client’s achievements come from “God-given talent and an indefatigable work ethic” rather than from steroids, and that he would not allow others deliberately to misrepresent his “years of hard work” and tarnish his reputation. Earlier, the Mayweather camp had insisted on both fighters making themselves available for testing before the projected March 13 fight, in accordance with US Anti Doping Agency regulations. Mr. Pacquiao refused to submit to blood testing in the 30 days leading up to the fight, announcing he would only give blood before the initial media conference and immediately after the bout. He also mentioned that he was starting legal proceedings against the Mayweather camp.

The US fighter’s team tried to defuse the controversy by issuing a statement in which they wished to make it “very clear” that no-one in the Mayweather team or Golden Boy Promotions was accusing the Filipino boxer of any unlawful practice. It added, however that the reality seemed to be that, “for whatever reason, Pacquiao does not want to participate in random blood testing”, which has already been deemed a harmless procedure to which many current athletes were subjected, both prior to and during competition (The Independent of 1/1/2010, p. 45).

This failed to pacify Mr. Pacquiao, who replied:

interpret what the spirit of the rule is. I understand black and white. Myself or any other player is allowed to play those clubs because they’re approved. End of story” (The Daily Telegraph of 1/2/2010, p. S25).

Except that this was not the end of the story. Many players were of the opinion that Mickelson and others are acting against the spirit of the game. Thus Lee Westwood, the top British performer, plays with Ping clubs but he is using wedges having the new, conforming, V-grooves. At the time of writing, it was not known whether Mr. Mickelson intended to carry out his threat of court action. Meanwhile, the PGA Tour is reported to be making strenuous efforts to defuse the controversy (Ibid).
“Enough is enough. These people, Mayweather Snr and Jnr, and Golden Boy Promotions, think it is a joke and a right to accuse someone wrongly of using steroids or other performance-enhancing drugs. I maintain and assure everyone that I have not used any form of kind of steroids and that my way to the top is the result of hard work, hard work, hard work and a lot of blood spilt from my past battles in the ring, not outside of it. I have no idea what steroids look like and my fear in God has kept me safe and victorious through all these years” (Ibid).

It should be added that Mr. Pacquiao has never tested positive for any unlawful substances. The outcome of this case was not yet known at the time of writing.

INSURANCE

University athletic fund locked in insurance dispute (US)

In early February 2010, it was learned that the athletic fund of Oklahoma State University (OSU) had become embroiled in a legal dispute with the Lincoln National Life Insurance Co. over a failed funding plan for charitable insurance. The previous month, Cowboy Athletics Inc., together with oil-and-gas magnate and OSU alumnus T. Boone Pickens, had instituted legal proceedings against Lincoln national in the Oklahoma State Court alleging fraud, breach of contract and misrepresentation. The action also cited Lincoln national agents Larry Keith Anders, John Ridings Lee and James Glenn Turner Jr.

Essentially, the fund is seeking cancellation of 27 life insurance policies of $10 million each which it had purchased on the lives of OSU alumni, alleging that the agents in question had misrepresented the policies. OSU also contends that Lincoln National failed to perform appropriate medical and financial underwriting, resulting in Cowboy Athletics paying vastly inflated premiums (www.investmentnews.com of 14/2/2010). However, a few weeks later Lincoln national issued a counterclaim against Mr. Pickens and Cowboy Athletics in the US district Court in the Northern District of Texas. The insurer alleges that the oil billionaire and former corporate raider had encouraged the athletic fund to breach policy contracts.

The legal dispute is centred on “Gift of a Lifetime”, a philanthropic programme established by Cowboy Athletics and Mr. Pickens in 2005. OSU contends that Mr. Lee and Mr. Turner pitched a funding strategy for the programme. That strategy, claims the action, involved creating a $350 million stream of income over a period of 25 years by purchasing life insurance on 27 OSU donors aged between 65 and 85. As part of the strategy, the school would use a $20 million benefactor loan – using Mr. Pickens as guarantor – in order to help cover the cost of a premium-financing loan aimed at covering the insurance policies. The suit alleges that Mr. Lee and Mr. Turner had committed themselves to arranging the premium-financing deal to cover the cost of the policies (Ibid).

In a statement, Cowboy Athletics announced that it “plans to aggressively pursue recovery of its damages on the matter (sic)” (Ibid). The court action had not yet been settled at the time of writing.

OTHER ISSUES

[None]
World Cup 2010: (mostly) all right on the night

Preparation doubts continue
It will be recalled by all that, when the decision was made to award the 2010 world showpiece of football to the “rainbow nation”, the project became immediately assailed by doubts as to the wisdom of allocating the tournament to this nation. Visions arose of a country totally unprepared for such a massive undertaking, half-finished stadiums, inadequate infrastructure and obstructive political manoeuvres, with a desperate world governing body seeking a last-minute alternative in a location better versed in the organisation of such events. Ultimately, these widespread predictions of doom went unfulfilled, and, as we now know, the tournament was one of the more efficient and pleasurable in living memory (at least off the field of play). That is not to deny that, right up to the ultimate stages of the project, some alarm bells kept ringing in the appropriate quarters and a general nervousness characterised the countdown to the start of the tournament up to the moment when the referee blew the whistle to set the first game, between the hosts and Mexico, in motion.

It must be admitted from the outset that at least some of this febrile uneasiness was fully justified at the time. Indeed, with 100 days to go before kick-off, it appeared that there remained many unanswered questions as to the state of readiness of the project. First and foremost of these concerns was the issue of the various venues and the question whether they were completed and ready for action. Although nine of the 10 stadiums were open and essentially ready, there was a problem with the 43,500 seated Mbombela Stadium in Nelspruit, due to stage four group matches. Two attempts to grow grass had already failed, and the venue, which had failed a FIFA inspection the previous December, had been described as an “arid dustbowl”. At a certain point, it was suggested that an alternative venue might be required. Nevertheless, as far as the actual stadiums were concerned, there was every prospect that these would be ready for action at the start of the tournament (The Independent of 2/3/2010, p. 57). The same, however, could not be said of some of the other facilities.

Thus there appeared to be a real problem regarding the base which would accommodate the England national squad. The Royal Bafokeng sports campus had been allocated to the squad, but by mid-February was still largely incomplete. This resulted in the unusual situation whereby the manager, Fabio Capello, was given an extension to the deadline which FIFA imposes on World Cup nations for signing contracts with their training ground. In fact, a sufficient number of national federations had expressed concerns about their team’s prospective training grounds for FIFA to postpone the original deadline. Thus Argentina, who had secured the high-performance centre at the University of Pretoria, had concerns about some aspects of the base, whilst Algeria had not even succeeded in finding a base yet. Faced with the resulting barrage of criticism, officials from the Bafokeng site insisted that the complex would be completed in time (The Independent of 23/2/2010, p. 59). However, with barely seven weeks to go, the England training base still resembled a construction site, with scores of workers deploying cranes and heavy earth-moving equipment in a race to complete vital facilities. This rendered the margin of error very thin. The problems were not restricted to the actual base itself, with the South African authorities admitting that some of the relevant infrastructure projects – mainly on the roads – might not be completed in time (The Independent on Sunday of 18/4/2010, p. 39).

Another issue which continued to beset the prospects of a successful tournament was that of ticket sales. The take-up of seats remained embarrassingly low, both among the local population and from visiting fans. This was due not only to fears over security and criminality – of which more later – but also to the inflated prices of travel and accommodation (The Times of 12/2/2010, p. 102). In fact, South African officials felt compelled to launch an investigation into allegations that hotels had raised prices to unreasonable levels in an attempt to exploit visiting fans. This investigation came one month after it was announced that domestic airlines would face similar scrutiny for alleged price fixing. An internet search had found that a room at a mid-range hotel near Johannesburg’s OR Tambo airport, which would cost £95 on a typical weeknight, would be at least 30 per cent more expensive during the tournament. Tourism leaders, however, countered this accusation by stating that the higher prices simply reflected higher demand (The Guardian of 25/2/2010, p. 18). When the significant 100-days-to-go stage was reached, there remained 700,000 unsold tickets,
which threatened the tournament with financial disaster. In an effort to boost sales, FIFA General Secretary Jerome Valcke announced that Category Two and Three tickets would now be regarded as Category Four seats, which could be sold exclusively to South African residents for around £13 (The Daily Telegraph of 19/2/2010, p. S7).

There appeared to be two other problems besetting the sale of tickets. One was the apparent inefficiency of the internet sales and booking system. Many fans who wanted tickets claimed that they did not even bother to try the internet as their applications were constantly being refused even when there remained plenty of seats available – as a result of which many had to queue up for tickets at the eleven ticket centres which opened across the country for the final phase of sales (Associated Press, www.findlaw.com of 28/5/2010). Even as, with a month to go before the start, fans were pushing and shoving each other at such ticket centres, the system crashed because of technical problems across all sales channels – which included FIFA’s own ticket centres as well as local bank branches (Associated Press, www.findlaw.com of 28/5/2010). However, a more sinister aspect of the ticketing process came to the fore in late February, when it was discovered that thousands of fake or bogus tickets were being sold on websites, including Gumtree, for many times their face value. This became evident when some sites were actually purporting to sell ready-made tickets, whereas FIFA had made it a matter of policy that paper tickets would only be available for collection in South Africa, a few weeks before the event kicked off. In addition, some resellers of tickets were abusing FIFA’s ticket transfer policy in order to resell tickets with a considerable mark-up. This policy permitted name changes for non-commercial reasons, such as illness, thus making it possible for tickets to be issued to people other than those whose name appeared on the ticket (The Times of 27/2/2010, p. 35).

Security issues
One element which, for perfectly understandable reasons, had cast a pall of uncertainty over the choice of South Africa as hosts was that of ensuring the safety of all concerned, in a nation whose criminality record is significantly higher than the norm. It was feared that the presence of such a high-profile event, bringing with it a host of relatively well-heeled visitors from abroad, would inevitably attract the interest of the criminal fraternity and give the nation an even worse profile in this respect. In addition, lurking in the background there is the ever-present threat of terrorism. These concerns had already, as has been reported in early editions of this Journal, prompted a number of participating countries to consider the employment of private security agents for their participating squads. This was followed by repeated assurances from the South African authorities and tournament organisers concerning the safety of players and officials. Nevertheless, with five months to go, countries such as Australia, Germany, Italy and New Zealand signalled their intent either to employ a local security firm or to take their own protection service to South Africa, with Greece admitting that this was “an option”. Whilst the attacks on the Togo team at the Africa Cup of Nations, described in detail above, do not appear to have produced a direct effect on the countries’ plans in this regard, they did serve to highlight the attractiveness to terrorist organisations of what are known in the security industry as “target-rich environments” (The Daily Telegraph of 27/11/2010, p. S7).

However, during the run-up to the tournament there did occur a number of developments which justified some of the concerns held by the participating nations’ authorities. In early February, it was learned that South Africa’s own security regulators, PSIRA, had revealed that criminals and illegal immigrants had obtained accreditation as security guards. In fact, at the time there were more than 800 criminal charges pending against private security companies in South Africa, and many of their employees were known to have police records. PSIRA figures revealed that 188 security officers had had their licences revoked during the previous year because of convictions which ranged from robbery to rape. During the previous 18 months, PSIRA had investigated as many security firms and 38 individuals allegedly involved in the fraudulent sale of documents, in many cases to unqualified illegal immigrants or criminals (The Mail on Sunday of 7/2/2010, p. S17). Two months later, there occurred the violent death of Eugène Terre’Blanche, the leader of the far-right secessionist Afrikaner Weerstandsbeweging (AWB), who was killed on his farm following an alleged dispute over pay with two of his employees. With a fair degree of cynicism, the AWB immediately associated this death with the tournament, with André Visagie, a senior member, warning the participating nations that they were “sending their soccer teams to a land of murder”. The ruling ANC party reacted
swiftly, calling on the AWB to respect the multiracial nature of the World Cup, and assuring visitors that the security forces were fully prepared for any eventuality (The Independent of 11/4/2010, p. S22).

Indeed, it seemed that, in a strange reversal of roles, there was one major threat of terrorist disruption in addition to that which emanated from extreme Muslims or militant African groupings seeking to exploit the tournament in order to gain publicity for their cause. It appeared equally likely that some of the most immediate candidates for such activity were white South African extremists. This seemed to be confirmed in early May when South African police announced that they had foiled a plot by such groupings to bomb black townships ahead of the tournament. Five suspects linked to Right-wing groups were arrested in police raids which revealed caches of explosives, illegal guns and ammunition. During his lifetime, terre’Blanche had threatened military action aimed at preventing black majority rule in South Africa following the end of racial apartheid in the early 1990s. However, the predicted race war never materialised and his support dwindled rapidly. His murder had renewed fears of conflict, with pressure groups claiming that more than 3,000 white farmers had been killed since the ANC came to power. A text message circulated the previous week had warned of a massacre of white people on Freedom Day, being the anniversary of the country’s first multiracial election. However, Nathi Mthethwa, the nation’s police minister, insisted that the threat of a race war had been greatly exaggerated – particularly by British tabloid newspapers (The Guardian of 8/5/2010, p. 34).

This did not mean, however, that the threat of terrorism from the more “conventional” sources could be safely discounted. In mid-April it emerged that an Algerian-based group had posted an online threat to bring “deaths” in an explosion on the day of the fixture between England and the US. The threats were made in a jihadist online magazine of the North African terror group “Al Qaeda in the Islamic Maghreb”, a militant organisation based in Algeria. The group announced that it intended to use a form of “undetectable” explosive which was capable of evading security checkpoints. Obviously this news put the tournament organisers on an increased state of alert (Daily Mail of 10/4/2010, p. 14). These fears were heightened with the news that a terrorist suspect arrested in Iraq had claimed that he had considered attacking Dutch or Danish fans at Cup (Associated Press, www.findlaw.com of 19/5/2010). The Danish element of this episode had clear overtones of the incidents which followed the publication by a Danish cartoonist two years previously of satirised images of the prophet Mohammad. The suspect in question, Abdullah Azzam Salih Misfar, immediately played down the seriousness of the threat, claiming that he had merely sketched notes for this idea and had given them to a senior Iraqi militant, from whom he had received no further response. Although not entirely reassuring, this news appeared to take the sting out of the security scare which this development had set in motion (The Guardian of 19/5/2010, p. 20).

Yet another source of potential World Cup disruption came from a source uncomfortable at home – in more than one sense. This Journal has not been, by far, the only organ which has carried accusations against the South African authorities that, amid the glamour and splendour of organising this showpiece tournament, it was ignoring the often desperate plight of its own population, who might conceivably have felt that the millions lavished on its organisation might have been better spent attempting to alleviate some of the abject poverty in which a large section of the indigenous population continued to find itself. As the start of the tournament approached, fears grew that this state of disaffection might conceivably find some violent expression at the event itself. This was particularly the case since the country had been convulsed by an increasing number of protests in the various townships, with impoverished communities demanding access to basic services. Demonstrations held during this period had been characterised by shootings, arson and stonings, prompting the government to raise security levels as the start of the tournament approached (The Daily Telegraph of 25/3/2010, p. 24).

Concern at safety issues was not restricted to the threat of wilful violence, whether perpetrated by terrorists or common criminals. There were also some serious question marks over safety procedures at the venues themselves, which became particularly acute when, with only a few days to go before the start of the tournament, a stampede developed at a stadium in Johannesburg which left over 15 people injured. This occurred as thousands surged to watch a pre-tournament warm-up friendly between the host nation and Nigeria, which had to be halted briefly because of the chaos. One
of the main questions facing organisers was why the fixture was staged at the Makhulong stadium which can only seat 12,000 spectators, rather than at one of the World Cup venues themselves. Entry to the event was free, which increased the likelihood of many more turning up to the fixture than the capacity allowed. One eyewitness described the crowd control as “atrocious”. The first rush came as stadium gates were opened to allow the fans in. Police soon closed the gates, but when they were reopened there occurred another rush, with many people falling and being trampled. Shortly after the second rush the gates were closed again and much of the crowd dispersed. (The Guardian of 7/6/2010, p. 17). It is true that not all the blame was laid at the door of the South African authorities, with many pointing the finger at FIFA for imposing the rule that World Cup venues should not be used for warm-up games. However, the world governing body disclaimed any responsibility, pointing out that there were plenty of other stadiums with a sizeable capacity, such as the 40,000-seater Orlando stadium in Soweto. They also rejected suggestions that they should adopt a more “hands-on” role in the organisation of freindlies in the host country during the run-up to the tournament, stating that this should be the sole responsibility of the teams concerned (The Guardian of 8/6/2010, p. S4).

The uglier side of the tournament – brutal evictions, disaffected locals and labour disputes

The threat of home-grown violent protest referred to in the previous section seemed to be accentuated by some of the tactics employed in order to present the most sanitised image of the country to the outside world during the tournament. More particularly attention was focused on the activities of certain groups whose services were employed for this purpose, especially the “Red Ants, a rented mob of what can only be described as licensed thugs. They became a growing force during the final few months before kick-off as the authorities started a campaign of “beautification” before the tournament started. This meant clearing away unsightly immigrant squatter camps.

Thus in late April, more than 100 Zimbabweans were beaten and evicted by the Red Ants from a derelict building on the main road to the Ellis Park stadium in Johannesburg, one of the tournament’s principal venues. This followed a series of Red Ant evictions ordered by the provincial Department of Public Transport along main roads within a mile of the stadium, which was to host five games. Hundreds more Zimbabweans were forcibly evicted from properties in the centre of the city. They also flattened over 100 shacks within a two-mile radius of the aforementioned Mbombela stadium – again, most of those evicted were Zimbabwean. This led human rights groups to warn of a return to the phobic violence which led to the deaths of many immigrants during the township riots of 2008 (The Sunday Times of 25/4/2010, p. 29).

There were also some serious question marks over the much-vaunted economic benefits which would benefit the nation’s people. This was initially seen one of the major attractions for the host nation. It should be pointed out that South Africa is one of the smallest economies ever to have organized the tournament. With 40 per cent unemployment and a further 30 per cent of the population subsisting on less than £100 per month, its balance sheet was infinitely more stretched by the event than was the case with recent host nations, such as Germany, Korea, Japan or France. However, as the event approached, it increasingly looked like the “playground of the rich” which its critics had decried. As final preparations were being made to receive some of the planet’s highest-paid sporting performers, benefits elsewhere in Africa from the tournament looked as elusive as ever. Even where the local population attempted to derive some profitable economic activity from the various fixtures, they appeared to have been frustrated. Thus under strict bylaws enforced at the insistence of football’s governing body, informal traders, being a crucial part of any African economy, were banned around the 10 stadiums where the games were to be played.

Even the future of the most important legacy project of the tournament, i.e. public transport, looked in jeopardy amid the reticence shown by the government to stand up to the nation’s powerful minibus-taxi industry.

Sepp Blatter, the President of the game’s world governing body, which is said to have earned more than £3 billion from sponsorship and advertising rights, has always insisted that the event was about “giving back to Africa what the continent has given to world football” through its players. The organization pointed to the 20 “centres of hope” (football academies) which it was scheduled to build. However, commentators such as radical Sowetan columnist Andile Mngxitama have dismissed these boasts, claiming that all FIFA has given the Africa is a month-long “feel-good” episode which will do
little in the long term to change perceptions or economic realities. More particularly, according to Mr. Mngxitama:

“The World Cup is a colonial playground for the rich and for a few wannabes in the so-called South African elite. Whereas in the past we were conquered, the South African government has simply invited the colonizers this time” (The Independent of 3/6/2010, p. 34).

He added that the £4 billion spent by the government on infrastructure development in the nine host cities should have been used to create sustainable employment in industry. Yet despite a measure of disappointment over immediate economic benefits, researchers have claimed that jobs created by these infrastructure projects have helped the country face up to the world economic recession. Udesh Pillay, of the South African Human Sciences Research Council, claims that 150,000 jobs have been created during the build-up to the event, and that this would contribute 0.2 to 0.5 per cent to the nation’s growth – a noteworthy achievement during a recession. However, there are few signs that the World Cup has rubbed off on the rest of the Continent. Although there was some excitement generated in some parts, especially in West Africa which had four nations participating in the tournament, the sense of anticipation was no greater than it would have been for any World Cup featuring such teams. Some commentators in these countries expressed the feeling that the South African embassies there could have done more in this respect (Ibid).

Another factor which caused a good deal of bitterness and antagonism was the pay dispute which erupted between stadium stewards and a security contractor during the first week of the tournament. The disgruntled workers had attempted to stay in the Moses Mabhida stadium following the Germany v Australia game in order to mount a protest about their remuneration. This protest action appears to have been discontinued in a brutal manner, with armed police charging into hundreds of workers, using tear gas and firing rubber bullets. Reporters from the Associated Press agency witnessed around 30 police officers charging into the crowd in order to drive them out of the stadium. One photographer claimed that police even fired tear gas at the protesters once they were outside the stadium. Around 100 police later surrounded a group of about 300 protesters on a street near the stadium and separated the men from the women. The protesters left peacefully following discussions with the police (Associated Press, www.findlaw.com of 14/6/2010).

Industrial unrest soon spread to other host cities. The following day, stadium stewards went on strike for better pay outside Ellis Park ahead of the game between Brazil and North Korea. Hundreds of workers chanted, whistled and sang outside the stadium after calling a strike around noon. It was claimed by some of the workers that the wages they received were considerably lower than those which they had been promised at the outset. Some even claimed that the original offer had been for £150 for a day’s work, but ultimately came away with just £19. Tensions between protesting stewards and the police also boiled over in Cape Town, with workers clashing with armed officers in the city’s streets before going on strike. For a while, the Green Point stadium, which was about to host the Italy v Paraguay match, was locked down, leaving fans in the torrential rain as freak storms battered the Mother City (Daily Mail of 15/6/2010, p. 75). In Durban, the original site of the unrest, protests resumed after the initial stand-off following the Germany v Australia match. This time, the workers were protesting about the fact that they had been banned from working following the outbreak of their industrial action, the police having taken over security at five of the 10 World Cup stadiums (Associated Press, www.findlaw.com of 15/6/2010). The workers were joined in their protest action by fishermen and other workers who claimed that their daily lives had been disrupted by the World Cup. In the same way that informal sellers had been banned from plying their trade outside the stadiums, as has been mentioned above, it appears that fishermen in Durban had been banned from fishing in a part of the city’s seafront where luxury hotels look onto the sea and an area populated by football fans (Associated Press, www.findlaw.com of 16/6/2010).

The unrest inevitably prompted a number of questions regarding the manner in which security arrangements had been contracted out by the authorities. This naturally attracted the interest of the South African media, who started to make attempts at examining the details of tenders such as that which led to the controversial Durban security contract. However, in so doing they became involved in a lengthy court battle with the world governing body FIFA and its local committee. More particularly questions were being asked about the manner in
which the contracts were awarded and who profited from preparations for the event, which has cost an estimated 5.6 per cent of South Africa’s gross domestic product (The Independent of 15/6/2010, p. 33). At the time of writing, the precise outcome of this litigation was as yet unknown.

Law and order during the tournament itself
So, apart from the wage riots described above, how did the tournament actually fare in terms of the maintenance of law and order – one of the main factors to have caused concern among the public and football authorities alike? Certainly the host nation seemed well prepared for any trouble – not only in terms of additional security, but also as regards the judicial fall-out of any criminality, with more than 50 courts especially designed to handle such cases having been established during the run-up to the tournament. With nearly 400,000 fans descending on the country for the event, it emerged that the government had spent £4 million for these judicial bodies to operate in the nine host cities. They had the brief of trying anything regarded as a crime under South African law and were set up because existing courts were already faced with a large backlog (The Daily Telegraph of 25/5/2010, p. 16). Travelling fans were also amply warned of some of the potential dangers ahead – such as drivers who could be lured to roadside incidents by motorists apparently in distress, as this could be a trap (The Daily Telegraph of 19/5/2010, p. S5). It would appear that all these measures proved most effective, given the relatively trouble-free atmosphere in which the tournament was allowed to proceed.

Certainly there were a number of incidents. There was a bad omen in the shape of the robbery of some members of the Colombian football team, who visited South Africa for a warm-up fixture with the host nation. This led to two employees of the hotel where the theft took place being arrested and charged the following week (Associated Press, www.findlaw.com of 28/5/2010).

With a few days to go before kick-off, a Portuguese photographer was held up at gunpoint in a World Cup hotel whilst two thieves stole camera equipment worth $35,000. Two other journalists were also robbed at the same hotel (Associated Press, www.findlaw.com of 9/6/2010). Three arrests were later made, and all the property was recovered. Two days later, three Greece players had £1,310 stolen from their hotel near Durban. FIFA also confirmed that a group of Chinese journalists had been attacked whilst covering the tournament (Daily Mail of 11/6/2010, p. 87). However, during the tournament itself there were remarkably few reported incidents. Nor was the tournament plagued by any significant instances of hooliganism. The most noteworthy incident came during the first week of the event, when South African police announced that they had detained a number of Argentine hooligans as a result of a raid at their accommodation, and that, as a result, 17 people were to be deported. The authorities had apparently been monitoring the hooligans, known as the “barras bravas” and observed some of them attempting to attend matches without tickets (Associated Press, www.findlaw.com of 16/6/2010). There were no reported incidents of terrorism.

Other law and order issues
Some of the law and order issues attending the tournament had nothing whatsoever to do with local criminality, hooliganism or terrorism, but emanated from some of the repercussions which the tournament and its results could produce in the participating countries. Here too, the authorities were on the alert – mindful perhaps of the incident which occurred 16 years ago, when a Colombian player was murdered in his home country as a result of having missed a vital penalty kick during a group match. Something similar threatened to develop during the 2010 tournament, after Nigerian midfielder Sani Kaita had been suspended after receiving a red card during his country’s Group B match against Greece. The African side were 1-0 ahead when he received his marching orders in the 33rd minute for kicking out at Vasilis Torosidis – after which they went on to lose 2-1. This, according to team spokesman Peteride Idah, resulted in the midfielder receiving over 1,000 death threats by email from within Nigeria, which were all being taken very seriously. As a result, security for the player was considerably increased, with South Africa’s national joint operational and intelligence organization confirming that it was giving this matter their attention ahead of the team’s next fixture, against South Korea (The Guardian of 22/6/2010, p. S9). In the event, no incidents were reported, although the Nigerian authorities will doubtless also be compelled to take preventative action.

The other problem concerned the possible repercussions of match results within the participating nations themselves. It is a sad fact that, when a national team loses, this is highly likely
to lead to an increase in domestic violence. Thus has prompted the authorities in The Netherlands, for example, to mount a remarkable campaign whereby enormous banners were displayed along the nation’s highways bearing the message “If our team loses, Daddy will hit us. Give the red card to domestic violence”. According to Johan Gortworst of the national Federation of Crisis Centres (Federatie Opvang), research on the subject had shown that, very often, men were tempted to vent their disappointment following a loss by their favoured team on their partners, with figures showing an increase of 8 per cent in domestic violence following such a result and even higher figures being recorded if the result was unexpected. Although this research was conducted in the US, Mr. Gortworst maintained that this phenomenon was not restricted by national frontiers. He also announced that this particular campaign would be continued in the nation’s football clubs even after the tournament had ended (Het Nieuwsblad of 15/6/2010, p.29).

Official sponsors in ferment – the ambush marketing affair
A phenomenon which has become almost as inevitable at large-scale sporting tournaments as last-minute labour disputes and rows over ticketing arrangements is that of “ambush marketing”, an issue which has frequently found its way onto the pages of this journal ever since its first manifestations at the Sydney Olympics of 2000. This is the term used to describe the practice whereby the manufacturers of products other than those who sponsor the event – and are therefore officially licensed to advertise their wares at the various events – attempt to use the event, and the massive media coverage which it brings in its wake, to ply their trade. This is an aspect which the world governing body FIFA takes very seriously. With around 30 per cent of its revenue emanating from its official sponsors, such as the “official” beer Budweiser, anything which can persuade the companies concerned that those millions have not been profitable spent, such as rival brands attempting to associate themselves with the event free of charge, will pose a major threat to the future of such revenues. However, the lengths to which some firms and authorities have gone to prosecute such dubious marketing manoeuvres has attracted at least as much ridicule as indignation. The World Cup would simply not have lived up to its expectations without an entertaining ambush marketing scandal – some would describe it less generously as the monsoon in the proverbial hot liquid receptacle – and we were not in any way disappointed.

It was not immediately evident that 36 women wearing bright orange suits at the match between Denmark and the Netherlands were advertising a brewery – although, as any sane person could have told the overzealous enforcers, the world-wide publicity which the company gained when every one of them was removed from the ground by stewards certainly has ensured that a global audience has become aware of the brand (The Guardian of 17/6/2010, p. G6). Although only a minuscule percentage of the world’s population can have been aware of this, the outfits in question are the symbol of an ale-advertising campaign in the Low Countries (Associated Press, www.findlaw.com of 15/6/2010). The matter would have remained at the relatively light-hearted level had not the heavy hand of criminal authority descended on the hapless females, with South African police announcing that they had in fact arrested two Dutch women at their Johannesburg hotel for their participation in the stunt. They were informed that they faced charges under the portentous Contravention of Merchandise Marks Act (Associated Press, www.findlaw.com of 16/6/2010).

Naturally, this turn of events gave rise to some strong reactions which caused a potential diplomatic dispute to brew – so to speak – between the game’s world governing body and the Netherlands authorities. The latter’s foreign minister, Maxine Verhagen, condemned FIFA’s handling of the incident, calling the arrest and criminal charges brought “a disproportional reaction”, adding: “It is outrageous that the two women have a jail term hanging over their heads for wearing orange dresses in a football stadium. If South Africa or FIFA wants to take a company to task for an illegal marketing action, they should start judicial procedures against the company and not against ordinary citizens walking around in orange dresses” (The Daily Telegraph of 17/6/2010, p. S5).

At the time of writing, the trial of the women concerned had yet to be commenced.

Conclusion: legal balance sheet positive – but is this all that matters?
The reader will not have been reliant on the reports and comments featured above to reach the conclusion that observance of the rule of law suffered no
major setback at the 2010 tournament, despite widespread gloom-laden predictions to the contrary. There were no bombs at or around the venues, no groups of supporters waylaid by machete-wielding gangs, and the actual criminality that did occur was, in fact, somewhat less than at a number of major sportfests organized in the allegedly more “civilized” world. There must be at least some national squads who now rue the amount of cash spent on importing their own security operatives. Some of the alleged breaches of the criminal law even had their entertaining side, as witness the episode involving the orange-clad enthusiasts with guttural accents referred to in the previous section.

It would be facile to end this feature on a rose-tinted note and hail this event as a “coming of age”, to use that laziest of clichés, of the Rainbow Nation. However, amid all the post-tournament euphoria, the darker side of the tournament cannot be euphemized away, and the brutal treatment of those who might have shed a ray of light on the indigent condition which too large a section of the local population continue to endure will remain as a stain on the entire event. Even the economic benefits which the tournament has brought to some parts of the country cannot obfuscate the question which loomed uncomfortably large during the entire month – was this the right and proper way in which to spend the resources of a country where, twenty years after the abolition of official racial segregation, the majority continue to live in conditions of abject penury? To pose this question amounts to more than guilt-ridden hand-wringing. It poses the question – frequently adumbrated in these columns and elsewhere – whether the world of sport would not be better served by organising such events in a less prodigal and more sustainable manner. There can be little doubt that the debate on this issue will continue for some considerable time to come.

Bullfighting controversy continues (Spain)

STATUTORY WARNING: This column refuses to recognise bullfighting as a sport, but will report on any development and measure which, actually or potentially, signals an end to this barbarous practice.

It has been extensively reported, both here and elsewhere, that in countries where bullfighting has assumed the status of a national institution, unceasing efforts to put an end to this practice have started to produce results. This has certainly been the case in the Spanish region of Catalonia, within whose Parliament the first moves had been made for the total abolition of this dubious tradition. A parliamentary committee set up to examine the issue had heard evidence from matadors, philosophers, writers and veterinary surgeons. Those opposed to the ban had marshalled their forces, even to the extent of calling on the services of French philosopher Francis Wolff, a professor at the venerated Sorbonne University and the author of a work enigmatically entitled Philosophy of the Bullfight. Somewhat disingenuously he put to the Committee the argument that fighting bulls would not exist without bullfighting, having been conserved as a breed precisely because of their “bravery” and having only one use – the one for which they were bred.

However, he was opposed by the Spanish philosopher Pablo de Lora, who argued that, over time, bullfights have increased in cruelty. In addition, the veterinarian José Zalivar, another opponent, informed the committee that the age-old claims that bulls experienced little pain when a matador sank his sword into its neck to kill it were wrong. He claimed that, in the vast majority of cases, the matador missed the vital spot which would cause the animal to die quickly, and described the bull’s demise as “a slow, agonising death”. On the side of those against the ban, Salvador Boix, the manager of José Tomas, the toreador whose daredevil style has made him the hero of bullfighting “purists”, accused the Catalanian parliament of hypocrisy for attempting to ban bullfighting whilst adopting measures to protect the correbous, a regional tradition in which burning torches are attached to bulls’ horns. He described the proposed ban as “just an attempt to force bullfighting fans into hiding (The Daily Telegraph of 7/3/2010, p. 12).”

Elsewhere in Spain, however, the proposed ban by Catalonia seems to have produced the opposite effect. In a clear attempt at provocation to its age-old rival Barcelona, the capital Madrid has officially elevated bullfighting to the status of a protected art form, with the local government declaring it as a protected item of the region’s cultural heritage. Esperanza Aguirre, head of the conservative regional government in Madrid, announced in early March 2010 that the practice was to be included in the list of items of “special cultural value” which were protected by law. Not to be outdone, the eastern regions of Valencia and Murcia immediately declared the bullfight part
of their protected heritage, thus confirming its new status as a key weapon in the long-running battle of identities waged between the nation’s fractious component parts. The move places the corrida on the same cultural level as the Spanish capital’s most important historical buildings and monuments. In addition, it gives bullfighting organisations special tax facilities and, as is claimed by critics, could see those attempting to ban the practice being taken to court for “damaging” the region’s cultural heritage (Ibid).

As the debate intensified in official Catalanian circles, some attempts were made at producing a compromise. Thus the region’s Socialist party presented a somewhat quirky proposal to save the controversial tradition, to wit bullfighting which incorporated the “dignified treatment of animals”. If accepted the proposal would entail that an allegedly “kinder” version of bullfighting would survive in the region subject to limits on the length of time for which the animal could suffer in the final stages, strictly delineated sword dimensions and the prohibition of drug use. The bulls would also have greater opportunities to earn the now-rare indulto, or pardon, which is their own escape route out of the ring alive. The Socialist plan was supported by the pro-bullfighting association, Platform for the Extension of the Fiesta, which was formed in order to counter protests by animal rights groups in the region. However, the groups campaigning to have the ban imposed ridiculed the proposal, particularly in the light of the 180,000 citizens who had signed a petition to place the bullfighting ban on the local parliamentary agenda. At the time of writing, the fate of bullfighting as essentially in the hands of the nationalist Catalan party, whose delegates were expected to back prohibition (The Independent of 12/5/2010, p. 31).

**Tournament bid developments**

**Football World Cup 2018-2020**

The battle to stage this most prestigious of world sporting tournaments has already featured in this issue in relation to the allegations of corruption made by a certain British administrator in mid-May 2010 (see above p. 77). It should also be reported that the English bid for the 2018 World Cup did itself no favours by risking the wrath of world governing body FIFA by breaching bid guidelines – and that was even before the royal reception given by its Football Association which has considerably angered rival bidders. London Mayor Boris Johnson was particularly active on the 2018 bid as the 2010 tournament proceeded in South Africa. This included addressing – after being introduced by bid chief Andy Anson – a near 100-strong audience of guests from the 12 selected English host cities and sponsorship personnel which had been flown to South Africa and subsequently “wined and dined” as part of the £900,000 spend by 2018 at the World Cup. The 2018 function was held at the Baia seafood restaurant in the middle of Cape Town’s busy Waterfront on the eve of the game between England and Algeria in full view of other diners, despite FIFA regulations forbidding bid promotional events during the tournament. England’s campaign team defend their “direct” strategy saying it was in a private room at the restaurant, and that everyone present was already connected to the bid. However, coming in advance of the parading of Princes William and Harry in a country house hotel to eight voting FIFA Executive Committee members in a 2018 initiative dressed up as an FA event, it gives the impression England are testing the resolve of the ethics committee to the limit (Daily Mail of 19/6/2010, p.115).

Regardless of any assessment of the damage which these developments may have caused to the bid submitted by England for the 2018 tournament, it seemed, at the time of writing, that the Russians’ high-profile campaign was propelling them to pole position in the tendering process. This was particularly the case when it was learned that the nation’s president, Dimitry Medvedev, had been pressed into service in the contest. This was particularly in evidence during a state vists paid by the Guatemalan President, Colom Caballeros, to Moscow as part of continued negotiations over a series of proposed trade deals. This followed a $1 million loan accorded by Russia to the Central American republic in order to enable them recover from a recent drought. Whilst no-one is suggesting that the World Cup was the principal motivating factor in this display of official warmth between the two nations, it is a fact that an important member of the 24-strong panel which is to make the final decision on the 2018 bid is Guatemalan Rafael Salguero (The Mail on Sunday of 25/4/2010, p. S4). However, not to be outdone, former US president Bill Clinton also threw his weight behind his country’s bid, drawing a parallel between his work in global philanthropy since leaving office in 2000 and the efforts made by football’s various authorities to promote
the game “as an agent for positive social change” (The Daily Telegraph of 18/5/2010, p. S5).

At all events, the nine bidders for the 2018 and 2022 tournaments submitted their technical documents to world governing body FIFA in mid-May. Four candidates from Europe, four from Asia as well as the US lined up in alphabetical order to present their submissions on stadiums, host cities and infrastructure to FIFA president Sepp Blatter. FIFA will make inspection visits to the bidders between July and September 2010, and its executive members will select the two hosts in December (Associated Press, www.findlaw.com of 13/5/2010).

France wins hosting rights for Euro 2016
In late May 2010, it was learned that, following a personal appeal by President Nicolas Sarkozy, France defeated Turkey and Italy on Friday for the right to host soccer’s European Championship in 2016. The executive of European governing body UEFA voted 7-6 for the French bid over Turkey after Italy was eliminated in a first-round points ballot. France will thus be the first country to host the championship three times. The result was announced by UEFA's French president Michel Platini, who captained his country to the European title in 1984 on home soil. Mr. Platini himself did not vote. The close-fought victory came after Mr. Sarkozy and former France star Zinedine Zidane supported their country's case in the final presentations. Sarkozy said the French government would help guarantee the projected €1.7-billion-euro cost of building and renovating stadiums. France’s star appeal appeared decisive against a Turkey bid team which has now lost three straight Euro bidding contests. Turkey had brought its own head of state, President Abdullah Gul, as it sought to secure its first major soccer tournament. He had called on UEFA to take a “historic decision” and help bring Turkey, which has a Muslim majority, closer to the heart of Europe. Italy, which hosted the Euros in 1968 and 1980, lost for a second consecutive vote. It was the outsider on this occasion, after going in as the favourite and losing to the joint bid from Poland and Ukraine for Euro 2012. Mr. Platini, however, praised the three “exceptional” candidates.

The 2016 championship will be the biggest yet, adding eight more countries for a 24-team field playing 51 matches over one month. The final will be played in the Stade de France, Paris, which hosted the 1998 World Cup final won by the Zidane-inspired host nation. France staged the inaugural four-team European finals in 1960, and the eight-nation finals in 1984. Its bid focused on creating family-friendly stadiums as a legacy for future generations. It has been reported in this organ and elsewhere that the domestic game also has been troubled with outbreaks of fan hooliganism this season. The French president said he wanted the Euros to help French soccer be free of the “cancer of violence”, a football with a human face and a football “that is a festival and a party”. France will choose nine stadiums from a pool of 12, including new venues in Bordeaux, Lille, Lyon and Nice, major renovations in Marseille and Strasbourg, as well as upgrades to existing arenas in Lens, Nancy, St. Etienne, Toulouse and Paris’ Parc Des Princes. The project calls for €662 million in public funding.

Rome defeats Venice as Italy’s bid city for 2020 Olympics
In late May 2010, it was announced that Rome was to be selected as Italy’s bid city for the 2020 Summer Olympics after Venice was dropped before a vote could take place within the Italian Olympic Committee (CONI). Venice had been eliminated before the final vote, with an internal CONI evaluation committee declaring the bid inadequate. With the vote reduced to a formality, Rome won 68-1. Rome had proposed a budget of $61 million, with a bid which included existing venues to the tune of 70 per cent (Associated Press, www.findlaw.com of 28/5/10). The International Olympic Committee is due to take the final decision in 2013.

Vancouver 2010: verdict negative
During his term of office, Juan Antonio Samaranch, the former President of the International Olympic Committee whose obituary is featured elsewhere in this issue (see above, p. 62) had adopted the somewhat tedious habit of signing off the closing ceremony of each tournament by describing the latter as “the best Games ever”, regardless of the inherent quality of the events which punctuated it. In the light of what has happened at some Games during the past few decades, it is legitimate to ask the question whether a new award should become similarly institutionalised, to wit that of “worst Games ever”. Given the multitude of adverse reports which have attended the 2010 Winter Games, held in
Vancouver, Canada, it would seem that a strong candidate for this dubious distinction has already emerged. It would appear that even the organisational chaos and naked greed of the 1996 Atlanta Games, or the financial disaster of the 1976 event, which bankrupted the host city Montreal, cannot surpass the list of failures at this year's tournament, which is generally regarded as such a disaster as to cast serious doubts on the continued existence of these events.

The tournament not unexpectedly attracted a number of observers from those who, actually or potentially, will have the responsibility of hosting both types of Olympics in the future. According to some commentators, they merely had to visit one particular venue to be given an object lesson in the art of how not to do it. The venue in question was the Cypress Mountain, where buses, tickets, food, lavatories, and even the mountain itself, were reported to have become a logistical failure. At one particular point, 28,000 tickets to all events at Cypress venues were cancelled. The reason given for this decision was concern at spectators falling through the thin snow layer and into the hay bale base beneath. This affected some spectators more than others – most notably those who had spent vast amounts of money in order to see their relatives perform, only to be excluded from the events in question. Organisers explained that they had to preserve the tonnes of snow which had been airlifted following a night of bad weather which claimed several feet of snow in the spectator area. At the same time there was heavy snow at venues which many believed should have been chosen in preference to Cypress (The Daily Telegraph of 17/2/2010, p. S10).

In addition, as has been the case with similar global tournaments (see the football World Cup described earlier!) questions were raised at the wisdom of holding and financing such an event in the face of pressing social problems which arguably merit preference. Vancouver is a city which is officially honoured as one of the most liveable cities in the world. Yet it is also a place which accommodates what has been described as the poorest postal code in Canada – 15-odd blocks of Downtown Eastside. This is a socially deprived area, where urine puddles, sunken cheeks, empty gums, calloused hands and grizzled chins bear testimony to the grinding poverty which pervades the area. This is in spite of the fact that, in accepting the Games, Vancouver pledged to remedy the blight of Downtown Eastside and the indigence which is evident everywhere. These were to be not just the Green Games, but also the Socially Responsible Games. The pledges included building more accommodation for the very poor to give them a better chance in life. By the city's own admission, many of these objectives have been missed. What made this issue particularly sensitive was the fact that an estimated 30 per cent of the homeless were aboriginal, in an area which has the largest off-reservation aboriginal population in the country. There is also the tragedy of the “missing and murdered women” from this area, who resort to the sex industry in order to survive, but vanish (The Independent of 12/2/2010, p. 31).

There have also been health and safety issues at the Vancouver Games, which are dealt with in the relevant section (below, p. 129).

Concern rises at Brazilian preparations for 2014 World Cup

The South American nation, which has proved itself over the years to be one of the leading footballing countries, has been given the honour of hosting the next World Cup tournament four years hence. However, concern has been rising at the progress made in preparing for this event. In mid-May, Jerome Valcke, the general secretary of world governing body FIFA, was moved to express his alarm at how little work had been carried out in the course of the 30 months since Brazil was selected to hold the competition. Obviously the world’s footballing administrators are anxious to avoid the concerns which had punctuated the run-up to the 2010 tournament which, in spite of its ultimate success story, had nevertheless kept the footballing world in a constant state of nervousness right up to the final months. According to Mr. Valcke:

“It is amazing that Brazil is already very late. I got a report on the status of the Brazilian stadiums and I have to say it is not very nice. The stadiums are the basic points we need to have a World Cup and in Brazil most of the deadlines are already over and we have to work on new deadlines. They are proving how difficult it is to hold a World Cup in Brazil, just as it was in South Africa. The red light has been switched on. Brazil is not on the right path. This year there is a presidential election, so almost nothing will happen. Next year, carnival comes along. So is everything going to start only after carnival?” (The Daily Telegraph of 7/5/2010, p. 59).

Because of the concerns raised by this apparent lack of progress, the 12 cities...
nominated as venues for the tournament were given one month to prove that they are capable of delivering the promised stadium projects. Brazilian inspectors accordingly started a two-week inspection of the 12 projects, which include five new stadiums and comprehensive upgrades of Rio de Janeiro’s iconic Maracana ground, which is scheduled to host the final, as well as Sao Paulo’s Morumbi stadium and five others around the country. Ricardo Teixeira, the President of the Brazilian Football Federation (CBF), warned all the host cities that they must satisfy the authorities that they have the finances in place to fund construction or risk having the honour taken away from them (Ibid). At the time of writing, the relevant progress report had yet to be published.

These apparent difficulties will no doubt concentrate the mind of the International Olympic Committee (IOC) in relation to the nation’s ability to face up to the task of hosting the 2016 summer Games. This will create a good deal of work for the person selected to head the Committee’s oversight panel for the tournament, to wit the former Olympic hurdles champion, Moroccan Nawal El Moutawakel. Ms. El Moutawakel, who also chaired the IOC’s evaluation commission which assessed the bids for the 2012 and 2016 Games, becomes the first woman to lead an Olympic coordination panel and is regarded as a strong contender to succeed Jacques Rogge as IOC president (Associated Press, www.findlaw.com of 13/1/2010).

Were the 2004 Olympics partly responsible for the Greek financial crisis?

This column is known amongst its readers for its distinct lack of enthusiasm and admiration for the world’s major sporting jamborees, in particular the Olympics, in view of the ever-mounting cost of staging them – at the expense of more worthwhile projects – and the availability of alternative solutions, such as establishing a permanent site for the Games at a mutually convenient and historically symbolical venue. The present writer trusts that his readership will discount an element of Schadenfreude whenever he reports on events which appear to vindicate his position and which, far from equating to Private Eye’s “Curse of the Gnome”, are capable of being counterbalanced by apparently positive developments resulting from some of these sportfests. In fact, any danger of complacency which may have inspired the author of this column in relation to the developments and speculations developed below was rapidly dissipated when it is considered that they concern the country which he had, in previous contributions, identified as the ideal “historically symbolical” venue – to wit, Greece.

That the 2004 Olympics in Athens proved to be a resounding success in sporting and organisational terms is beyond dispute, and was in fact acknowledged as such in the various items devoted to these games in this Journal. Yet it is a fact that the wider consequences of the event have remained controversial, particularly in view of the enormous financial demands which the organisation of the tournament made of a relatively small nation which could not be counted amongst the most prosperous in the European Union. Yet this is also a nation which “has form” in allowing its ambitions to outweigh its capacity. In fact – of the readership will pardon the facile metaphor – it can be claimed without incurring accusations of hyperbole that, when it comes to overspending, Greece gets the gold medal. Successive Athens governments have failed to balance their budget in nearly 40 years, and the country narrowly averted bankruptcy in the late spring of 2010 before panic-stricken European partners grudgingly put up massive rescue loans. And it is a fact that, whilst there are many factors are behind the crippling debt crisis, the 2004 Summer Olympics in Athens has drawn particular attention. If not the sole reason for this nation’s plight, some point to the Games as at least an illustration of the shortcomings inherent in Greek governance.

Their argument starts with more than a dozen Olympic venues, currently vacant, fenced off and patrolled by private security guards. Stella Alfieri, an outspoken anti-Games campaigner, says they marked the start of Greece’s irresponsible spending binge. The former member of Parliament who represents a minority Left-wing party said that she felt vindicated, but that at the same time it was a tragic development for the country. She claims that the Greek authorities exploited Greek people’s feelings of pride and derived the full benefit of such demagogy. In the process, claims Ms. Alfieri, “was totally squandered in a thoughtless way” (Associated Press, www.findlaw.com of 3/6/2010). The 2004 Athens Olympics cost nearly $11 billion by exchange rates, double the initial budget. And that figure that does not include major infrastructure projects rushed to completion at
inflated costs. In the months before the games, construction crews worked around the clock, using floodlights to keep the work going at night. In addition, the bill for security alone was more than $1.2 billion.

Six years on, more than half of Athens’s Olympic sites are barely used or stand empty. The long list of mothballed facilities includes a baseball diamond, a massive man-made canoe and kayak course, as well as arenas built for unglamorous sports such as table tennis, field hockey and judo. Even those sparse opportunities to exploit such venues commercially appear to have been missed. Don Porter, president of the International Softball Federation, claims that his organization made an offer several years ago to maintain the Olympic softball venue and use it to host events but never received a reply. Now it stands overgrown with weeds, unmaintained and unused. In addition, potential deals to convert several venues into recreation sites, such as turning the canoe-kayak venue into a water park, seem to have been stalled by legal challenges from residents’ groups and Byzantine planning regulations.

Criticism of the Olympic spending has sharpened recently, after the Greek parliament launched an investigation into allegations that German industrial giant Siemens AG paid bribes to secure contracts before the 2004 Games. A former Greek transport minister has been charged with money laundering after he told the inquiry that he had received more than $123,000 from Siemens in 1998 as a campaign donation.

International Olympic Committee president Jacques Rogge has described linking the debt crisis to the games as “unfair”. He argues that Athens continues to reap the benefits from its pre-games overhaul of the city’s transport systems and infrastructure. He added: “These are things that really leave a very good legacy for the city … There have been, of course. You don’t build an airport for free. Had Athens still been outmoded, the economy would have been much worse probably than it is today.” (Ibid)

Greek Olympic officials insist the scale of the country’s dire financial problems, as well as its staggering national debt of $382 billion, are simply too big to be blamed on the 2004 Games budget. Some agree with this view. Andrew Zimbalist, a US economist who studies the financial impact of major sporting events, claims that, put in proper perspective, it is hard to argue that the Olympic Games were an important factor behind the Greek financial crisis. However, he did admit that it was “likely that they contributed modestly to the problem”. The empty or underused facilities remained an issue and the maintenance and operating costs continued to impose a burden. That said, stated Mr. Zimbalist, Athens had also “benefitted from infrastructure development and the Greek public debt is $400 billion” (Ibid)

In preparation for the Games, Greece’s densely populated capital was given a new metro system, a new airport, and a tram and light railway network, along with a bypass highway, while ancient sites in Athens’s city centre were connected to a cobblestone walkway. It is, incidentally, those advantages which organizers of the 2012 London Games are quick to point out, as Britain now also faces high public debt levels.

Over the last decade, Greece’s budget deficit remained well above the limit set by the European Union of 3 percent of gross domestic product, but rose abruptly last year to reach an estimated 13.6 percent, i.e. the highest level since Greece was previously in recession in 1993. Greece will receive up to $135 billion in “bailout loans” until 2012 from the International Monetary Fund and European governments worried the Greek crisis could damage the euro. Prime Minister George Papandreou blames the debt crisis on decades of poor management, postponing unpopular reforms, and vast clientele networks set up by political parties, promising government jobs, social security perquisites and loss-making regional projects to win votes. Nassos Alevras, the lead government official for Olympic projects, insists that, overall, the games carried a net gain including a tourism boost. He said: “The issue of venue use is a sad story (…..). Plans for post-Olympic use were later ignored. [However], the money spent on the Olympics is equivalent to one quarter of last year’s budget deficit. So how can the amount spent over seven years of preparation for the Olympic Games end up being considered responsible for the crisis? That’s irrational” (Ibid).

The present writer will obviously continue to monitor the situation in relation to the long-term consequences of such tournaments with the keenest of interest.

Commonwealth Games 2010: same old story? (India)

At the time of writing, the world was awaiting the start of another great carnival of sport. As was reported earlier,
we hailed the 2010 World Cup for the sporting success it undoubtedly was whilst at the same time uneasily suppressing our reservations about the possible benefits, or the absence of them, to the great majority of the indigenous population. Even before that particular tournament commenced, however, news was coming through of a disturbing report into the next such event, also taking place in a corner of the former British Empire where the desperately poor vastly outnumber even the modestly affluent. The, scheduled to start in Delhi in early October 2010, had already been characterised by concerns over security, which was quite understandable in the wake of the terrorist atrocities suffered in the country in recent times. Infinitely more worrying than the possible threat to a few thousand privileged visiting foreigners, however, was a new report by the Housing and Land Network, an arm of the global movement Habitat International Coalition, which suggested that by the time the Games were to begin, around 140,000 families would have been evicted from their homes to clear the space for the lavish facilities now felt to be a mandatory feature such events (The Guardian of 25/5/2010, p.S10).

In fact, for 100,000 such families, it was already too late. In a disturbing echo of the events in South Africa during the summer, they had been moved out of their shanty towns and “resettled”, a word which has a deceptively comforting sound. Normally, the victims of such draconian measures find themselves relocated to distant places where the prospects of work are even more remote and there are no schools for their children. It is anticipated that a further 40,000 families will soon share this experience in order to allow athletes to demonstrate their prowess and commercial sponsors to advertise their wares to a global audience. The report in question was drafted by Miloon Kothari, a former United Nations human rights expert. He also alleged that “tens of millions of dollars”, originally intended to fight poverty in Delhi had instead been used to fund the Games, for which the budget is now around 20 times its original estimate, making the fourfold rise in the London 2012 budget seem almost like prudent housekeeping.

As early as January of this year, Mr. Kothari had already called for the Indian government to be held accountable for “persistent human rights violations against the homeless” and “a clear violation of [its] commitments under constitutional and international law” to make provision for its poor. Now the opportunity to present Delhi as a “world city” and to make money for those with vast commercial interests appears to have taken precedence over such commitments, as indeed seems to have been the case in South Africa, where, as reported earlier, the “people’s game” was out of the reach of all but a tiny minority of the population (Ibid).

Yet another uncomfortable parallel with the events in South Africa materialised when a panel set up by an Indian court reported that migrant workers rushing to finish buildings for the Commonwealth Games in Delhi in October were living and working in “rock-bottom” conditions which infringe Indian laws. The committee submitted a report accusing government-appointed companies of denying minimum wages, adequate accommodation, basic equipment and medical care to many of the 17,000 workers on the Games sites. According to Arundhati Ghose, a former Indian Ambassador to the United Nations, and one of the five panel members:

“They’re in such a hurry to finish that they’re cutting corners where they shouldn’t. This could have been an occasion to show the rest of the country how to do things, but they haven’t. You can’t be proud if you treat the people who built the venues so badly” (The Times of 19/3/2010, p. 41). She called for an immediate investigation into reports that 43 workers had died, as compared with 6 reported fatalities during preparation for the Beijing Olympics in 2008. She explained that the panel did not have “enough time to look into that,” adding that the panel had inspected ten venues in one month. She also called for contractors responsible for the worst violations to be fined or jailed, citing cases where there were only four lavatories for 150 workers.

The Delhi High Court appointed the panel in January in response to a public interest lawsuit filed by a non-governmental organisation called the People’s Union For Democratic Rights. The panel’s official report described the overall situation as “rather tragic” and workplaces as “extremely unclean, unhygienic and unsafe”. Mike Hooper, chief executive of the London-based Commonwealth Games Federation (CGF), which owns and controls the Games, gave his support to the panel’s recommendations, saying that there was “no excuse for operators or contractors to circumvent the laws of India”. The report in question represented the latest embarrassment
for Indian authorities as they hurried to complete preparations for the country’s biggest international sporting event since the Asian Games in Delhi in 1982. There had already been widespread allegations in the media that contractors were cutting corners by employing child workers on the sites.

The Indian authorities are clearly hoping that the Games will highlight the country’s economic progress over the past two decades and has started a series of important infrastructure projects in Delhi, including a new airport and a metro extension. But with three months until monsoon rains slow work further, the main stadium remained a building site, the swimming complex a pile of rubble and the metro extension behind schedule. The organisers continue to insist that everything will be finished on time and the Games will be the “best ever” (once again, eerie echoes of earlier reports!).

However, the CGF has given expression to its concerns, saying that venues needed to be tested two months before the event. Michael Fennell, the CGF president, told reporters in Delhi that there remained “a lot of work still to be done” (Ibid).

**Briatore wins appeal and negotiates return (motor racing)**

It will be recalled from a previous issue of this Journal ([2009] 1 Sport and the Law Journal p. 72) that, as a result of his part in the “crashgate” race-fixing plot at the 2008 Singapore Grand Prix tournament, Flavio Briatore, then the Renault team principal, had been issued with an indefinite ban by the world governing body, the FIA. Engineer director Pat Symonds, for his part, had received a five-year suspension. Both immediately launched an appeal against these decisions before a French tribunal de grande instance (equivalent to the English High Court). The new year 2010 was but a few days old when it was learned that the court overturned both bans on the grounds that these penalties were invalid because of “irregularities” in the FIA decision-making process following the investigation into allegations that the two had conspired with driver Nelson Piquet Jr. to arrange a deliberate crash which helped team leader Fernando Alonso to win the race. The court found that the world governing body did not have the authority to issue the penalties in question because neither Mr. Briatore nor Mr. Symonds were required to hold a licence to perform their activity and were thus beyond FIA jurisdiction. It ruled:

“The FIA can sanction licence holders, leaders and members of the ASN (national sporting authorities) but it cannot, with respect to third parties, take measures equivalent to a sanction. (…) The decision of the World Council was presided over by the FIA president who was well known to be in conflict with Briatore. The decision of the FIA World Motor Sport Council is not annulled but declared irregular, and rendered without effect in its provisions against Mr. Briatore and Mr. Symonds” (The Independent of 6/1/2010, p. 58).

The wording of this decision appears to indicate that the court accepted that there was a bias in favour of the ban by the governing body because of Briatore’s dispute with FIA president over a threatened breakaway world championship, as well as other team issues, and that Mr. Mosley had played a prominent part in both the investigation of the allegations and in the determination of the penalties (Ibid). The court also admonished the FIA for summoning mr. Briatore by email with only three days’ notice, and for failing to provide him with any documents or charges before the hearing (Daily Express of 6/1/2010, p. 72). Initially, it seemed as though this courtroom saga was to continue, since the FIA announced a few days later that they intended to appeal against the French court’s ruling. This meant that the suspension against Messrs. Briatore and Symonds remained in place for the time being (The Guardian of 12/1/2010, p. S8).

However, three months later both men reached an out-of-court settlement with the FIA which was intended to draw a line under the whole affair. Under this arrangement, Briatore and Symonds have the option of returning to the sport in 2013. The pair admitted to their involvement in the “Crashgate” affair, in return for which the FIA agreed to abandon its appeal against the French court ruling. In addition, the men have agreed to “abstain from any operational role” in Formula One racing until the end of 2012, and in any other competition registered under the FIA calendar until the end of 2011. Effectively, this means, in Briatore’s case, a reduction of the lifetime ban to three years (The Independent of 13/4/2010, p. 55). The FIA also appeared to have taken on board some of the criticisms of their internal procedures made by the French court.
when, in the same statement as that which announced the deal, they acknowledged the need for “structural reform” aimed at preventing “another misunderstanding” (The Daily Telegraph of 11/4/2010, p. S20).

It would, however, seem that the legal implications of this affair have not yet reached their full conclusion. In early April 2010, it was learned that Nelson Piquet père et fils intended to launch a court action against Mr. Briatore over a press release issued by the Renault F1 team in which the two were accused of giving false evidence to the FIA and of blackmailing Renault F1 (The Independent of 1/4/2010). No further details are available at the time of writing.

UAE defies ban on child camel jockeys

It will be recalled from a previous issue of this Journal ([2005] 3 Sport and the Law Journal p. 78) that a few years ago, after considerable pressure from campaigning groups, the United Arab Emirates (UAE) had banned anyone under the age of 18 from taking part in camel races as jockeys. Youngsters had been killed or hurt, incurring head and spinal injuries as well as damaged genitals. Under the new law, the use of children as jockeys is punishable by three years’ imprisonment and fines. Prior to the ban, there were some 3,000 child jockeys in the country, many of them trafficked from Pakistan, Bangladesh, Sudan and Mauritania. However, the pressure group Anti-Slavery International claims to have uncovered evidence that the law is being flouted on a large scale. Photographs taken by them show children with ill-fitting hats falling over their eyes at an event attended by dignitaries and uniformed police officers (The Independent of 3/3/2010, p. 25).

Catherine Turner, a child labour expert at the pressure group, conceded that anecdotal evidence suggested that fewer child jockeys had been involved in camel racing since the ban took effect, and that the under-age jockeys were older than before. However, the organisation’s observers openly photographed abuses at the course in question. They spoke to children at the event who claimed to be from the UAE, but their appearance and the languages they used aroused suspicions. The group expressed its concern at the fact that the race was attended by police officers and UAE dignitaries, which seemed to indicate that child protection was not being taken seriously (Ibid).

Gaming law developments

ECJ decision leads to calls for overhaul of gambling laws

In early June 2010, the online betting industry called for an overhaul of European Union gambling legislation after one of its courts upheld Holland’s decision to bar Ladbrokes and Betfair from the Dutch market. The EU Court of Justice (ECJ) ruled that EU law permitted the Netherlands to ban the bookmaker and betting exchange from offering bets to Dutch gamblers if its aim was to combat “fraud and crime”. Both companies dismissed Dutch claims that giving them access to the market would increase problem gambling, and expressed their belief that the principal objective of the ban was to preserve the Netherlands’ state-licensed monopoly of lottery operator De Lotto.

Ladbrokes claimed that Holland’s stance was “hard to reconcile” with its expansive gambling policy, which, it claimed, is characterised by the introduction and active advertising, marketing and promotion of new gaming products. John O’Reilly, who heads Ladbrokes’s e-gaming business, said the decision clearly demonstrated the fragility of the entire Dutch legal framework in relation to gambling.

In 2008, the Netherlands Supreme Court (Hoge Raad) requested the ECJ to give a preliminary ruling on the question whether its position was compatible with EU law allowing for the free movement of goods and services across the member states. Betfair described the notion that online gambling was more dangerous than other forms of betting as being “without foundation”. According to Tim Phillips, its European public affairs spokesperson: “Today’s judgment once again demonstrates the need for the European Commission to take a lead on this issue, so that we can separate fact from fiction and settle the online gambling debate once and for all” (The Daily Telegraph of 4/6/2010, p. B2).

EGBA, the body representing the electronic gambling industry, called on the EU to propose legislation at the Community level, with infringement procedures against obstructive member states where necessary. Its Secretary General, Sigrid Ligné, said that the internet raised new issues and challenges which could not be resolved through the judicial process. She urged the Netherlands to follow the examples of Italy, Denmark and France, which have recently decided to liberalise their gambling markets. For their part, the
internet gambling group Sportingbet said it hoped to agree a settlement this year with US authorities to expunge all liabilities associated with previously taking illegal bets from American citizens. “I would hope for something in this current year” said Andrew McIver, its chief executive (Ibid).

New Belgian law on gaming

In January 2010, the Belgian Parliament adopted a new law on gaming, officially entitled the Law on Gaming, Betting, Gaming Establishments and the Protection of the Player. This replaced the previous Law of 1999, which had itself fundamentally altered the gaming landscape in the country. It applied a very broad definition of what constituted “gaming” and introduced a differentiated set of licences and licensing categories. Ten years on, however, the need for change had become evident as a result of a number of recent developments, especially internet gambling. The new Law has considerably simplified the system and made it a good deal more coherent. Various grey areas have been clarified, and virtually all types of gambling are now invigilated by the most appropriate body for this purpose, i.e. the Gaming Commission (Kansspelcommissie). The new Law has also introduced important safeguards for the gambler. However, according to the author Nele Hoexel, the Law presents a number of aspects which are deserving of criticism, more particularly as regards the domestic betting sites, which stand to be badly affected by such strictures as the ban on the use of credit cards (“De wet op de kansspelen, de weddenschappen, de kansspelinstellingen en de beherming van de speler” in [2010] Rechtsskundig Weekblad p. 1330).

Major review ordered of New Jersey gaming, sports and entertainment laws (US)

In early February 2010, it was learned that the Governor of the US state of New Jersey, Chris Christie had set up a seven-member commission to find ways of solving the problems currently faced by the state’s troubled gaming, sports and entertainment industries. Under an executive order by Mr. Christie, the New Jersey Gaming, Sports and Entertainment Advisory Commission must deliver its recommendations to the governor by the end of the fiscal year. Announcing the creation of this commission, Mr. Christie said the industries have significant problems and a major impact on the state’s economy. The panel will examine what the fate should be of the New Jersey Sports and Exposition Authority, the Meadowlands and Xanadu retail and entertainment complex and the state’s horse racing industry. Christie also invited proposals on how to promote Atlantic City as a resort destination. He added: “The bottom line for success is to exploit to the greatest degree possible the assets that New Jersey has in order to benefit the taxpayers and the citizens of the state. I don’t think anyone could argue at the moment that that’s not happening”.


Mr. Christie noted the NJSEA’s $38 million deficit for 2010, the circumstance that the state had already spent $160 million in rent prepayments at Xanadu, a horse racing industry projected to lose $22 million this year and continual declining revenues at Atlantic City casinos, which last month recorded their worst financial returns since 1997. Meanwhile, lawmakers would also undertake their own examination of the NJSEA, starting with a hearing later that month. A report by Mr. Christie’s transition team suggests that the NJSEA should be seriously looked into and possible disbanded. More particularly it stated that, with a $38 million dollar budget shortfall which will need to be made up by the state’s taxpayers in 2010, it is important that the entire mission, structure and even very existence of the NJSEA be questioned.

The NJSEA, created in 1971, operates the Meadowlands, which includes the stalled Xanadu retail and entertainment project and the new Giants and Jets football stadium, as well as the nearby Izod Center, the Monmouth Park Racetrack in Oceanport, and the new and historic Atlantic City Convention Centers. Leading the commission will be Jon Hanson, a former head of NJSEA who also chaired Mr. Christie’s transition team on gaming, sports and entertainment, an indication that the commission recommendations may not depart too far from the teams’ conclusions.

The major problems the commission will be required to solve include:

Xanadu: The stalled giant retail and entertainment complex next to the Izod Centre and across a highway from Giants Stadium was scheduled to open in 2007. A new opening date for the sprawling $2 billion complex has not been set and the viability of the project is currently in question.

Izod Center: A deal to move the New Jersey Nets from the arena to Newark’s Prudential Centre for two years while a new arena is being built in Brooklyn is
on hold. At issue is the question whether the Nets will pay $7.5 million in penalty fees for breaking the team’s lease at the Meadowlands. The Nets are planning to move to Brooklyn by 2012.

**Horse Racing:** With the industry projected to lose millions in 2010, the transition team suggests forcing horse racing to become self-sufficient; having Monmouth Park consider moving to a 50-day summer meet with high purses; and letting the NJSEA oversee off-track betting and video.

Other suggestions by the transition team include studying whether the Meadowlands can be redeveloped for NASCAR racing, creating a public-private venture to market Atlantic City as a destination resort, and privatizing the state lottery. State Senator Barbara Buono, who chairs the committee that ordered the exam, said her legislative hearings will examine the overall fiscal operations of the NJSEA. She has not revealed whether the committee will issue a report or suggestions.

Christie’s new commission will consider input from former Governor Jon Corzine’s horse racing commission, which was expanded to include the casino industries because Atlantic City casinos supplement track purses with $30 million annually. That commission was then to be dissolved by April 2010.

**Constitutional challenge against skiing legislation fails (Italy)**

In March 2010, an attempt was made to challenge the constitutional validity of certain provisions of legislation relating to skiing accidents. More particularly the challenge was brought against those provisions of a regional Law which stipulate that, at the conclusion of the annual skiing season, the police are required to transmit the list of skiing accidents to the Regional Council of Basilicata, and which transfer the invigilation of the manner in which the provisions of regional legislation are observed and the relevant penalties are imposed to the national police force, the national woodlands police, the special police force (carabinieri) and the finance police. However, the Constitutional Court dismissed the action (Decision of 17 and 24 March 2010, [2010] Il Foro Italiano p. 1383).

**NFL improves head safety for players… followed by other sports (US)**

In a sport that prides itself on its toughness and commitment under physical duress, Mike Webster was about as tough and committed as they come. “Iron Mike” was the anchor of the Pittsburgh Steelers, a gritty task in one of the grittiest teams in American football. He played for the Steelers from 1974 to 1989, winning the Super Bowl, i.e. the annual championship of the National Football League (NFL), four times, three of them as captain. He was inducted into the pro football hall of fame, and came to be seen as an icon of the sport. All this makes his demise all the more poignant. Even before he retired in 1990, he began to suffer mental problems. He displayed symptoms of dementia, memory loss and depression. As his behaviour grew more erratic, he found it hard to hold down a job and by his death in 2002 aged 50, he was reported to be sleeping homeless in railway stations or in the back of his pickup truck.

Such an ignominious end for so huge a personality marked a low point of American football. At the time of Webster’s death, the condition from which he was suffering, to wit repetitive brain injury, later dubbed chronic traumatic encephalopathy, or CTE, was not even recognised, let alone understood. However, over the past eight years, partly as a result of Mr. Webster’s death, pressure has mounted on the NFL, the professional sport’s governing body, to confront what has been described as a ticking time-bomb that could be facing hundreds of thousands of players. Concern about the dangers of a sport in which players routinely suffer blows to the head has reached Washington. Accordingly, the judiciary committee of the House of Representatives today opened a special hearing in Detroit, calling on top sport officials and experts in neurosurgery to help it assess the threat of brain injuries to players, particularly at school and college levels. “Clearly, we have reached a tipping point in our understanding of the causes and treatment of brain injuries in football” said John Conyers, chairman of the committee (The Guardian of 5/1/2010, p. 22).

The committee heard from Kyle Turley, a former player with the St Louis Rams, currently disabled. He informed the panel that he suffered “terrifying symptoms” as a result of many concussions, adding that his faculties “continue to degenerate and my life continues to change”. He spoke angrily about the “arrogance of NFL owners” as they neglect the health of those whose careers and talents they should protect. He added that he saw himself, his friends and the heroes of his youth dismissed and thrown away as if all the hard work and dedication they put into
building the NFL into the huge financial success it is today meant absolutely nothing.

The hearing was held the day after another incident in the final game of the season, when a quarterback for the Miami Dolphins was admitted to hospital after a head-to-head collision with a defender for Mr. Webster's old team, the Steelers. The judiciary committee sought to build on the momentum for reform that began with Mr. Webster, who was the first American football player to be diagnosed with CTE, a degenerative illness caused by repetitive trauma to the head. The diagnosis was made by Bennet Omalu, the forensic pathologist who carried out the autopsy. Dr. Omalu suspected the player's erratic behaviour was linked to his sport and decided to investigate. Webster's brain appeared normal, but when Omalu sliced it into 250 slides and subjected it to tissue analysis he was astonished to find an abnormal protein called tau at levels usually seen in dementia sufferers in their 80s or 90s.

Further research has steadily deepened understanding of the crisis. A survey of 1,000 retired professional players by the University of Michigan found 19 times more Alzheimer's disease or dementia than normal for men aged 30 to 49. An earlier study by the University of North Carolina had also found higher levels of dementia among retired players who had suffered concussions. After years of pressure from brain injury researchers, the NFL has finally accepted the need to tighten its rules. Guidelines introduced last month require any player who shows signs of concussion to remain off the field until the following day (Ibid).

The guidelines have been greeted as a huge step forward for the NFL. Shortly before the restrictions were announced, Ira Casson and David Viano, who co-chaired the NFL committee on brain injuries, both resigned, having come under mounting criticism. Casson, who was asked to address the Congress hearing, had consistently tried to discredit research linking football to dementia and dismissed calls for rule changes. On the scientific front, understanding of CTE has grown through the work of the Brain Injury Research Institute, jointly founded by Dr. Omalu. The institute has carried out tissue analysis on up to 11 dead NFL players. In all cases, they found abnormal levels of the brain proteins that cause CTE. One was a college player aged 18, which suggests that hundreds of school football players who are concussed every year could be at risk. More than a million young people play football at school, and may be storing up long-term mental problems.

However, some researchers claim that the NFL guidelines do not go far enough. CTE is most likely to be induced by hundreds of small traumas that can have a cumulative effect in sporting careers spanning many years, rather than a couple of dramatic knocks, they say. Over a 20-year career in football, a player might experience 18,000 jarring blows, according to an authoritative study. This poses the sport with a much greater challenge, i.e. how to prevent head traumas happening in the first place. Julian Bailes, a former team physician for the Steelers who works with Dr. Omalu at the institute, wants to see the rules tightened to eradicate all head contact. Paradoxically, he said, football helmets have only made matters worse, encouraging players to use their heads as weapons. Such a cavalier approach to an organ as sensitive as the brain under the current rules of the game can lend players short-term competitive advantage. But for those like “Iron Mike” Webster, the payback comes years later in a slow, excruciating fall into despair (Ibid).

Concern about brain injuries in American football players has grown as understanding has deepened of the condition chronic traumatic encephalopathy (CTE), a degenerative disease formerly known as dementia pugilistica (punch-drunk syndrome) as it was thought to relate mainly to boxers. Microscopic analysis of the brains of National Football League players who have died with a history of dementia and depression reveals a pattern. Many display an accumulation of tau, an abnormal protein that can impair brain cell function. It is now understood that tau is formed after a trauma to the head, which provokes a chemical reaction that in turn leads to a deposit of the protein. Repetitive trauma can lead to a build-up, which not only eventually kills the brain cells but can also lead to an imbalance of neurotransmitters believed to be responsible for mood swings, depression and other symptoms of CTE (Ibid).

In a further sign that head safety was beginning to receive the attention it undoubtedly deserved from the game's authorities, the NFL, later that month, adopted rules aimed at giving further protection to defenseless players, including ball carriers who lose their helmet during a play. The key rule change bars a defenseless player from being hit in the head or neck area by an opponent who launches himself and
uses his helmet, shoulder or forearm to make contact. Previously, those kind of tackles were banned against receivers who could not protect themselves, but henceforth the ban will apply to every one on the field. NFL rules also will now echo those applying in college football when a player running with the ball loses his helmet. The whistle will blow immediately and the ball will be placed at the “progress spot” where the helmet came off. A safety move to protect the umpire also was made. The latter now will be stationed behind the offensive backfield rather than in the linebackers area. The competition committee saw “a hundred” examples of umpires being run over, according to co-chairman Rich McKay (Associated Press, www.findlaw.com of 25/3/2010).

There were other rule changes made, some of which related to player safety.

During a field goal or extra point attempt, the defensive team may not position any player on the line directly across from the snapper. Previously, a player needed to have his helmet outside the snapper’s shoulder pads. Also, a dead ball personal foul on the final play of the second or fourth quarters will cause a 15-yard penalty on the second half or overtime kickoff. Previously in those situations, no penalty was enforced, although players subsequently could be fined by the game’s authorities.

If a punt returner makes a fair catch signal and “muffs” the ball, he is entitled to “reasonable opportunity” to catch the muff before it hits the ground without interference of the coverage team. The ball will be rewarded at the spot of the interference, but there will be no penalty yardage marked off.

When a ball strikes a videoboard (as one punt did during the last preseason at the new Cowboys Stadium), guide wire or sky cam, the play is whistled dead and replayed. The game clock is reset to when that play started.

The replay judge will be allowed to initiate a review if he believes there was some sort of interference with the ball. This is the only case outside of the final two minutes of the second and fourth quarters and overtime that the booth can order a replay.

Coaches may also challenge on the question whether there was interference with the ball. If the clock is stopped in the final minute of either half for a replay review, but would not have stopped without the review, officials will run off 10 seconds before resuming play. Either team could take a timeout to void the 10-second run-off.

It would seem that the new NFL safety rules are having a beneficial effect on the nation’s other sports. Some states have adopted protective legislation, and it has recently been reported that at least a half-dozen states are considering measures that would toughen restrictions on young athletes returning to play after head injuries, inspired by individual cases and the attention the issue has received in the NFL. Already Washington State had led the way in 2009, adopting what is considered the nation’s strongest return-to-play statute. Athletes under 18 who show concussion symptoms may not take the field again without a licensed health care provider’s written approval. Several other states, including California and Pennsylvania, have similar bills pending. Elsewhere, the Maine legislature passed a law last year that creates a working group on the prevention, diagnosis and treatment of concussions in young athletes. In New Jersey, there is no state law to regulate how head injuries should be handled for athletes, but the legislature has allowed a commission to look into brain injury research.

These state-level efforts come as a congressional committee prepares to hold a forum in Houston which considers how high schools and colleges deal with concussions. This is the same House panel which held the hearing on head injuries in the NFL referred to earlier, and the college sports authority NCAA has recently endorsed the idea of requiring athletes to be cleared by medical personnel before returning to competition if they show concussion symptoms. Estimates for the number of sports- and recreation-related concussions in the United States each year go as high as 3.8 million, according to the Brain Injury Association of America.

Assembly member Mary Hayashi is hoping California will soon have a similar requirement. After learning about concussion-related health problems for retired football players, the Democrat politician has led a campaign to strengthen her state’s laws on this topic. In January 2010, Ms. Hayashi introduced two bills. One would require high school coaches to get training on potentially catastrophic injuries in addition to first aid certification already required. The other would require an athlete suspected of having a concussion to obtain written permission from a doctor before returning to play. Because younger athletes’ brains are still developing, they often need longer to recover from a
concussion, and the risk of a catastrophic injury is greater if they return to the field too quickly.

In Pennsylvania, Republican representative Tim Briggs has introduced a bill that also would require written clearance for an athlete to return to play. He says he hears “occasional comments that I’m going to scare parents from getting their kids into different sports” - but that is about it as far as naysayers are concerned. In Connecticut, Massachusetts, Missouri and Rhode Island, lawmakers are also looking into enacting return-to-play restrictions. According to Missouri Republican Don Calloway, who tabled a legislative proposal to this effect in his state:

“We’ve ignored it for so long and now the baby boomer generation of athletes are coming to middle age and older adulthood and we’re seeing the effects that the bodily abuse has had on them over the years. You wonder what we could have done as a society or as leagues or just as citizens to perhaps have prevented some of that stuff.”


Even these new laws are incapable of preventing every tragedy. Shortly before the relevant measures were adopted, a high school football player in Washington died after a concussion this past fall - he had been medically cleared to play. Micky Collins, assistant director of the University of Pittsburgh Medical Center’s Sports Medicine Concussion Program, says the measures being considered are a big step forward, but that even some medical personnel have a lot to learn about how to evaluate head injuries. The programme tests, inter alia, a person’s memory, and the results can be compared to a baseline to show whether an athlete is ready to return to competition - or even how much an injured student should try to take on academically (Ibid)

In New Jersey, around 140 schools use the ImpACT programme, which limits the extent to which schools should rely on answers from athletes who could be tempted to play down the effects of an injury so he or she can return to the game. The new proposals working their way through various State legislatures would also place greater responsibility on coaches and medical personnel to make the final determination on whether an athlete plays – and they are presumed to err on the side of caution (Ibid).

Another sport which is becoming increasingly conscious of the dangers inherent in head injuries is ice hockey. In late March 2010, the executive board of the players’ union voted today to accept a new temporary rule proposed by the National Hockey League (NHL) which will ban hits to the head against unsuspecting players. The decision took effect immediately, starting with the league’s 11 games that very night. According to NHL commissioner Gary Bettman:

“We believe this is the right thing to do for the game and for the safety of our players. The elimination of these types of hits should significantly reduce the number of injuries, including concussions, without adversely affecting the level of physicality in the game” (Associated Press, www.findlaw.com of 25/3/2010).

The rule prohibits “lateral, back-pressure or blindside hit to an opponent where the head is targeted and/or the principal point of contact”. The League will have the power to review such hits and apply further discipline. The rule remains in effect throughout the 2010 play-offs. The competition committee is expected to meet during the summer to create a permanent rule that will also include an on-ice penalty instead of solely punishment after the fact. In a statement issued after the relevant meeting, the union declared itself encouraged by the league’s recent willingness to explore on-ice rule changes as a means of reducing player injuries. It had no doubt that by working together, a safer working environment can be established for all NHLPA members (Ibid).

After these recommendation by the players’ association members on the competition committee to accept the ban, the union announced that its executive board would vote within two days. The latter acted swiftly to agree to the new rule. The NHL Board of Governors, for its part, unanimously approved the proposed penalty a few days earlier. Florida forward David Booth missed 45 games this season after being hit by Philadelphia captain Mike Richards, a ploy which was legal at the time, but will no longer be tolerated under the new system. An unpunished blindside hit by Pittsburgh’s Matt Cooke against Boston’s Marc Savard in early March had also increased pressure to enact a new rule. Mr. Savard sustained a concussion that will likely sideline him for at least the rest of the regular season. The relevant meetings began the day after Mr. Savard was hit (Ibid).

(Head safety has also been to the forefront of concerns by the skiing federations and US legislators – see below).
Luger death mars Vancouver Olympics (Georgia/Canada)

Winter sports have always been risky ventures, which is a factor the organisers of such competitions invariably have to take into account. One such sport is the luge. This involves a small one- or two-person on which the competitor lies face up and feet-first. Steering is done by flexing the sled’s runners with the calf of each leg or exerting opposite shoulder pressure to the seat. Performers race each other, not directly but against a timer. Top practitioners of this sport, called lugers, are capable of reaching speeds of 90 mph per hour. At previous Winter Olympics there have been a few fatalities, and unfortunately yet another victim was added to this list during the controversial Games held in Vancouver earlier this year. Nodar Kumaritashvili, a 21-year-old Georgian competitor, at a certain point left the track at a bend and struck a metal pillar (The Mail on Sunday of 14/2/2010, p. 112). Concerns had already been raised over the safety of the track – in fact the victim’s father reported that, just hours before the fatal crash, his son had telephoned him to express his fears, stating more specifically that he “really feared that curve”, adding ominously that he would “either win or die”. Others had expressed worries that the venue was too technically demanding and that only the host nation’s competitors would have sufficient practice to adapt (Daily Mail of 16/2/2010, p. 69). In fact, this apparent discrimination had also been adversely commented upon by others. Before the Games commenced, Andy Schmid, the British team’s performance director, had gone public with a warning that the Games’ authorities had placed the lives of athletes at risk by preventing competitors from obtaining valuable access to the controversial track. He said: “I would say, especially for speed sports, that you need to have more access to tracks and whoever organises the Olympics needs to offer that. Not only so that everyone has a fair chance, but also because of the danger (involved). We need to be careful so that these sports stay great action sports and don’t become dangerous killer sports” (The Mail on Sunday, of 14/2/2010, loc. cit.)

Following the fatality, a joint statement was issued by the Luger Federation and the Vancouver Games officials, in which the accident was blamed on the athlete himself, stating that he was late in emerging from the next-to-last turn and failed to compensate. This contention was angrily dismissed by the competitor’s father, who pointed out that the athlete had passed through all the stages of the World Cup and made it to the Olympics, a feat which he would not have been able to accomplish if he were an inexperienced performer (Ibid). Bermudan luger Patrick Singleton was also adamant that the blame should not be placed on the victim, but on the sport’s federations, the race organisers and the designers of the track. He claimed that even the Canadian competitors, who had privileged access to the track, had experienced difficulties. At all events, extra banking and protective sheeting was subsequently added to the fatal bend. The men’s starting point was moved 30 metres down the course to the women’s start – which was itself relocated to a lower position. Various other changes were made in a bid to lower speeds. Nevertheless, Tim Gaya, a member of the Vancouver Organising Committee (VOG), insisted that everything had been done to make the track safe.

The International Luger Federation (FIL) subsequently appeared to shift its position slightly when it produced a report on the incident two months later. In it, the FIL stated that “no single reason” caused the Georgian racer’s demise, and described it as an “unforeseeable fatal accident”. The federation’s Secretary-General, Svein Romstad, said that: “after an in-depth analysis we concluded that there was no single reason, but a complex series of inter-related events which led to this tragedy” (Associated Press, www.findlaw.com of 19/4/2010).

Obviously this fatality will concentrate the minds of the organisers at future Winter Games. In mid-April 2010, Dmitry Kozak, the Russian Cabinet Minister responsible for preparations for the 2014 Sochi Olympics reassured visiting officials from the International Olympic Committee (IOC) that the luge and bobsled track will be safe. Mr Kozak said that an Austrian company employed to study the relevant plans had confirmed that the track complied with safety standards. However, he added that changes could still be made once construction has started if experts consider them necessary. The IOC officials in question pronounced themselves “on most accounts very satisfied” with the progress made by the preparations (Associated Press, www.findlaw.com of 15/4/2010).

Skiing safety under the spotlight (Austria – US)

Bob sleigh and luge events are not the only winter sports fraught with considerable danger. According to the International Ski Federation (FIS), 43 per cent of all Alpine World Cup skiers
suffered an injury in the course of 2009. More particularly downhill world champion John Kucera, World Cup slalom champion Jean-Baptiste Grange and former overall World Cup winner Nicole Hosp are among the competitors who were ruled out of this year’s season because of severe injuries. This is why the Federation has started a three-year research project at an Austrian university aimed at improving safety for Alpine skiers. The University Salzburg has been asked to analyse the risks involved in the sport and produce proposals which might reduce the number of injuries (Associated Press, www.findlaw.com of 21/1/2010).

This is an issue which has also captured the attention of the civilian, non-sporting authorities. Thus in mid-March 2010, a bill was introduced in the Californian Assembly aimed at improving safety for skiers and snowboarders and at providing the US state with the most far-reaching ski resort regulations in the country. The following are some of the requirements which skiers, snowboarders and resorts would be confronted with under proposal AB 1625, tabled by Assembly Member Dave Jones:

Helmets: Every skier or snowboarder under the age of 18 would be required to don a helmet whilst on the slope.

Enforcement: Skiing resorts would be required to enforce the helmet rules and revoke the tickets of those who fail to comply. However, a similar Bill tabled in the State senate by Democrat representative Leland Yee of San Francisco would make parents, not resorts, responsible for ensuring that their children comply with the law. Under the latter proposal, parents would face a fine if their children failed to wear a helmet.

Employees: All resort employees would be required to wear a helmet while skiing or snowboarding when on duty.

Reporting: Resorts would be required to track (sic) and report all injuries and deaths of which they had been made aware. This would apply only to accidents which occurred within their boundaries. The relevant information would have to be made available to the public or to state agencies. The monthly report would specify the number of injured customers airlifted to hospital, treated at a local medical facility or not treated but advised to seek medical attention. The report would be required to include details of the location of the injury on the body and the conditions which applied at the resort at the time, such as wind and snow.

Signs: Californian skiing resorts would adopt standardised signs for the purpose of labelling a slope’s level of difficulty, warn skiers about potential dangers and identify the ski-area boundaries.

Safety plans: Ski resorts would be required to prepare an annual safety plan describing the signs used to mark the resort boundary and the procedures put in place by the resort for marking out trail hazards such as rocks, or using padding on other obstructions. The report would be made available to the public upon request (Associated Press, www.findlaw.com of 15/3/2010).

Volcano ash flying ban has no significant effects on sport
When the unpronounceable Icelandic volcano erupted in mid-April 2010, various measures were taken which served to close down most airports in Europe for fear that the ash thus released into the atmosphere might cause operational difficulties for aeroplanes and flights. It was thought initially that this would create some havoc for a number of sporting competitions with international dimensions. Nevertheless, it can be said that the various sports and their authorities coped remarkably well with the crisis, even though one might have been mistaken in this perception if the attitudes of some competitors were anything to go by. The London Marathon was due to take place during this period, and Olympic champion Sammy Wanjiru gave vent to his frustration that the prevailing airspace difficulties might “affect his performance”. This was in spite of the fact that the race organisers had arranged for a private jet to transport him and three other Kenyan runners to Europe. Mr. Wanjiru’s gripe was that the private jet was to take them to Spain, whence another flight would take them to London. The flight had been scheduled to leave Nairobi on the Tuesday afternoon but was postponed until early Wednesday. He claimed that this delay would mean less time to adjust to the London weather and to rest before the race… (Associated Press, www.findlaw.com of 20/4/2010).

**Calls for extra netting in baseball to protect fans (US)**

Having accidentally hit his own mother with a foul ball in a training game, Denard Span, the Minnesota Twins player, called on baseball teams to extend the netting which protects fans. Spectators sitting behind the home plate are currently protected from foul balls by netting. However, most major league and minor league grounds stop the netting before the dugouts on each side. The lady in question, Wanda Wilson, was sitting adjacent to the Twins dugout in Tampa when she was hit in the chest by a line drive emanating from her progeny. She was not seriously injured, but Mr. Span contended that the position could have been a good deal worse. The game’s supervisory authority, major League baseball, commented that it was for each individual team to decide how much netting is used at its stadium (Associated Press, www.findlaw.com of 1/4/2010).

**Heat illness institute founded at Connecticut University (US)**

In recent years, some alarm has been expressed in US sporting circles at the rate at which athletes are dying from heat-related illnesses. More particularly Kelci Stringer, the widow of (American) footballer, who died from heat stroke nine years ago, hopes to do something about it. So do the sport’s governing authority, the National Football league (NFL) and the University of Connecticut, who have created a partnership with Ms. Stringer to open the Korey Stringer Institute at UConn’s Neag School of Education. If the past 35 years are broken into blocks of five years, the worst segment for such deaths has been the most recent. According to Doug Casa, Professor of Kinesiology at the University and the leading researcher for the institute, there have been twice as many deaths in that span than was the average for previous five-year blocks.

Stringer died of complications due to heat stroke on 1/8/2001, during training camp. At 27, he was the first professional football player to die from the illness. Kelci Stringer spent several years in court suing the NFL and equipment manufacturers, whilst at the same time envisioning a day when there are athletic trainers at every high school in the nation (currently only about half of the schools employ one). She also imagines a time when professional, college and youth sports organizations have set policies on prevention of heat illnesses. She believes that day soon will arrive, stating:

“**The first goal is to make sure this is not some sort of fly-by-night institute. I hope we are around a long time. There’s constant research that comes out each day and we want to continue to put out that information and be a resource for every athlete in any sport at any level. I would hope in the short term we can help eradicate these types of heat-related deaths**” (Associated Press, www.findlaw.com of 20/4/2010).

To give the institute some cachet, Ms. Stringer sought the aid of the NFL and of Professor Casa. The League, which settled the lawsuit over her husband’s death out of court, was impressed by her plan and her objectives, so much so that the league is providing financial help, as is one of its main sponsors, Gatorade. The NFL also will help publicize and market the institute, and few sports organizations are more effective in those areas.

In late 2008, Kelci Stringer, Casa and Jimmy Gould, who was Korey Stringer’s agent, met a number of NFL executives, including commissioner Roger Goodell. According to Gary Gertzog, the NFL’s senior Vice-President of Business Affairs: **“It was clear they had a strong commitment and passion in doing work in the heat illness prevention area. We all thought this was a terrific opportunity to increase the education at all levels of sports, particularly at the youth level, so that they understand how to prevent heat illness. We all have been parents or coaches for youth sports and we all have seen kids playing in very extreme weather conditions. They wanted to make sure everyone understands how important it is to be properly hydrated”** (Ibid)

One of the primary aims of the institute will be to extend awareness, education and advocacy about the proper precautions to avoid heat stroke through its website (ksi.uconn.edu). The institute also will offer its services to athletic trainers, team doctors, athletic directors, coaches, league supervisors, parents, principals, equipment manufacturers and others to create proper protocols, policies and emergency action plans to prevent sudden death in sport, especially where this is related to heat stroke. Eventually, Kelci Stringer hopes her husband is
remembered for more than the “senseless and tragic way” his life ended (Ibid).

**Delhi cricket pitch banned for safety reasons (India)**

In late December 2010, a year in which India climbed to the top of the Test rankings ended in recrimination when a one-day international (ODI) played at Delhi’s Feroz Shah Kotla stadium was abandoned after the pitch was deemed to be too dangerous for play. The home side had already won the series against Sri Lanka 3-1 thus cementing their second place in the ODI table, but this cancellation cast serious doubt on the ground’s future – nay even on India’s ability to host the four games allotted to it for the 2011 World Cup. The visiting side had struggled to reach 83-5 on a surface where grass sprouted in patches. The odd ball shot through whilst others reared disconcertingly, and when one delivery from Sudeep Tyagi, a medium-paced bowler making his debut, went for four byes over Mahendra Singh Dhoni’s head, the Sri Lankan team management had seen enough. Following a closed-room discussion between the relevant officials, the match was abandoned. Angry spectators tore down hoardings, broke chairs and threw bottles onto the field of play (The Guardian of 28/12/2009, p. 28). The next month, following an investigation by the International Cricket Council, it was announced that the ground would not stage another international cricket fixture for a year (The Daily Telegraph of 22/1/2010, p. S16).

**SPORTING FIGURES IN POLITICS**

**US sporting figures turn to politics for second career**

This particular section in our Journal saw the light of day as an increasing trend amongst top sporting performers to seek elected office in the “civilian” world became apparent. Nowhere is this truer than in the US, where the ranks of politicians, both actual and budding, have been swelled recently by those who have decided to transfer their energies from track and field to the nation’s legislatures and governors’ mansions. One such hopeful is former basketball star Chris Dudley. His towering presence, at 6 ft 11, and six years playing for the Portland Trail Blazers have given Mr. Dudley name recognition, an invaluable asset in his run against two more mainstream Republican candidates in this year’s Oregon State primary elections.

In New Jersey, another former basketball pro, Jon Runyan is going after a congressional seat with the same determination that made him an All Pro and fan favourite with the Philadelphia Eagles. Clint Didier, a former American footballer- turned-alfalfa farmer, is campaigning for the U.S. Senate in Washington State. Yet another former basketball star, Shawn Bradley, is running for the Utah Legislature. Many of the athlete-candidates are Republicans, like many other professional athletes or coaches who have pursued office in recent years. Their platforms mostly follow the mainstream Republican ethos of free enterprise, lower taxes and limited government. As is mentioned above, they conform to a tradition of professional athletes turned politicians such as the late Congressman and Republican vice presidential candidate Jack Kemp (football), former Congressman Steve Largent (football), Senator Jim Bunning (baseball) and former Senator and presidential candidate Bill Bradley (basketball). More recently, Democrat Dave Bing was elected mayor of Detroit, a city that loved him during his Hall of Fame career with the local basketball team Pistons (Associated Press, www.findlaw.com of 15/4/2010).

It has to be conceded that Mr. Dudley has been faulted for his performance in debates and other formal campaign events. Party regulars say he lacks a command of the issues and sometimes comes off as unprepared, responding too often to questions with a non-committal “I’m open to that.” But as he mixes with the public at a local coffee house, he seems perfectly at ease. Many an Oregonians have teased the former star about his famously inaccurate free-throw shooting during his years as a Trail Blazer. However, more recently they are just as likely to tell him about losing their employment, or trying to retain the family ranch, or how state taxes are hurting their business.

Clint Didier, for his part, is one of 10 candidates in Washington State’s 2010 Primary who are seeking to stand against Democratic Senator Patty Murray in November 2010. Whilst raising the most money among Republicans (approximately $352,000) Mr. Didier is campaigning in the shadow of Dino Rossi, a powerful Republican who is flirting with a last-minute run. However, Mr. Didier is not considered a real threat to Murray. On the other hand Mr. Runyan, in
New Jersey, has raised about $137,000, has the support of Republican organizations in his district and is considered a favourite to win the primary election. As for Dudley, he has collected more cash than any candidate in the Oregon governor’s race, to wit $1.3 million. His main rival, Allen Alley, has raised $425,300. The two Democratic candidates in Oregon’s primary are John Kitzhaber, who has previously served two terms as governor, and Bill Bradbury, a former Oregon secretary of state (Ibid).

The sports world has provided much of Dudley’s financial support. Former Trail Blazer Terry Porter is on his finance committee. Contributions from NBA Commissioner David Stern, Nike founder Phil Knight and former agent Daniel Fegan have assisted in priming the candidate’s campaign. Mr. Dudley’s platform calls for tax reductions, particularly for businesses, and curbs on government spending. He advocates thinning timber to provide jobs and boost the economies of struggling timber-dependent towns. Oregon faces a $2.5 billion state budget deficit, and its unemployment rate is stubbornly stuck at more than 10 percent. Name recognition alone could get Dudley through the primary election. He freely acknowledges that his basketball career has helped him as a political newcomer but says it also taught him lessons useful on the campaign trail. However, winning in the fall in Democrat-leaning Oregon will be difficult for any Republican (Ibid).

Brazil football legend Romário aims for political power

On the football field, his nickname was “shorty”, a stocky football legend who rose from the slums of northern Rio to become a legend of ‘jogo bonito’. Now, the 5ft 6ins former Barcelona and Brazil striker is pushing for a new, unexpected title: Romário MP. The third-highest scorer in the history of Brazilian international football, known more for his deadly accuracy in finding the net than for his views on economic policy, hopes to become one of his native country’s 513 federal delegates in this year’s elections. Romário de Souza Faria, better known as just Romário, is one of several Brazilian football stars hoping to swap pitches for politics in the coming elections, this time defending the colours of the Brazilian Socialist Party (PSB).

Whilst the involvement of former footballers in Brazilian politics is not unprecedented – Pele, Brazil’s renowned “king of football”, was minister of sport between 1995 and 1998 – a record number of Brazilian craques, or stars, are expected to run for office this year. Other candidates reportedly include the former Corinthians idol Marcelinho Carioca, who is standing for the lower house on an education policy, the Atletico Mineiro striker Marques, who intends to stand for the Brazilian Labour party (PTB) in Belo Horizonte after hanging up his boots later this month, and the former Brazil stars Edmundo and Vampeta (The Guardian of 17/5/2010, p. 21).

The Brazilian press has reacted to the footballers’ candidacies with a strong dose of irony and Romário, a notorious rebel who was once famously sent home from the Youth World Cup finals in 1985 after being caught relieving himself off a Moscow hotel balcony, has come in for particular obloquy. According to the weekly news magazine L’Epoca, Mr. Romário’s adhesion to the Socialist Party took place one month after his seafront penthouse was auctioned in order to pay debts incurred with neighbours, thus suggesting that the former star was more interested in the MP’s salary of about R$8,000 (about £3,000) per month than furthering issues such as tax or electoral reform.

Unlike many would-be politicians who have already begun setting out their policies to the electorate, Romário has so far revealed little about his plans for office. However, last year, when announcing his allegiance to the PSB, Romário scored an own goal (forgive the mixed metaphor), informing a press conference he was in fact joining the Social Democratic party (PSDB). In a brief interview with the Estado de Sao Paulo newspaper, Romário described Brazil’s outgoing president, Luiz Inácio Lula da Silva as his political idol (“he came from nothing … and has changed the history of Brazil”) and claimed he had “always” been a socialist (Ibid).

Germany skating coach tarnished by Stasi past

To outsiders a figure skating coach is the anonymous figure who sits next to the athlete, holding their hand as they breathlessly wait for their scores, but to the cognoscenti of the Olympic rink Ingo Steuer is one of the most controversial figures of the 2010 Winter Games in Vancouver. Twenty-five years ago, Steuer was a teenage skating protégé in the former East Germany and an informer for the much-feared Stasi state police under the code-name Torsten, passing information to the Communist police authorities about his fellow skaters. However, in mid-
February of this year he was rink-side in Vancouver as the German couple Aliona Savchenko and Robin Szolkowy tried for gold in the pairs figure skating. Mr. Steuer was predictably reticent about his alleged controversial past when taxed about it by the media, confining himself to saying “I don’t want to talk about all of that here at the Olympics, adding that anyone requiring further information would be able to “read it soon in my book” (The Guardian of 16/2/2010, p. S8).

Mr. Steuer’s book, Ice Age, will in fact be published later this year and marks the latest attempt to rehabilitate his reputation that was all but destroyed after details of his Stasi past were revealed just before the 2006 Winter Games in Turin. Documents revealed that he had tipped off the secret police that a fellow skater was about to defect, as well as providing them with information about the figure skater Katarina Witt, including, it is thought, details of her love life. Steuer was in the pay of the Stasi for four years. When the news broke, the German Olympic Committee dropped the coach from the 2006 team. The German Skating Federation, and Steuer himself, disagreed with the decision. There followed a convoluted court case, and the coach was allowed to travel to Italy. Four years later, Mr. Steuer’s inclusion in the German party travelling to Vancouver was not so controversial.

The coach’s presence in Vancouver was undoubtedly under strained circumstances. Under rules laid down by the Berlin government, sporting bodies are not allowed to pay anyone with links to the former communist regime. However, he has apparently apologised for his past, which may have made a difference. On the other hand, some sources claim that Steuer receives money from Savchenko and Szolkowy, who themselves receive government funding – an indication perhaps of how much they value the advice of a coach who himself won a bronze medal at the 1998 games in Nagano and who has guided them to victory in two world and three European championships. Yet their relationship with the coach may soon end, regardless of the colour of medal won by the couple. Mr. Steuer is reported to have given the Federation an ultimatum; he will withdraw his services after the Games unless he gets paid. As for his own dark past, the coach said he was naive, that he was manipulated by an older Stasi minder, and that it did not occur to him that he was doing anything wrong until it was too late (Ibid).

The author, Mikhail Prokopets ([2009] 3/4 ISLJ p. 33-37) discusses the legal basis for sports governing bodies to impose restrictions on foreign professional sporting performers competing in Russia in the sports of football and ice hockey. He asks the question whether the commercial, rather than the social, status of a governing body is relevant and whether the partnership agreement between Russia and the European Union renders limits on EU nationals in Russia unlawful, in line with the decision by the European Court of Justice (EJC) in Simutenkov v Ministerio de Educacion y Cultura (case C-265/03) which allowed a Russian sporting performer to compete in the European Union (European Current Law 3-2010 p. 83).

OTHER ISSUES

America’s Cup to be governed by new set of rules

It has already been apparent from earlier issues of this Journal that his venerated sailing competition, which has a pedigree of well over 100 years, has recently been allowed to degenerate into an unseemly battle fought out in the US courts rather than on the high seas. The various legal disputes which have marred this event have centred mainly on the interpretation of the Deed of Gift, the late 19th century document which governs the competition. It has now been announced by BMW Oracle racing, one of the teams involved, that the America’s Cup will become subject to a new set of rules, negotiated with the other teams, which will introduce sweeping reforms. Independent experts will also be appointed to solve any disputes. It is hoped that this will put an end to the expensive litigation which has recently punctuated the event (Associated Press, www.findlaw.com of 6/5/2010).
6. Administrative Law

PLANNING LAW

[JNone]

JUDICIAL REVIEW

Offering for sale of football shirts displaying sports betting firm not illegal. German court decision

In the case under review, the applicant before the Administrative Court of Appeal (OVG) of Bremen was the owner of a chain of supermarkets which, in its sportswear department, offered for sale football shirts worn by, amongst others, the players of AC Milan and Real Madrid. These shirts bore the expressions “b.”, which was a reference to a firm operating sports betting services which was not licensed so to do in the German Land concerned. The relevant Land authorities had issued an injunction against the applicant prohibiting the sale of such shirts. The applicant appealed sought to have this injunction overturned through the administrative courts, but was unsuccessful at first instance. The issue then landed before the Administrative Court of Appeal, which in turn set aside the first court’s decision. The Court accepted that the Land authorities had issued a ban not only on unlicensed sports betting, but also on any advertising for such unlicensed services.

However, the Court did not accept that the statement featured on the football shirts in question qualified as “advertising”. In so doing, it relied on a reasonably strict definition of the term “advertising” (Werbung) applied by the German Supreme Court (Bundesgerichtshof). In addition, the Court noted that the supermarkets in question also sold football shirts worn by players of other clubs, which were also inscribed with sponsors’ names and logos; this did not amount to advertising these sponsors’ products and services. The object here was merely to meet the demand for sportswear articles. The subjective element required for such sales to constitute advertising was not present in this case (Decision OVG Bremen of 23/3/2010 – Case No. 1 B 35609, in (2010) 24 Neue Juristische Wochenschrift, p: 1767).

One Asia tour will not be thwarted by South Korean boycott, warn golf officials

In 2009, the One Asia tour was launched as a joint venture between the Australian Professional Golfers Association (PGA) and governing bodies in Asia, including China and South Korea. The tour scheduled 11 events for 2010 across the Asia-Pacific region. However, this event has met with opposition from the more established Asian Tour, as well as from South Korean players unhappy that the international circuit is absorbing tournaments restricted to locals, such as the Mae Kyung Open. In fact, the golfers have protested against what they describe as quotas against local players, and a group of approximately 135 golfing professionals announced at a certain point that they would refuse to compete in three forthcoming One Asia tournaments in South Korea, i.e. the SK Telecom Open, the Kolon-Hana Bank Korea Open and the GS Caltex Mae Kyung Open. Players complained that only half the number of South Koreans who normally compete in these tournaments would be able to participate this year. Korean PGA tournaments typically attract up to 100 local golfers.

However the Korean Golf Association (KGA) have announced that this boycott would not deter them from going ahead with the tournaments. They claim to have explained to the protesting golfers that they would not be disadvantaged at the events, but apparently to no avail (Associated Press at www.findlaw.com of 26/4/2010).
Land Law

(Inte)
Basketball star faces antitrust action (US)
In mid-January 2010, I emerged that Dwayne Wade, a star player with top basketball side Miami Heat, was defending a court action brought by his former partners in a failed restaurant and sports memorabilia chain. The investors are alleging that Mr. Wade infringed US anti-trust law by failing to honour their contract. The restaurants were supposed to market valuable Wade memorabilia which the investors claim the NBA star is wrongly monopolizing. Mr. Wade’s lawyers on the other and, claim that anti-trust laws do not apply in this instance and that the basketball player has absolute control over the licensing of his name and image (Associated Press at www.findlaw.com of 14/1/2010). The trial had not concluded at the time of writing.

Discrepancies in sporting scholarship distribution examined by US Justice Department
When it comes to its policy as regards the award of athletic scholarships, the NCAA being the body which supervises college sport in the US claims that is rules are clear: these are one-year “merit-based” awards which require both demonstrated academic performance and “participation expectations” on the sporting field. However, other college sport “watchdogs” – and occasionally, athletes themselves – tell a different story. They claim unredeemed promises and decisions of principle which are at odds with the definition of “student athlete”. These alleged discrepancies appear to have attracted the interest of the US Justice Department, whose antitrust division is currently investigating the one-year renewable scholarship, with its agents interviewing NCAA officials and member colleges (Associated Press at www.findlaw.com of 24/5/2010).
EU COMPETITION LAW

Important doctoral theses on competition law and sport published (Netherlands – Belgium)

In 2008, the authors Marjan Olfers and An Vermeeersch successfully completed their PhDs on various aspects of competition law as it relates to sport – both of which can fairly be said to be both highly readable and perfectly complementary. The former (Sport en mededingingsrecht, 2008) focuses on the field of tension which exists between competition law and sporting rules by seeking to find an area of immunity in which European competition law must yield to the sporting rule. This key question is examined from two angles: the specific nature of organised competitive sport and the latter’s beneficial social effects. Although these aspects are examined thoroughly, the author does not really arrive at a definitive conclusion as regards the said key question.

An Vermeeersch, on the other hand (Europese spelregels voor sport, 2009) examines he related, yet different, issue of the place occupied by sport in EU law in the light of two issues: (a) what is the influence exerted by the division of competencies within the EU on the latter’s sporting policy, and (b) what is the effect of existing EU action as regards sport on the extent to which the EU will ever be allowed to decide sporting policy. The author arrives at the conclusion that the provisions included in the Treaty of Lisbon are the outcome, albeit on a provisional basis, of a long process of development and represent a relatively adequate reflection of such actions as he EU has hitherto carried out in the area of sport. However, they do not allow any certainty as to the question whether there will ever be such a thing as a direct European sporting policy (both papers reviewed by Van den Bossche, A., in Rechtskundig Weekblad 2009-10, p 1712).

Other works on EU competition law applied to sport

In “Competition law and sport: established principles don’t prevent new actions across the EU and beyond,” the authors Riccardo Croce, Stephen Sampson and Will Sparks ([2010] The European Anti-Trust Review 82-86) review aspects of the application of EU competition law to sport, including (a) the sale of media rights, (b) the rules of sporting associations on player release and nationality restrictions as potential restraints on trade, (c) salary caps, (d) marketing rights with regard to major sporting events and (e) merger and acquisition activity in sport. They also consider the manner in which regulatory policy in this area is likely to develop.

In “Ensuring access to sports content: 10 years of EU intervention. Time to celebrate?” the authors Katrien Lefever and Ben Van Rompuy ([2009] JML 243-268) review and evaluate the efforts made by the European Union to ensure fair access to sports broadcasting rights, including (a) the application of Article 81 EC Treaty in order to combat anticompetitive agreements between sporting organisations and broadcasters, (b) decision-making by the European Commission on the competitive effects of the joint selling and the joint buying of media rights, and (c) the mechanism for ensuring that sporting events of major public interest are broadcast on free-to-air television. The also consider how these initiatives have affected sports fans (reviewed in European Current Law 4/2010, 77).

EU LAW

Football clubs allowed to seek compensation for training of young players

The question whether football clubs should be entitled to some compensation when players whom they have trained depart for other teams, who thus reap at least some of the fruits of the previous club’s endeavours, has been to the forefront of sporting administrators minds for some time. This issue has now achieved an EU law dimension with a recent decision of the European Court of Justice (Case C-325/08, Olympique Lyonnais SASP v Olivier Bernard and Newcastle United FC). In the course of 1997, French footballer Olivier Bernard signed a “joueur espoir” contract with top side Olympique Lyonnais for three seasons. The Professional Football Charter of the French Football Federation (FFF) stipulates that these “young hopefuls” are football players aged between 16 and 22, employed as trainees by a professional club under a fixed-term contract. At the conclusion of his contract, the Charter obliges the player in question to sign his first professional contract with the club which trained him if the club requires him so to do.

This is precisely what Olympique attempted to do by offering Bernard a one-year contract. The player declined to sign this contract, signing instead for English Premier League side Newcastle United. The French club took Mr.
Bernard to court seeking damages against him and Newcastle to the amount of €53,357, i.e. the equivalent of the salary which the player would have received over one year had he signed the contract offered him by Lyon. The matter landed before the French Supreme Court (Cour de Cassation), which requested the a preliminary ruling from the European Court of Justice on the question whether the principle of the free movement of persons within the EU allowed clubs which provided the training to prevent or discourage their joueurs espoir from signing a professional contract with a football club in another Member State, inasmuch as the signature of such a contract might give rise to an order to pay compensation.

The Court ruled first of all that Mr. Bernard’s gainful employment represented an economic activity and was as such subject to EU law. It noted that the aforementioned Charter had the status of a national collective agreement aimed at regulating gainful employment and, as such, also fell within the scope of EU law. In addition, the ECJ held that the rules in question, under which a joueur espoir is required, at the end of his training period, to sign a professional contract with the club which trained him, at the risk of being sued for damages, is capable of discouraging that player from exercising his right of free movement. Therefore these rules constitute a restriction on the free movement of workers.

However, as the Court had already ruled in the now-famous Bosman decision, because of the considerable social significance of sporting activity, and particularly football, within the EU, the object of encouraging the recruitment and training of young players should be accepted as legitimate. When considering the question whether a system which restricts the freedom of movement of such players is suitable for ensuring that the said objective be achieved and should not go beyond that which is necessary to achieve it, account must be taken of the specific characteristics of sport, in general, and football in particular, as well as of their social and educational function.

The Court held that a scheme which provides for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him can, in principle, be justified by the objective of encouraging the recruitment and training of young players. However, such a scheme must be capable of actually reaching that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally. It follows that the principle of the free movement of workers does not preclude a scheme which, in order to reach the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another member state, provided that the scheme is suitable to ensure that this object be attained and does not go beyond that which is necessary to achieve it.

As regards the French scheme which gave rise to the litigation, the ECJ notes that it was characterised by the payment to the club which provided the training, not of compensation for training, but of damages to which the player concerned would be liable for the breach his contractual obligations, and the amount of which was unrelated to the real training costs incurred by the club. The damages in question were not calculated on the basis of the training costs incurred by the club providing that training but in relation to the total loss suffered by the club. Accordingly, the Court held that the French scheme went beyond that which was necessary to encourage recruitment and training of young players and to fund these activities.

Implications of BW in decision for sports betting in Austria and Germany

As was reported in the previous issue of this Journal ([2009] 2 Sport and the Law Journal p. 65), the European Court of Justice (ECJ) has recently issued a key judgment on the national legislation governing various types of gaming which to a large extent represents a departure from the liberalising tendencies on the part of the EU institutions. Essentially, the Court ruled that it was permissible for the national authorities of a member state – in this case Portugal – to prohibit a gaming company having its seat in Gibraltar from offering on-line gambling services within their national territory. The Court justified the lawfulness of these measures by reference to considerations of public policy, safety or health, as well as to the pressing needs of the general interest. This case has naturally aroused a good deal of interest amongst the
leading authors, not least in those countries which stand to be affected one way or another by the consequences of this decision.

Thus the Austrian author Martin Kind ("EuGH für Verbot des Internetglückspiels – Placanica ade!" in [2010] Österreichische Juristenzeitung p. 446 et seq) highlights the statement by the Court in this decision that there is as yet no harmonising EU legislation governing on-line gambling, and that, accordingly, a member state is not entitled to rely on gaming companies being adequately invigilated in the other member states. This led the ECJ to rule that the principle of the freedom to provide services does not, in essence, apply to the online gambling sector. This represents a significant change in approach on the part of the ECJ. Hitherto, it had tended to circumvent the difficulties inherent in assessing the compatibility of a national measure with EU law, in the sense that, instead of determining itself the threshold as from which national restrictions such as those imposed on online gambling are no longer appropriate or necessary for the purpose of achieving the various accepted policy objectives, such as protecting the consumer, countering criminality or preventing addiction, the ECJ devolved this task to the domestic courts. However, since the bWin decision, the ECJ itself determines the applicable criteria, and the member states no longer enjoy any discretion in assessing the proportionality of the grounds for justifying the restrictions advanced by the national authorities. The suitability and necessity of the national measure has become subject to a Community-wide standard. Under the latter, a restriction or even prohibition of gambling online gambling will be appropriate where such measures confine the operation of gambling within controlled channels and be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators.

This approach differs radically from the more “market-friendly” approach adopted in previous decisions, more particularly the Placanica decision (Case C-338/04). Such a turnaround was, moreover, already anticipated in the Opinion of the relevant Advocate-General, Bot. The author, however, has major reservations about this approach, since, for all its EU-wide applicability, it circumvents the question whether the national measures in question are actually suitable for the purpose of protecting the consumer or, indeed, of achieving a consistent and systematic set of policy objectives which protect the general interest. This will have serious consequences for the relevant legislation in the member states. Thus the author mentions that the Austrian courts have often lamented the absence of a system of national rules which systematically and consistently – i.e. in conformity with EU rules and standards – regulates this particular activity. Since the current Austrian legislation conforms very much to the new approach stipulated by the EU, these reservations should no longer apply, given that the national authorities are henceforth not required to assume that the other member states exercise sufficient control and supervision over the providers of internet gambling. This will enable national authorities to favour the state monopolies in this field, which is already the case in Austria. This does not bode well for the private operators of online gambling.

However, the author Hans-Georg Dederer, writing in the German professional journal Neue Juristische Wochenschrift ("Stürzt das deutsche Sportwettenmonopol über das Bwin Urteil des EuGH?" NJW 2/2010, p. 198) cautions that the national monopolies should not regard the Bwin decision as an unalloyed blessing. With particular reference to the applicable German rules, the author points out that the exercise of such monopolies by the national authorities remain subject to a number of EU “general principles of law”, more particularly those of consistency and proportionality. In the said Placanica decision, the Court had stated that state monopolies in this sector should, in order to be consistent with the principle which allows them to exist lawfully in an EU law context, be geared to the objective of countering gambling addiction. In this respect, the German monopoly seems to infringe this requirement. The monopoly which it exercises covers sports betting, but excludes horse racing and gaming machines. However, reliable research suggests that gaming machines are more likely to cause addiction than horse racing betting, which in turn appears to be more addictive than sports betting. The German monopoly therefore would appear to fall at this particular hurdle (so to speak).

Report on EU Sport Forum 2010

The second EU Sport Forum since the adoption of the White Paper on Sport took place in Madrid on 19 and 20 April 2010. The Commission’s report from the Forum had recently been made available. As anticipated in the 2007 White Paper on Sport, this Forum has become a key annual event.
organised by the European Commission in the framework of the structured dialogue on sport at EU level. This year’s event provided valuable input for the Commission’s consultations with stakeholders on the implementation of the sport provisions of the Lisbon Treaty, which entered into force in December 2009. On the second day of the Forum, jointly organised with the Spanish Presidency, a joint panel discussion with EU Sport Ministers took place, prior to their informal meeting which was held in Madrid on 21/4/2010. An active exchange of views with representatives from a variety of sport and sport-related organisations contributed to ensuring the success of the event in spite of the exceptional circumstances due to the closure of parts of European airspace because of the volcano ash “crisis” (see above, p. 130) and has helped the Commission to identify future priorities for its planned initiatives in the field of sport.

Objective of the Forum was for the Commission to listen to the voices of sport at EU and international level.

Commission launches public consultation on sport
In addition to the sports forum initiative described in the previous section, the European Commission has launched an online consultation on the EU’s strategic choices for the implementation of the new EU competence in the field of sport. The Lisbon Treaty calls on the EU to promote European sporting issues and to develop the European dimension in sport. The European Commission is preparing concrete policy options in view of the implementation of this new EU competence. Within this framework, the Commission is currently conducting a consultation process with governmental and non-governmental stakeholders and has now extended this consultation process to the wider public. The consultation is addressed to organisations and citizens with an interest in sport in order to obtain their input for the Commission’s future proposals. The outcome of the consultation, as well as information as to the manner in which the Commission used the opinions of respondents will be published on the EU’s website at a later date.

Commission closes case against Luxembourg over footballers’ nationality
In early June 2010, the European Commission announced that it had discontinued legal proceedings against Luxembourg over quotas for foreign footballers. The Commission had initially taken legal action because of limits on the number of foreigners allowed to play for Luxembourgish clubs, contrary to EU rules on free movement of workers. The case was successfully concluded following changes to the rules applied.

The Commission began infringement proceedings against Luxembourg in July 2004 because of rules limiting the number of foreign footballers playing for clubs in the Luxembourg Football Federation. These rules required that at least seven players at the start of a match should have Luxembourg nationality or have obtained their first licence to play in Luxembourg. A new rule was later introduced that limited to four the number of players who had been transferred in any one season. The Commission considered that these rules could be discriminatory on the basis of nationality, representing a barrier to free movement of workers (EU Document IP/10/665).

Following discussions with the Luxembourg authorities and changes to the statute of the Luxembourg Football Federation, the Commission is now satisfied that the Luxembourgish rules do not constitute discrimination based on nationality. The changes focused on

- removing the obligation to have Luxembourg nationality;
- the rule relating to the first licence, statistics provided by the Luxembourg authorities showed that, in practice, this rule does not preclude employment of foreign players and therefore does not constitute any discrimination against EU nationals.

In addition, in terms of the rules
relating to transfers, the Luxembourg authorities explained that this rule is temporary in nature since the status of “transferred player” is only valid for the current year 2010. Statistics also show that, on average, the number of players transferred is less than four per season. On the basis of this information, the Commission concluded that this provision is also compatible with EU law. The current rules do not represent, in the Commission’s view, discrimination on grounds of nationality.

The legal action initially taken by the European Commission in this case has to be seen against the background that the free movement for workers means that every EU national has the right to work, and at the same time live, in any other EU country. This fundamental freedom (laid down in the EU Treaties) entitles citizens to enjoy equal treatment with nationals in access to employment, among other things. Sport is subject to the same rules on free movement of workers in so far as it constitutes an economic activity. The EU Court of Justice has confirmed on several occasions that professional and semi-professional sportsmen are workers by virtue of the fact that their activities involve gainful employment, in particular in the now-renowned Bosman case (C-415/93).

**London 2012: EU ruling leaves Britons facing battle for tickets**

British taxpayers’ access to tickets for the London 2012 Olympic will be limited because of European Union competition law, raising serious concerns that the Olympic venues will not be full of local fans. Sports fans in European Union countries have the legal right to buy the tickets when they go on sale to the public next year. With London so accessible and the mandatory inclusion of European involvement in the local ticket programme, the demand for the 9.3 million London Olympic and “Paralympic” tickets is expected to be particularly intense. However, early indications seem to be that any such move would contravene EU law (The Daily Telegraph of 17/2/2010, p. S12). According to Lord Coe, the chairman of the London Organising Committee of the Olympic Games (LOCOG), commented that the reality was that Britain was a member of the EU, and that consequently “the tickets have to be made available to Europe at the same time as Britain” (Ibid).

As matters stand, LOCOG is planning to allow British people to pre-register for tickets later this year. This will allow the organisers to understand which events and sessions will be the most popular but it will not provide any advantage in securing tickets. When the London tickets are eventually released to the public next year, it will be via a ballot, with ticket orders being made through the internet over a yet to be determined period of time. Lord Coe added that LOCOG had conducted the most rigorous research into ticket sales, “more than any other organising committee has done. We know we have got to get it right, potentially this is one of our biggest challenges. We understand the need for people to understand these are their Games and they will want access to these Games. We are doing a lot of to work it out. We want tickets to be distributed to people who most want to go, we want the tickets into the fans’ hands” (Ibid).

Hugh Robertson MP, the then Shadow Sports and Olympics spokesman, said it would be an absolute tragedy for taxpayers if they were not able to buy the majority of Olympic tickets available. LOCOG has already indicated to the International Olympic Committee that it wishes to restructure some of the VIP areas that are reserved for the Olympic family and the media for some of the morning sessions, which in past Olympics have featured blocks of empty seats. It is understood that Tessa Jowell, who was Olympics Minister at the time, has requested the Foreign Office to have a second look at the relevant European Union competition law (Ibid).
UEFA continues attempts to create “fairer” system of football finance

The domination of European football by a handful of big teams is an issue which has been frequently debated in this Journal and elsewhere. It is also an issue which is increasingly preoccupying the game’s authorities – not least the body charged with invigilating the sport at the European level, i.e. UEFA. This is not only because of the potentially stifling effect this state of affairs could have on the sport in the long term, but also because of the instability caused by those top sides which incur huge debts in order to maintain their supremacy.

Particularly its high-profile president, former French international Michel Platini, has let it be known that measures aimed at curbing this dominance are imminent. These endeavours were given fresh impetus in mid-January 2010 with the news that half of all European professional football clubs were operating at a loss, with more than 20 per cent recording sizeable deficits in the last year despite the game generating record revenues.

These troubling figures, compiled by UEFA and published in February 2010, reveal the full scale of the financial excesses in club football across the continent. Speaking to a leading British newspaper, the controlling body’s general secretary Gianni Infantino, said the financial plight of clubs in England and across Europe demonstrated the need for new regulations on the subject. Fearing a spiral of wage inflation across the continent UEFA is in the pressing ahead with the compilation of new rules requiring clubs to live within their means rather than relying on wealthy owners or bank debt to underwrite player wages and transfer fees. The intention is to prevent a repeat of the difficulties being felt at clubs such as Portsmouth and West Ham, as well as limit the ability of benefactors such as Sheikh Mansour bin Zayed al-Nahyan at Manchester City to achieve fast success with short-term spending which the club’s income could not otherwise sustain (The Daily Telegraph of 22/1/2010, S6).

UEFA President Michel Platini’s “financial fair play” initiative will require clubs competing in European competition to break even or turn a profit, relying only on what they earn from football revenues. Clubs repeatedly making a loss over a three-year cycle could be barred from the Europa League and Champions League. The proposed rules, which will be welcomed by those concerned at the financial extremes of the leading European leagues, are to be introduced from the 2012-13 season. They will not limit the amount of debt that clubs can carry, but stipulate that interest payments will have to be covered by income. Clubs will be able to record losses as a result of long-term football investment such as stadium improvements and youth academies. Short-term spending, such as the £170 million lavished on transfers by Manchester City during the previous year, will have to be funded from club earnings, and heavily-leveraged models such as that imposed on Manchester United by the Glazer family will be imperilled. United’s holding company has regularly recorded losses as a result of interest on its £716 million debt burden, though last season the £80 million transfer of Ronaldo contributed to a £6.4 million profit.

The implications for English football are quite considerable. In the 2007-08 season, 14 of the 20 Premier League clubs made a loss, including Manchester United, Chelsea and Liverpool. Major European clubs including Inter Milan, AC Milan and Real Madrid will also be affected.

According to Mr. Infantino:

“What we are doing, with the support of all the stakeholders in the game including the major professional clubs, is to try and improve the long-term stability of European club football by encouraging clubs to live within the revenues that they generate. We are concerned, and many of the clubs and owners are concerned, about the sustainability of the game. We survey more than 650 clubs all over Europe, and found that 50 per cent of those clubs are making losses every year, and 20 per cent of them are making huge losses, spending 120 per cent of their revenue every year. (...) Around one third of the clubs are spending 70 per cent or more of their revenues on wages. Revenues across European football grew by 10 per cent last year, but the salaries of players and coaches have gone up by around 18 per cent. It is clear that if we continue like this it will end up with a spiral of inflation, so we need to bring a more rational and reasonable approach to this crazy game.” (Ibid)

The UEFA proposals have been backed by the influential European Club Association, but, predictably, gave given rise to misgivings in the English top flight. Thus Premier League chief
executive Richard Scudamore had already made known his opposition to any limit on the ability of benefactors such as Sheikh Mansour to invest freely. He argued that requiring clubs to break even would mean the big clubs would always dominate. Mr. Infantino disagrees with this statement, stating that Premier League clubs had nothing to fear. He claims that the intention is not to make all clubs equal with the same money to spend. Instead, what was wanted was a “healthier environment which will allow smaller clubs to invest in their infrastructure” and be able to compete with the bigger clubs, knowing that they can only spend what they earn (Ibid).

Concerns over English football’s financial health deepened when UEFA further revealed that clubs owed more money than all the other clubs in Europe’s top divisions put together. This finding was contained in the governing body’s official report, entitled “The European Club Footballing Landscape”, which analyses the 2007-08 annual accounts, the latest available, of all 732 clubs licensed by Uefa. It assessed the combined debts of just 18 Premier League clubs at just under €4bn (£3.5bn), around four times the figure for the next most indebted top division, Spain’s La Liga. Total Premier League debts were higher even than this amount – only 18 clubs are included in the report because two of the most indebted, troubled and West Ham, were not granted UEFA licences that year because of their financial difficulties (The Guardian of 24/2/2010, p. S1).

The Premier League made much more money from television and other commercial income than its rivals, €122m on average at the 18 clubs; the next wealthiest was the German Bundesliga, whose clubs made an average €79m. Yet despite that commercial advantage, the 18 English clubs were hugely more reliant on borrowed money from banks and club owners than the 714 other clubs combined. “English clubs contain on their balance sheets an estimated 56% of Europe-wide commercial debt” the report says. The European governing body’s leadership draws a marked contrast with the silence at the Premier League and the Football Association over the debts at and , which have risen to more than €1bn collectively. Those huge debts were loaded on to the clubs by their North American owners’ “leveraged” takeovers, yet despite the furore and mass supporter protests, particularly over Manchester United’s £716m debts, neither the Premier League nor FA have voiced any concern.

However, shortly after these revelations were made it appeared that, after all, the English top teams might not be the biggest sinners after all, when a Spanish academic study put the amount owed by all 20 La Liga clubs at €3.53bn (£3.03bn). Debt among Spanish clubs had risen marginally in accounts for the 2008-09 season from the previous year’s figure of €3.49bn, according to research by the University of Barcelona professor José María Gay. Of the 20 La Liga clubs, only the two huge teams that dominate income and exposure – Real Madrid and Barcelona – and the relegated minnows Numancia made an operating profits. Labour costs, largely accounted for by player wages, represented 85% per cent of total operating income. At several clubs – including Sevilla, Atlético Madrid and Valencia – outgoings on wages were significantly higher than their operating income.

Unlike the Premier League, where a collective television deal means that broadcasting income is divided equally between all 20 clubs and weighted according to the number of appearances and final League position, the Spanish top flights has a system where clubs conduct their own negotiations. That has led to an unbalanced situation where Real Madrid and Barcelona were able to bring in half of their £500m income from media rights. With rival clubs clamouring for a Premier League-style collective deal but the big two resisting for fear of damaging their competitiveness in the Champions League, Prof. Gay suggested that the status quo would have to change or the Spanish game would be left in its “death throes”. He added that the current model was unsustainable (The Guardian of 20/5/2010, p. S4).

The economic woes of the Spanish game were highlighted recently when Real Mallorca, who only narrowly missed out on qualifying for the Champions League on the final day of the season, announced that they would apply for voluntary administration within the next few days. The club has been labouring under debts of €85m and has failed in its attempts to find a buyer. Real Mallorca has been up for sale since the former president Vicenç Grande’s property company applied for insolvency in 2008. Mateu Alemany, the managing director and majority shareholder, said the move would “open up positive opportunities” and was “a solution not a problem” (Ibid).
Finally, in late May 2010, UEFA approved plans to force clubs in European competition to spend only what they earn, with the body’s president Michel Platini insisting they want to “protect clubs and not punish them”. The financial fair play rules will require clubs to break even over a rolling three-year period if they wish to compete in the Champions League or Europa League. Clubs will also be assessed on a risk basis, taking into account “debts and salary levels”, according to UEFA. Mr. Platini, speaking after Uefa’s executive committee approved the rules at a meeting in Nyon, Switzerland, commented:

“We have worked on the financial fair play concept hand-in-hand with the clubs, as our intention is not to punish them, but to protect them. We have an agreement with the clubs. The philosophy is that you cannot spend more money than you generate” (The Daily Telegraph of 28/5/2010, p. S9).

Some leeway will be granted for the six years after 2012 but some Premier League clubs, in particular Manchester City, Chelsea and Aston Villa, could still fall foul of the rule unless they change their spending habits. Manchester United have carried out a “dummy test” and believe they would pass the rules despite having to pay out £45m to service debts every year. Arsenal and Tottenham would pass the test comfortably, while Liverpool would probably do so too. The new UEFA scheme will come into effect in 2012. It is understood that initially clubs must not return losses of more then €45m (£38m) for the 2012-15 period. After 2015, clubs are given a leeway of €30mn (£26m) for three-year losses after which the figure will be reduced still further. If clubs breach the rules then they will not be granted a Uefa club licence to take part in European competitions (Ibid).

Is IAAF heading for financial collapse?
In March 2010, the world of athletics was served with a warning that its world governing body, the IAAF, faced bankruptcy unless it reduced its expenditure. This disturbing scenario was put to the Executive Council of the organisation by its treasurer, Jean Poczobut, at a meeting in Doha. The crisis could even erupt before the 2012 London Olympics, a year which also sees the IAAF’s centenary. This news was received with “shock and horror” by Council members, including Lord Coe, who also chairs the 2012 organising committee. Mr. Poczobut presented a financial projection which showed expenditure to be far above its £30 million income; in addition, its reserves, which 10 years ago stood at £50 million, will soon be exhausted (Daily Mail of 26/3/2010, p. 101).

It appears that the decline in television and marketing income, which constitute almost 90 per cent of the IAAF’s revenue, has hit its finances very hard. Major networks such as BBC and ZDF (Germany) failed to broadcast the world indoor championships early this year, claiming that the world governing body was asking too much by way of fees. However, whilst income has declined during the 11-year presidency of Liam Diack, spending has increased in line with the latter’s determination to spread the popularity of athletics through less developed continents. The organisation currently has 220 member countries – more than the number represented at the United Nations. The irony of the situation is that the sport is struggling to market itself despite the emergence of record-breaking Olympic champions such as Usain Bolt, who seemed the ideal figure to “sell” the sport (Ibid). This column will obviously follow further developments in this area very closely.

Coyotes bankruptcy continues to raise legal issues (US)
The battle between the National Hockey League (NHL) and Jerry Moyes, the former owner of top team Phoenix Coyotes, has been raised before in these columns. Essentially, in the course of 2009 Mr. Moyes filed for the team's bankruptcy, then attempted to sell the franchise to Canadian businessman Jim Balsilie. The bankruptcy application sparked a legal battle which initially appeared to have ended in November 2009, with Mr. Balsilie being rejected as an owner and the League left in control of the team. However, the NHL are now claiming that, by his actions, Moyes infringed a number of League agreements. More particularly they alleged that Mr. Moyes violated a pledge, made in 2006, not to explore any sale which would moved the Coyotes team away from its home in Phoenix (Associated Press, www.findlaw.com of 9/3/2010). No further details are available at the time of writing.
11. Procedural law and evidence

PROCEDURAL LAW

Italian decisions on conflicts of jurisdiction
In mid April 2009, the Italian Supreme Administrative Court (Consiglio di Stato) gave a landmark ruling in the case of a football referee who sought to challenge a decision by the Italian Referees' Association to transfer him to a different sector. The Court decided that such a matter was purely internal to the sport and that the administrative courts had no jurisdiction here. In the case in question, the claimant M had been transferred from the Serie A (i.e. the Italian Premier League) to the Schools and Youth Division of the league, on the basis of alleged technical errors – but without causing him to lose his membership of the Association (Mazzoleni v. Federazione Italiana Giuoco Calcio of 17/4/2009 [2009] Il Foro Italiano Part III, col. 305, as reported in European Current Law 1-2010, p. 74).

In another case, on the other hand, the Civil Supreme Court (Corte di Cassazione) ruled that, where a claim was instituted against the Italian Football association for its refusal to promote a certain football club to a higher division, it was the administrative courts which had exclusive jurisdiction, even if the claim had been made by a third party who was not directly the addressee of the decision. The case under review was one in which the Official Receiver, who was handling the case of the insolvent Napoli Football Club, had sought the setting aside of certain decisions by which the governing body of Italian football had assigned certain clubs to the Premier and other Leagues as a result of the 2005-6 season, the net result of which was the exclusion of Napoli from the top flight. Although the Official receiver had initiated proceedings before the local administrative court (Tribunale Amministrativo Reionale – TAR) he at the same time sought a declaration that the ordinary courts should have jurisdiction over a further claim for damages. However, the Supreme Court ruled that the TAR had exclusive jurisdiction in this dispute, even though the Official receiver was not himself the subject-matter of the relevant decisions by the governing body in football (Fallita Societa Sportiva Calcio Napoli v. Federazzione Italiana Giuoco Calcio [2009] Il Foro Italiano No. 11, col. 3045, as reported in European Current Law 6-2010, p. 78).
12. International private law

INTERNATIONAL PRIVATE LAW

[None]

13. Fiscal law

FISCAL LAW

IPL offices raided in tax probe (India)
In late April 2010, it was learned that payments made to various cricketers employed by teams in the controversial Indian Premier League were to be examined by the Indian tax authorities, who proceeded to raid offices across India. During those raids, it is reported that the officials in question demanded details of payments made to all players and employees of the eight franchises in the past three years. There is no suggestion that the players themselves have committed any infringement. The raids followed the Indian Finance Ministry lodging a case against the IPL to probe possible violations of the country’s foreign exchange rules (The Daily Telegraph of 22/4/2010, p. S17). No further details are available at the time of writing.

Jewel purpose – Maradona earring sold to off-set tax liability (Italy)
The legacy left by Diego Maradona’s sojourn in Italian football in the 1980s, when he appeared for top team Napoli, expressed itself not only in the club’s trophy cabinet but also, less glamorous, in the nation’s tax offices. Italy’s fiscal authorities have, in fact, been seeking various payments from Mr. Maradona for a number of years now, and each time he returns to Italy they make a move to recover at least some of the former Argentine international’s debts. Thus in 2005, they impounded several thousand euros which he had earned taking part in the nation’s version of the television programme Dancing with the Stars. The following year, as was reported in these columns at the time, they seized two Rolex watches worth approximately €11,000 when the player returned to napels for a charity game.

Last year, Maradona paid another visit to Italy, residing at a weight-loss clinic near Bolzano, which gave the authorities yet another opportunity to recover some of the money owed by the current Argentina manager. This time they seized a diamond-studded earring, which they promptly put up for auction. The white gold jewel was eventually sold to a Bolzano woman for €25,000 – nearly five times its estimate. Marco Cuccagna, who heads the Italian debt collection agency Equitalia, described this development as a “blow for justice on behalf of those citizens who pay their taxes” (The Daily Telegraph of 15/1/2010, p. 23). However, his colleague Giovanni Lombardo described the auction as a “drop in the ocean” represented by the former player’s fiscal debt (Associated Press, www.findlaw.com of 14/1/2010).

Academic article on sporting impact of taxation changes (Spain)
In “Changes to taxation: impact on professional sport” ([2010] 8 WSLH p. 8), the author, Bartolome Sanchez, discusses the treatment under Spanish income tax law of top foreign footballers who appear for Spanish clubs. In so doing, he focuses particularly on the measures in the nation’s 2010 Budget which exclude foreign nationals on high incomes from the favourable fiscal regime for impatriates. He outlines the original rules applying to impatriates and the charges introduced in 2010, highlights discrepancies where salaries are just above the highest rate threshold, and asks the question whether the definition of remuneration covers bonuses and variable payments. He also
comments on the possible effects all this may have on sporting stars, clubs, agents and other involved in professional sport (reviewed in [2010] 6 European Current Law p. 78).

**Top golfer fined for tax evasion (Denmark)**

In mid-May 2010, it was learned that Ryder Cup player Soren Hansen had been fined nearly $1.1 million for tax evasion. The Copenhagen City Court found Mr. Hansen guilty for offences committed between 2002 and 2006, during which time he had claimed residence in tax haven Monaco. The court found that the golfer did, in fact, live in Denmark and avoided Danish taxation (Associated Press, www.findlaw.com of 19/5/2010). It was not clear at the time of writing whether Mr. Hansen would appeal against this ruling.

No obligation to deduct tax at source for player loan compensation. German court decision

In the case under review, the Taxation Court (Finanzgericht) of Münster ruled that the income received by a foreign sporting association from a transfer deal concluded with a domestic sports club which took the form of a player loan did not constitute income from loans or leases obtained as a result of the temporary assignment of a right, which gave rise to a limited tax obligation. Therefore, the domestic club was not liable for tax deduction at source (Steuerabzugspflicht) under German fiscal law (Decision of 27/5/2010, cited in [2010] 11 Neue Juristische Wochenschrift p. 800).
RACISM IN SPORT

Racial issues continue to affect South African Sport

Even the most curmudgeonly commentator will be compelled to admit that, for a country which was as riven with racial issues as South Africa, its various sporting competitions have made praiseworthy efforts to banish the spectres of the past and create a genuinely multi-ethnic environment in which it could prosper. That is not to say, of course, that racial tensions have entirely disappeared from the nation’s sporting scene, as the various entries under this heading in this Journal will readily attest. At the time of writing, it looks as though various wounds have been reopened during the period under review – in spite of the launcing of an epic film on South Africa’s Rugby World Cup triumph in 1995 which has been hailed as a major landmark in this struggle.

Very often, such racial tensions as have subsisted relate to ethnic issues in team selection – once again, previous issues of this column have borne ample witness to this factor. They burst out into the open again early this year, when Mickey Arthur, one of the most successful international coaches of modern times, resigned from the post of national cricket team manager which he had filled with distinction for almost half a decade, only four days before his team left for an important tour of India. It was widely suspected that the main reason for this resignation was that he had been worn down over the years by the requirements of selection policy. Throughout his tenure, he was under constant scrutiny, bordering on instruction, to ensure that the national cricket team displays an appropriate racial mix. I some ways this objectove had been relatively easy to meet, with several members of the batting line-up being non-white (The Independent of 27/1/2010, p. 68).

However, it has become a tenet of government policy, and by extension of the game’s national authorities, that the side should include not only non-white faces, but also players of a discernibly black African extraction. This requirement was easily met when fast bowler Makhaya Ntini was at the height of his powers. Now that he has lost a yard of pace and been omitted from the team, the search for a replacement has been somewhat problematic, and gave rise to heated debates about the merits or otherwise of black players such as Loots Bosman and fast bowler Lanwabo Tsotso. Officially, Mr. Arthur’s resignation was not in any way linked to any disagreements over race quotas, a claim which was forcibly made by Gerald Majola, the chief executive of governing body Cricket South Africa. He insisted that the coach’s resignation “came through the normal stock-taking process” which followed the home series against England and against the background of the disappointing results achieved by the national team the previous year. However, bearing in mind that, with Mr. Ntini’s departure, the national team had not included a single black player during the last two tests against England, as well as the dismissal of the multi-racial selection committee chaired by former all-rounder Mike Procter, there appeared the danger of a new stand-off, and the resulting tensions, on this fraught subject (The Guardian of 28/1/2010, p. S8).

It was particularly unfortunate that this renewed bout of cricket-related racial tension should erupt around the time of the 20th anniversary of that epoch-making day when the nation’s iconic martyr figure and future president, Nelson Mandela, was released from over two decades of imprisonment to usher in the end of apartheid. The reason why the sport emerged as a tainted spectator to this momentous occasion was that it came against the backdrop of the ill-fated rebel tour of South Africa, organised by former test player Ali Bacher which, far from featuring as an irritating side-show to the wider political drama being played out at the exit of the nation’s most notorious prison, became a focus for political resentment and rancorous protest. Such was the frenzy of unrest stirred up by the tour that at a certain point fears were expressed for the players’ safety – more particularly that of captain Mike Gatting, whose disastrous handling of the public relations surrounding the demonstrations had made him the most obvious and identifiable target for obloquy. This was particularly the case when, to the former England captain’s credit, he undertook to accept any legitimate protest petition wherever the team played. Even though, 20 years on, the players involved remain divided as to whether the tour should, with hindsight, have gone ahead, there can be little doubt that the prospects of the sport playing a significant role in ethnic reconciliation received a severe setback that year (The Sunday Telegraph of 10/1/2010, p. S2).
better in terms of ethnic diversity and integration. Uncannily, the divisions and tensions which reappeared in the nation’s cricketing circles as outlined above coincided with the premiere of the film Invictus, an cinematographically epic account of the historic capture of the 1995 Rugby World Cup by the South African national team. Rapturously received by the critics, the film skillfully combines the sheer sporting endeavour which prompted the win with the underlying political and social issues. Prominent among the latter was the speech by President Nelson Mandela in which he persuades the sporting committee of the ruling African national Congress not to ban the Springbok name and colours – which is the moment at which his calculated move to use rugby as a political tool becomes apparent and justified.

However, even more significant for the role played by the sport in effecting ethnic harmony was the occasion, in mid-May, when the Blue Bulls, a team based in the former bastion of apartheid, i.e. Pretoria, and supported by the most conservative phalanx of white fans, played a crucial fixture in the impoverished township of Soweto. The team's main home ground being out of commission until its use for the football World Cup the following month, the Soweto ground was chosen as the host venue after the Bulls qualified for the semi-finals of the prestigious Super 14 tournament. The influx of mainly white Bulls supporters into the township provided a unique opportunity to bridge the gap, as well as stimulating the game among the nation’s non-whites, traditionally more attracted to the round-ball variety of football (The Sunday Telegraph of 9/5/2010, p. 27).

Row over Johns allegations reopens racial wounds in Australian sport

It was one of the most defining moments in the history of Australian sport. As fans supporting a rival team unleashed a torrent of racial abuse, a top Aboriginal player of Australian rules football, Nicky Winmar, walked across to them, lifted his jersey and pointed defiantly to his skin. It was this incident which gave rise to radical action by the sport’s authorities to stamp out racism in its ranks. This happened in 1993. nearly two decades later, both the Australian Football League (AFL) and the nation’s rugby league authorities were caught up in an ugly imbroglio with racial overtones when, within the space of one week, three of the sport’s veterans used language which many inhabitants of the country believed had been consigned to history. The most serious incident occurred in mid-June 2010 when it was learned that Andrew Johns, a former Rugby League Test captain, had described Greg Inglis, an Aboriginal player, as a "black c*nnt".

Johns was – until he made the remark – assistant coach to the New South Wales side, whereas Mr. Inglis represents Queensland. The furore erupted as the two teams were preparing for the fiercely-contested State of Origin series, generally regarded as the highlight of the rugby league season. Following the incident, Timana Tahu, a half-Aborigine, half-Maori competitor, withdrew from the NSW side in protest, and Mr. Johns had no alternative than to resign from his post (The Independent on Sunday of 20/6/2010, p. 36). Moreover, Mr. Tahu claimed that this was far from an isolated incident, adding:

“It was not just one racial comment directed at one individual that offended me. The remarks were directed at various races and the situation I encountered was totally unacceptable. I believe that I am a role model for children and I did this to show my kids that this sort of behaviour is wrong” (The Independent of 15/6/2010, p. 56).

Mr. Johns subsequently apologised unreservedly for what he described as “banter” (Ibid). On the playing field, the abused players (Israel Folau also having been the subject of Mr. Johns’s invective) had the proverbial ultimate bellow, scoring a try each in a devastating 34-6 victory over their opponents (The Independent of 17/6/2010, p. 64). The entire affair came at a fraught time for the sport in Australia. A few months earlier, the very same Mr. Johns had been involved in a group sex scandal involving a New Zealand barmaid, and it was revealed (as reported in these columns at the time) that one leading team, Melbourne Storm, had for several years paid its players above the maximum permitted by the sport’s salary cap rules, after which the team were stripped of their 2007 and 2009 Premierships and heavily fined (The Independent on Sunday loc. cit.).

Then it was, once again, the turn of the AFL to court racial controversy. Addressing a mid-week charity lunch in Melbourne, Mal Brown, a former player and coach to the Western Australia team, recalled an occasion when poor lighting had apparently been visited upon a fund-raising picture against Victoria 15 years previously. He said:

“It actually disadvantaged us. We couldn’t pick any of the cannibals.
All the good black fellows, we couldn’t pick them because we couldn’t see them in the light (….) we didn’t even get any white shirts to put on them” (Ibid).

Although this drew laughter from the audience, others in the game were less enchanted, particularly when the story made at least one front page in the national press the next day. Once again, there were profuse apologies from the “guilty” party, but this was soon neutralised by yet more embarrassment for Australian Rules football when, at a function in South Australia, former AFL star Robert DiPierdomenico described another great of yesteryear, Gavin Wanganeen, as being “not bad for an Abo”. He was promptly suspended as the face of Auskick, an AFL programme aimed at encouraging youngsters to take up the sport. Perhaps the most unfortunate aspect of the entire episode is that all three men involved – Johns, Brown and Di Pierdomenico – have made considerable efforts to train young indigenous players, yet they appear not to grasp the niceties of language or the offence non-observance of the latter is capable of causing, with Mr. Brown even claiming that, in the past, expressions such as “cannibal” and “little black bugger” had been used as terms of endearment (Ibid).

However, during the period under review, those who are not directly involved in the nation’s sport have also demonstrated an uncanny knack for creating sporting-related ethnic tension. In January 2010, the Italian Football Association banned a section of Juventus fans from attending the next home fixture because of racial taunts against Inter Milan Striker Mario Balotelli, who is of Ghanaian descent. Supporters sitting in the southern curve of the Stadio Olimpico during a cup game with Napoli chanted derogatory slogans about mr. balotelli during half time. An appeal over the stadium’s public address system requesting them to stop was ignored (Associated Press, www.findlaw.com of 15/1/2010). However, the authorities also penalised the Inter forward €7,000 for ironically applauding Chievo fans who had called him a “f***ing monkey”, chanted “a negro cannot be Italian” and “if you jump up and down, Balotelli dies”. In what many commentators regarded as an over-reaction by the Italian football authorities, Mr. Balotelli was ruled to have “incited crowd disorder” (The Observer of 4/4/2010, p. S6).

Juventus had already been penalised for abusing Balotelli the previous year, having been ordered to play a home game without spectators following an incident. The Turin side challenged this decision before the Italian Supreme Sporting Court (Alta Corte di Giustizia Sportiva). The Court first of all had to deal with a procedural dispute as to whether it actually had jurisdiction to try the case. The Court ruled that this was indeed the case. It held that an order to play a game behind closed doors made against a football club did not constitute a minor penalty, and as a result fell within the jurisdiction of the
Supreme Court. A dispute surrounding a sporting penalty issued as a result of racial chants issuing from spectators during a football game was highly relevant to the governance of the sport, which gave the Court jurisdiction to adjudicate. In procedural terms, there was also a dispute as to whether the body, created by the Italian Olympic Committee (CONI), which had issued the ban, had the power to do so. Here too, the Court ruled in the affirmative. Since the Olympic Committee has the power to create sporting judicial bodies which are entitled to exercise their own jurisdiction in the context of, and complementary to, judicial proceedings organised by the sporting federation in question, the rules created by CONI which establish such judicial organs apply regardless of whether they have been accepted by the sporting federations or not. On the substance of the dispute, the Court held that the penalty imposed for the chanting of racist slogans was entirely justified (Decision of 9/6/3009, [2010] Il Foro Italiano p. 656).

In early April, Roman side Lazio were fined following racial abuse levelled at AC Milan player Clarence Seedorf (The Observer, loc. cit.).

GENDER ISSUES

The Caster Semenya affair – an update (South Africa)
The controversy surrounding Caster Semenya, the South African runner who gained the World Championship gold medal in the 800m event, has already been extensively covered in the previous issue of this Journal. Briefly, her runaway victory in the event, held in Berlin during the summer of 2009, aroused suspicion, both in official and non-official circles, that the athlete’s gender may not necessarily be female. When this Journal last reported on this issue, the athlete’s career was very much in abeyance as she awaited the results of a gender verification test carried out following the World Championships. This was in spite of the fact that the world governing body in the sport, the IAAF, had confirmed that the runner had not been suspended pending the outcome of this test, and therefore remained free to compete. In fact her coach, Michael Seme, emphasised that she intended to take a full part in the South African domestic season, including the national championships, and to compete on the European circuit, as well as possibly representing her country at the Delhi Commonwealth Games (The Daily Telegraph of 14/1/2010, p. S18).

However, these confident noises were thrown into disarray when Ray Mali, the administrator of national governing body Athletics South Africa (ASA), announced that the runner would only be allowed to compete again with the authorisation of the IAAF. This naturally caused some confusion, and a few days later, ASA spokeswoman Ethel Manyaka was forced to admit that Ms Caster’s position was “not clear” and that it was a matter for the IAAF to decide, since it was the latter, and not ASA, which had ordered a gender inquiry. She added that the narrative “was changing like the weather” (The Daily Telegraph of 15/1/2010, p. S17). The 19-year-old athlete finally decided to put an end to the uncertainty by announcing that she intended to resume her running career in preparation for the summer season in Europe, expressing her frustration that, seven months after the Berlin championships, she was still waiting on a decision regarding her future (The Daily Telegraph of 31/3/2010, p. S20).

However, the very next day she was issued with a statement from ASA that she would be barred from competing until the results of the gender tests were known (Daily Mail of 1/4/2010, p. 103). As a result, the legal firm representing the athlete threatened to take court action against ASA in order to return their client to competitive action, describing the ban visited on the latter as “unlawful” (The Independent of 2/4/2010, p. 72). This threat was revoked a few days later; however, the athlete at the same time announced her intention to return to competitive action in Spain during the final week of June – thus clearly expecting to have been cleared by the IAAF by that time (The Independent of 7/4/2010, p. 51). In the meantime, the manner in which the world governing body was handling the matter was giving rise to increasingly trenchant criticism. One of the voices thus raised came from no lesser figure than Tim Noakes, professor of sports science and exercise at the University of Cape Town, who claimed that the organisation was more interested in the image of the sport than in Semenya’s
welfare. He claimed that Ms. Semenya’s case was far from unique in this respect, stating:

“As many as eight “intersex” women may have been expelled from athletics in the past and I gather that they were warned that if they made a fuss, they would be exposed. So it seems it’s not about athletic advantage. It’s about keeping the Olympics free of intersex athletes, free of unwanted complications. It sends the message that women must do what men say and if the eight previous athletes had to be sacrificed, so be it, which I find very disturbing” (The Daily Telegraph of 20/5/2010, p.S11).

As if the picture were not sufficiently confused, South African sports minister Makhenesi Stofile became involved in an embarrassing climbdown – on the eve of the football World Cup – after being ordered to cancel a high-profile announcement that Semenya had been cleared to compete. The minister, who only the previous year had warned of “Third World War” if the 800m champion was barred from competition on gender grounds, had called a news conference in Johannesburg to announce that the athlete was free to resume her athletics career following the conclusion of the IAAF inquiry. He had invited Semenya to join him at the media announcement, along with her legal team and mediator Brian Currin, a South African civil and human rights lawyer. However, just two hours before the conference was due to open, the latter was cancelled without explanation. It later emerged that the IAAF had been forced to intervene, alleging that Mr. Stofile had acted prematurely and that its long-running investigation had yet to be completed.

The Minister’s blunder was all the more embarrassing because Semenya’s law firm, Dewey and LeBoeuf, were compelled to withdraw a statement distributed earlier in the day in which it welcomed the IAAF’s decision to clear its client for competitive action (The Daily Telegraph of 11/6/2010, p. S24).

The IAAF later issued a statement to the effect that “the procedure had not yet been completed” and that all parties concerned should therefore refrain from making “statements that could only cause unnecessary confusion” (The Guardian of 11/6/2010, p. S14). The test results were not as yet known at the time of writing. However, I am sure that the present writer is not alone in the view that the Semenya affair could legitimately be described as a copypbook example of how not to handle such cases.

Women’s boxing enters Olympics
In mid-May 2010, the International Olympic Committee (IOC) announced that women’s boxing was to make its first appearance on the Olympic programme at the 2012 Games in London. IOC President Jacques Rogge described this move as a “great addition to the games” (The Financial Times of 14/5/2010, p. 23).

Courts in Ireland and the US give contradictory rulings in golf discrimination cases
The various issues surrounding female participation in golf clubs and tournaments has increasingly given rise to controversy and opposition, and not only in feminist circles. There appeared to be a major victory for the campaign against gender discrimination in this field in early April 2010, when a US amateur golfer won a federal discrimination suit which she had brought after a municipal golf course in Massachussets had barred her from playing in a men’s tournament. Elaine Joyce had sued the town of Dennis and others after being informed that she was not allowed to compete in a 2007 men’s tournament at the Dennis Pines Golf Course. Ms. Joyce has a single-digit handicap and has won many tournaments. US District Judge Nathaniel Gorton ruled that Ms. Joyce was protected under federal civil rights law and was entitled to damages and reimbursement of legal fees. A lawyer for the golf course later announced that no appeal was planned, whereas club officials said that they had already changed the club’s rules to allow women to play in men’s tournaments several months before the court action was commenced (Associated Press, www.findlaw.com of 5/4/2010).

It was a different story altogether on the other side of the Atlantic, more particularly with a recent decision by the Irish Supreme Court (Equality Authority v. Portmarnock Golf Club & ors, and Cuddy and anor v Equality Authority [2009] IESC 73, reported in [2010] 4 The Bar Review p. 39 et seq). This served to confirm the decision of the High Court that the golf club in question was lawfully entitled to exclude women from membership. The case turned on the interpretation of S9 of the 2000 Equal Status Act, which provides that a club will not be regarded as acting in a discriminatory manner if its principal purposes “is to cater for the needs of (i) persons of a particular gender, marital status, family status, sexual orientation, religious
belief, age, disability, nationality or ethnic or national origin”. The Equality Authority, one of the claimants, argued that the term “need” should be narrowly construed and that giving the term its ordinary and natural meaning, golf could not be said to constitute a “need” of gentlemen, given that playing golf is not a necessity. At first instance, the District Court found for the claimants. On appeal to the High Court, however, O’Higgins J accepted the lower court’s interpretation of S9 and held that the principal purpose of the golf club was to “cater only for the needs of male golfers and therefore comes within the exception (…) provided by Section 9” (Ibid).

The Equality Authority then took the case to the Supreme Court, which confirmed the High Court decision. The majority rejected the submission that the word “need” should be narrowly interpreted, and held that the Equality Authority’s attempts to convince the Court and the gender for which they cater was “manifestly ludicrous” (per Hardiman J). The principal object of the club was to cater for the needs of male golfers, and the expression “principal purpose” related to the category of persons whose needs are catered for and not to the activities of the club. The minority adopted a different approach. Thus Denham J, on the subject of the interpretation of the term “need”, found that it raised the concept of necessity, and was not simply a choice. On this analysis, the Judge concluded that the principal purpose of the club was to play golf, and that it did not simply cater for men but for women also, in a different manner. She accepted the Authority’s submission that there must in fact be a logical connection between the objects of the club and the gender, and found that such a connection was not present in this case (Ibid).

Islamic women and sport

Palestine’s Speed Sisters on track for race equality

When Suna Aweidah pulls on her red overalls and slips behind the wheel of her car, she empties her mind of everything but the race ahead. But there is also an indelible nugget of pride that she and her team, the Speed Sisters, are breaking through the traditional conservatism of Palestinian society to compete in a motor racing event on an equal basis with men. As she eases her Opel Corsa on to the Ramallah race track, she blocks out the yells of “Suna, yallah!” (“Let’s go!”), and focuses on the map of the course she has memorised, and the techniques she has learned from British instructors.

The Speed Sisters comprise eight women, aged 18 to 39, Muslim and Christian. They are starting to get attention, practical backing and the adoration of crowds on what is unsurprisingly a male-dominated motor racing circuit. Men and women compete on an equal basis but, according to Aweidah, the men have more expensive, modified cars. Aweidah now has a dedicated car in which to race, but for years relied on the loan of spare vehicles from a car rental firm, Dallah. One supporter has also donated an old BMW for training and racing purposes. The women have the backing of the British consulate in East Jerusalem, which has invested about £6,500 in helmets, training and revamping the BMW.

Consulate spokeswoman Karen McLuskie describes them as positive role models for women and as “inspiring in a conflict zone where fun is low on the priority list” (The Guardian of 19/6/2010, p. 28).

When the was established in 2005, Aweidah hoped to participate. But her family was reluctant. A year later she was invited to a women-only go-kart competition in Sharm el-Sheikh, Egypt. Aweidah came sixth in a field of 18. Her family grew more supportive. Her first race in the West Bank was in 2006 when, to her astonishment, she found two other women participating. The male competitors apparently found it “strange”, but raised no objections. After a while they proved themselves, and the men even became supportive. With the encouragement of the British consulate, the female drivers finally formed a team. British trainers and former competitors Helen Elstop and Sue Sanders spent an entire weekend, courtesy of the consulate, building on the women’s basic driving skills and mental preparation for racing. The youngest of the team is Marah Zahalka, 18, a business student at Bir Zeit University whose mother is a driving instructor. Another team-member, Mona Ennab, 24, is supported at races by her mother and aunts clad in traditional Palestinian dress. Betty Saadeh, 29, comes from a racing family: her father was a rally champion in Mexico and her brother was the 2009 autocross champion in the West Bank.

Aweidah, who lives with her parents and two of her siblings, and works for the UN Relief and Works Agency, believes the success and acceptance of the Speed Sisters is an indication of progress in Palestinian society. She hopes one day to be able to represent...
Palestine in competitions abroad, and to "have our own state so we could invite other countries to compete" (Ibid).

UAE women’s football team battle to enhance status
They only recently obtained a grass practice field. They have come under attack on their Facebook page, and some fear telling their relatives that during their spare time they play football. Such are the troubles facing the national women's team from the United Arab Emirates – and this comes amidst unprecedented progress. Earlier this year, the UAE women scored their greatest triumph, making their first appearance in a major tournament. Playing live on national television and in front of a boisterous crowd of several hundred men, the UAE “upstarts” stunned reigning champion Jordan 1-0 in the West Asian Football Federation championship.

The obstacle-ridden journey of the UAE team is symptomatic of the issues faced by female athletes across the Islamic world. Assisted by families moving to the cities, improved levels of education and increased government support, Muslim women from Indonesia to Morocco are taking up sports in small but growing numbers. They are forming football leagues in Turkey, boxing clubs in Afghanistan and rugby teams in Iran. Nearly 150 female athletes from 18 Muslim countries took part in the 2008 Beijing Olympics, a record and a fivefold increase from the 1988 Seoul games, according to the International Olympic Committee (IOC). Yet this growth comes in fits and starts, and is vulnerable to age-old cultural pressures, modern rules and varying player commitment. Saudi Arabia, for instance, does not allow women to participate in the Olympics and the once-banned Kuwaiti football team was denounced on its return from the WAFF tournament by conservative lawmakers who want a ban on all international competitions. In Iraq, a women's wrestling club disbanded last year after receiving death threats from religious groups.

Then there is growing debate on the wearing of head scarves at sporting events. While rugby, volleyball and taekwondo federations allow them, FIFA has resisted lifting a ban standing by rules designed for safety but seen by Muslims as discriminatory. In mid-April 2010, FIFA initially blocked the Iranian girls’ football team from competing in this summer’s inaugural Youth Olympics over their insistence on wearing head scarves which some Muslims say protects the modesty of Islamic girls and women. FIFA allowed them to return the next month after the team agreed to return the next month after the team agreed to wear a cap that covers their head. Despite the growth in participation rates, the biggest challenges remain “legal prohibitions, social stigma and limited opportunity”, according to said Meghan O. Mahoney, an expert on women’s sports at Northeastern University in the United States.

Formed in 2004 by a handful of young women in love with the game, the UAE team operated in name only for the first several years. Then, two years ago, the group employed Australian Connie Selby, who instituted regular practices and games with opponents from other parts of the country and tours of Europe. Their victory over Jordan in February 2010 raised the team's profile and turned many of the players into local celebrities. But on a balmy night at the team's new practice field, a gift of the government located in the shadow of a men's football stadium, the limit of their newfound success was easy to see.

Ms. Selby, a 50-year-old former Australian national team captain, was running out of patience. She had spent the day gearing up for the intense passing drills. By the time practice was set to start, only two player had bothered to attend, and the practice had to be abandoned, with the coach getting text message after text message whereby the others gave their apologies. Obviously, retaining players all of whom are in school or have day jobs as police officers, bankers and administrators is a huge challenge. Compared to thousands of players to choose from in nations such as Australia or Japan, the UAE only has a pool of 20 who are trying to balance family and work demands with the team (Associated Press, www.findlaw.com of 195/2010).

In addition, there is no UAE league to motivate them and games are rare. The next match following their triumph in Jordan was another regional tournament in August. Without a league, the team cannot qualify to play in Asian Football Confederation tournaments which could lead to a World Cup berth a dream of Selby and many of the players. According to Nadine Schtagleff, a 25-year-old banker whose family hails from Lebanon, "A lot of them see this as a job, rather than a love of the game. It takes a lot to be committed. It is new here and there are not a lot of people willing to step out and invest in the team" (Ibid)
Also, there is the conservative culture to confront. While Sheikh Mohammed bin Rashid Al Maktoum, the ruler of Dubai, and his wife, Princess Haya, have championed women’s sports and two of Mohammed’s daughters actually took part in the 2008 Beijing Olympics, many Emiratis have their suspicions about Western sports. They fear that women’s football forces their women to wear revealing clothes that will expose their bodies, a taboo in a country of 4.8 million people where the preferred dress is the black, cloak-like abaya and hijab. As a result, the team has lost several players, including one who left after a relative saw her playing in the championship game without her headscarf.

The task of changing the Emirati mindset falls to Nada Yousef al-Hashimi, a Ministry of Economy official who took up swimming and athletics at school. When she is not trying to lure foreign investment into the country, Ms. al-Hashimi can be found at the team’s practice watching protectively over the players. She insists she is not trying to change the culture as much as making the case that football is no threat to local traditions. She tirelessly promotes the team and has been known to engage critics who pop up on the team’s Facebook page, which includes a lively discussion page debating the merits of women’s football in the Middle East, dozens of team photos and links to YouTube videos. A few angry comments criticizing women’s football as culturally inappropriate have been deleted, though most are respectful, said one of the page’s creators, Abdul Razaq al-Kabi. The UAE players also have to contend with siblings and parents who feel soccer undermines family traditions dictating that a woman’s place is in the home. Several team members have spoken of long fights just to play, including one player who no longer talks to her father and a second forced to quit the team for a month after her parents were inundated by complaints from friends and relatives (Ibid).

Women’s wrestling gains popularity in conservative southern Iraq

In Iraq’s conservative and religious south, women are modest, tribal elders are respected and Friday means the mosque. That was until Hamid al-Hamdan came to town. A former wrestling champion and five-times national wrestling coach of the year, Mr al-Hamdan decided a year ago to challenge the orthodoxy. Inspired by the female fighters he had seen at international tournaments, he helped to set up Iraq’s first women’s freestyle wrestling club in the city of Diwaniyah, claiming that he “wanted it to be another of my achievements”. Up to 20 teenagers and students now meet on Fridays and Saturdays and shed their abayas – which cover the whole body – to practise holds, throws and grapples. Authorities were initially shocked and confused, but now the group has inspired copycat clubs across the country. Newal al-Hasnawi, whose three daughters are all keen wrestlers, defended the exercise as giving women “a chance to prove themselves in sports here.” A retired headteacher, she managed the club after it was launched at Mr al-Hamdan’s suggestion. As word spread, more young women joined, but news of the club reached community leaders, who were ruffled. Mrs al-Hasnawi said that she and her daughters “were getting comments in the street, even in university – they thought it was strange for our society”. Even Iraq’s Wrestling Union labelled the as club haram – forbidden (The Times of 6/1/2010, p. 31).

Mr al-Hamdan said that he and his wrestlers were good Muslims, and wrestled either in hijabs or clothing that covered most of their bodies. Gradually, helped by widespread media coverage bringing acclaim to the team, the community had become more accepting, said the women. The coverage has also sparked imitators. Two teams started last year in Baghdad, as well as one in Kurdish northern Iraq, and one in the deeply religious Shia city of Karbala. The Diwaniyah club hosted them all for a wrestling tournament in the summer. Mr. al-Hamdani described the event as a “success”, and his goal now is to take his team to tournaments in Turkey and Syria, where he thinks they would finish “first or second”. The team members are unanimous in their ultimate goal: to win an Olympic medal for Iraq.

The acceptance of the female wrestlers is a rare example of women’s sport being encouraged, said Mohamad al-Said, of the Olympic Committee. He said that sport in the country, especially among women, had dwindled to almost nothing. After the 2003 invasion and subsequent insurgency subsided, the society that emerged was in many areas more religious and conservative than under Saddam Hussein. In addition, according to Mr. al-Said, because of the security situation and the religious parties “we have girls who are too frightened to go out in the evenings, so we have less participation in sports” (Ibid).
Australian Rules Football star tells gay players to remain in the closet

Much has been made recently of gay competitors in various sports who have had the courage to “come out” and candidly declare their sexuality. In some sports, however, this is a more difficult proposition than in others. Last year, for example, Gareth Thomas became the first British Rugby Union player to reveal that he was homosexual. Now an imbroglio has broken out in the macho world of Australian Rules Football after one of the game’s star players said that homosexual players should stay in the closet. Jason Akermanis, a veteran of the sport who plays for Melbourne’s Western Bulldogs team in the Australian Rules Football league (AFL), said that if a footballer revealed he was homosexual it could “break the fabric of a club”. Mr. Akermanis made his comments because he believed two former AFL players had been offered $150,000 (£90,000) to be the first to publicly come out as homosexual. He said:

“If a player wants to out himself, then I say good luck. But I believe the world of AFL footy is not ready for it. To come out is unnecessary for a lot of reasons” (The Daily Telegraph of 21/5/2010, p. 22)

AFL is the most popular winter sport in the country. A variant of association football, the game is played by two teams of 18 players, dressed in shorts and tight vests, on large oval fields with a rugby ball. The aim is to score goals by kicking the ball between the middle two posts of the opposing goal. Fixtures between clubs can draw crowds of more than 38,000, which include a large female and homosexual fan base.

Denying he was homophobic, Mr. Akermanis went on to say that the conservative, macho culture of the AFL, which has its origins in the 1800s, may not be safe for homosexual men, because some players think that homosexuals suffer from some kind of disease. He said that while he was “fine with it”, many others would not be. The AFL and the Bulldogs management quickly distanced themselves from his comments, which have incensed gay and lesbian groups. Daniel Kowalski, a four-time Olympic medallist who announced he was gay the previous month, said the comments were deeply disappointing, adding that where comments of this nature are made by a figure of his stature, “why would you come out?”

Dr Christopher Hickey, a senior lecturer in sport at Deakin University in Melbourne, said that the AFL had tried to change its image in recent years in an attempt to become more tolerant and less misogynistic. He said the homegrown code had gay fans, but had never had an openly gay player. He added:

“There is a performance aspect to the game, the beauty of the players and the physical attributes and all that, but there is a lot of machismo too, it’s a culture in which men are tough and you don’t show weakness” (Ibid)

Despite a celebrated sporting culture, and a thriving gay community, Australia has few openly homosexual athletes. However, former rugby league international Ian Roberts came out in 1995 despite being told to “keep a low profile” and avoid attending the Gay and Lesbian Mardi Gras by rugby league officials.

ANIMAL RIGHTS ISSUES

Racehorse owner vows to quit amid jockey boycott over horse breakdowns (US)

In early February 2010, an embattled large-scale racehorse owner in the US vowed to quit the sport amid a jockey boycott involving the condition of his animals. Jockeys at Penn National Race Course in Grantville have refused to ride against horses owned by Michael Gill after 10 of his horses broke down on the track in the past 13 months. Several jockeys racing on horses behind them have been thrown from their rides. The Pennsylvania Racing Commission and Penn National have both opened investigations into Mr. Gill, a New Hampshire mortgage company owner who topped the industry’s leader board last year with US$6.7 million in earnings and 370 wins.

Gill denied suggestions that he uses Penn National as a dumping ground to eke out a few final wins from cheap or late-career horses. He instead faulted the condition of the track, which races four nights per week throughout the often-harsh central Pennsylvania winter. He added that Penn National has a history of that track being bad, and horses breaking down, and that the most recent horse to break down, Laughing Moon, pulled a suspensory ligament in its leg when it hit an ice patch at the end of a third-place finish on Jan. 23. Jockeys immediately huddled after the tragic finish - which sent several jockeys tumbling off their mounts and at least one to the hospital - and announced their protest, leading to a delay of the next race. In a letter to the Racing Commission, the jockeys
wrote that, clearly, the jockeys and equine athletes should not be put in a position of participating in "events that involve their health, safety and welfare, and where their riding strategy is compromised", until the commission's investigation had been completed (Associated Press, at www.findlaw.com of 2/2/2010).

According to Mr. Gill, the necropsies conducted on Laughing Moon and a horse named Melodeeman, which broke down days earlier at Penn National, showed that there no wrongdoing had occurred. He insisted that he does not use any illegal drugs on his animals and said he takes good care of them at his training facility in southern Chester County. He also noted that his horses at Philadelphia Park and Charles Town Races and Mountaineer Park in West Virginia have had no such problems. Gill typically runs about five horses a night at Penn National, where he keeps 49 stalls. He was said to have had approximately 1,000 starts last year over 200 racing days. Gill, who won the prestigious Eclipse Award in 2005 as the sport's top owner, has owned as many as 400 racehorses, but said he now has about 100. He plans to sell them off quickly and retire from the business, he said. But he predicts the breakdowns at Penn National will continue (Ibid).
15. Drugs legislation and related issues

GENERAL, TECHNOLOGICAL AND SCIENTIFIC DEVELOPMENTS

WADA aims to catch dope takers with the help of drug manufacturers

In mid-January 2010, leaders of the World Anti-Doping Agency (WADA) announced that their collaboration with the pharmaceutical industry would soon help to catch more doping users. The organisation’s Director General, David Howman, stated that co-operation with drug companies could deliver appropriate results within the next 12 months. He added that drug manufacturers had approached WADA after the Swiss company Roche played a key role in catching cyclists who took unlawful substances during the 2008 Tour de France. Riders used the new blood-boosting hormone CERA in the belief that it could not be traced. However, Roche had alerted WADA to the potential for abuse by athletes which was inherent in the drug four years earlier, and several cyclists were caught during and after the race. Stage winners Riccardo Ricco, Leonardo Piepoli and Stefan Schumacher were stripped of their prizes and suspended (Associated Press at www.findlaw.com of 19/1/2010).

DOPING ISSUES AND MEASURES – NATIONAL BODIES

Dr Galea formally charged with administering illegal substances (US/Canada)

It will be recalled from the previous issue of this Journal ([2009] 1 Sport and the Law Journal 78) that Anthony Galea, a Canadian doctor of sports medicine who counts golfer Tiger Woods and baseball star Alex Rodriguez amongst his clientele, was arrested in Canada last October on four charges relating to an unapproved substance used in healing therapy called Actovegin. He is known for using a technique, called platelet-rich plasma therapy, designed to speed recovery from injuries. He has used this technique to treat several high-profile athletes. Galea, who recently resigned as the team doctor for the Canadian Football League’s Toronto Argonauts, became the focus of authorities’ attention last September when his assistant, Mary Anne Catalano, was stopped at the U.S.border in Buffalo, N.Y. US federal court documents claim that “20 vials and 76 ampoules of unknown misbranded drugs including Nutropin (Human Growth Hormone - HGH) and foreign homeopathic drugs” were found in a car driven by Ms. Catalano. However, Galea claimed that Catalano only could have had a tiny, half-empty bottle or one ampoule of HGH because she was bringing the drug across the border for his own use. He admits to having taken HGH, which is banned by the major sports, for a decade because it can improve the quality of life for people over 40, and was arrested in mid-October 2009 after a search warrant was executed at the Institute of Sports Medicine Health and Wellness Centre in Toronto. He is charged with selling Actovegin, conspiracy to import an unapproved drug, conspiracy to export a drug and smuggling goods into Canada.

Yankees star Alex Rodriguez has in the meantime declared himself to be “at ease” with his ties to Dr Galea, claiming that through his treatment the doctor never administered any of the banned substance HGH to him or to any other athlete. Mr. Rodriguez and other baseball players, including Jose Reyes and Carlos Beltran of the Mets, have been contacted by U.S. federal investigators regarding Galea. Colorado Rockies closer Huston Street said he was on a list of players federal investigators wanted to interview. Reyes and Beltran each said they did not receive human growth hormone from Galea (Associated Press, www.findlaw.com of 10/3/2010).

This had been a relatively quiet spring for Rodriguez compared to last year, when he admitted during an awkward news conference that he used steroids from 2001-03. Even if he is cleared in the investigation, Rodriguez could be in violation of his record $275 million, 10-year contract because a team has the right to approve doctors who are not on its medical staff. If Rodriguez was treated without club consent, any attempt to determine whether he violated the contract’s guarantee language or baseball’s collective bargaining agreement likely would hinge on whether treatment was elective or necessary (Ibid).

Tiger Woods, for his part, has promised to give his “full co-operation” to the FBI in the Galea investigation. He
denies ever taking human growth hormone, but revealed that he needed extra treatment from Dr Anthony Galea after tearing his Achilles tendon in December 2008. That is an injury he has never mentioned before; either on his return in 2009 from eight months out following reconstructive knee surgery or during the rest of the season. He added:

“He never gave me HGH or any PEDs [performance-enhancing drugs]. I've never taken that my entire life. I've never taken any illegal drug, ever, for that matter. I had PRP, platelet-enriched plasma treatments. Then in December I started running again and tore my Achilles in my right leg. I then had PRP injections throughout the year. I kept retearing it. I used tape to play most of the year.” (The Independent of 6/4/2010, p.44)

In mid-May 2010, Dr. Galea was formally charged with administering unlawful drugs, including human growth hormone, to at least one National Football League player. No athletes were identified in the federal criminal complaint filed in Buffalo, New York, but while the charges related only to one of Galea’s NFL clients, others might possibly also come under suspicion (The Daily Telegraph of 19/5/2010, p. S20). Galea's attorney Brian Greenspan called the complaint disappointing but declined to comment on the charges. He said it was “regrettable that Dr. Galea, a world renowned and respected sports medicine physician, now faces these further charges”. Separately, Galea was arrested in Canada on 15/10/2009 after a search warrant was executed at the Institute of Sports Medicine Health and Wellness Center in Toronto and charged with selling Actovegin, conspiracy to import an unapproved drug, conspiracy to export a drug and smuggling goods into Canada. If convicted of the U.S. smuggling charge, Galea could face up to 20 years in prison. The other charges carry maximum sentences of three and five years (Associated Press, www.findlaw.com of 19/5/2010).

No further details are available at the time of writing.

French legislation amended to conform to World Anti-Doping Code
By Order No. 2010-379 of 14/4/2010, the French Government took the measures which were necessary to bring its national legislation in line with the World Anti-Doping Code (WADC). The author Jean-Christophe Lapouble highlights the various legal changes which this integration of the WADC has entailed. Chief amongst these are the wide powers given to the World Anti-Doping Agency (WADA) in enforcing the Code, such as its authority to seize the national administrative courts in order to challenge any penalties imposed by a national sporting federation, or even by the national anti-doping organisation. The author also draws attention to the broadened definitions of the various concepts involved in the campaign against doping which the WADC brings about, and the increased powers for the national anti-doping agency which it introduces. He also notes the new offences which the Code has brought in its wake, and the increased intensity of the various doping controls (La semaine Juridique – Edition Générale No, 19-20, p. 989).

Virginia chiropractor charged with supplying steroids (US)
In mid-March 2010, a chiropractor in the US state of Virginia was arrested on drug charges after a co-defendant claimed that he had provided members of Washington-area sports teams with steroids. The chiropractor in question, Douglas Nagel, was charged on seven counts of conspiring to deliver a controlled substance, specifically steroids. The previous year, a Florida-based associate of Mr. Nagel had pleaded guilty to possessing steroids with intent to sell. According to the relevant affidavit, that man had informed the authorities that Nagel had been supplying steroids to members of the Washington Nationals and the Washington Capitals (Associated Press, www.findlaw.com of 23/3/2010). The verdict in this case was unknown at the time of writing.

DOPING ISSUES AND MEASURES – CYCLING

The Floyd Landis affair – an update (US/France)
The reader will recall that in 2006, the initial Tour de France winner, Floyd Landis of the US, was stripped of his title and banned for two years for taking illegal substances. It will also be recalled that Landis subsequently and unsuccessfully attempted to clear his name, alleging that the relevant computer files had been mishandled and erased. To the world at large, it seemed as though this might be the end of the matter. However, in mid-February 2010 the news broke that an international arrest warrant had been issued by a French judge in connection with a case of data hacking at a doping...
laboratory. French anti-doping chief Pierre Bordry announced that judge Thomas Cassuto sought to question Mr. Landis about computer hacking which dated back to September 2006 at the Chateny-Malabry laboratory. It was this laboratory which had uncovered abnormally high testosterone levels in the US rider’s samples collected in the run-up to his 2006 Tour de France win (The Independent of 16/2/2010, p. 52).

However, this was not the most explosive development to occur in the wake of the Landis scandal. That came three months later, when Landis plunged his sport into a new crisis by not only confessing to systematic doping in the course of his career, but also accusing his compatriot Lance Armstrong, the seven-time winner of the Tour, of assisting him with the use of drugs and claiming that an official operating for the sport’s world governing body, the UCI, had suppressed a failed doping test by Mr. Armstrong in 2002. Mr. Armstrong, who was competing in the Tour of California at the time of the allegations, issued a swift and uncompromising denial. Nevertheless, the World Anti-Doping Agency (WADA) undertook to investigate the various explosive claims, which were contained in emails apparently sent by the cyclist between 30 April and 6 May, to the UCI and the US national governing body, USA Cycling, and leaked to the Wall Street Journal. The UCI, for its part, reacted angrily to the accusation that Armstrong and his long-time director, Johan Bruyneel, had arrived at a “financial arrangement” with a UCI official to cover up a positive test for the banned EPO drug by Armstrong during the 2002 Tour of Switzerland. It issued the following statement: “Deeply shocked by the gravity of this statement, which considerably impinges on the honour of all persons who have dedicated themselves to the fight against doping, the UCI wishes to clearly state that it has never changed or concealed a positive test result” (The Daily Telegraph of 21/5/2010, p. S10).

More details of the allegations made against Mr. Armstrong gradually began to emerge. In the email referred to above, Landis claimed that the latter helped him to understand how the EPO drug worked. He alleged that Armstrong explained to him the evolution of EPO testing and the extent to which transfusions were necessary because of the inconvenience presented by the new test. He further alleged that, during a training camp held in Girona, Spain, in 2003, he had two half-litre units of blood taken in three-week intervals to be used later during the Tour de France. He claimed that the blood had been extracted in Armstrong’s apartment and that blood bags taken from him and from teammate George Hincapie were kept in a refrigerator in Armstrong’s wardrobe. Mr. Hincapie has since then strenuously denied the allegations (Ibid). It is also a fact that, in late December 2009, items which could have been used for blood doping were found in a search of medical equipment belonging to Astana, Mr. Armstrong’s former team, during the 2009 Tour, according to a source close to a French judicial investigation. The inquiry opened after “syringes and perfusions” were discovered during the Tour, according to leading French newspaper Le Monde (The Times of 24/12/2009, p. 52).

Almost immediately afterwards, Armstrong decided to launch a counter-offensive against his fellow-American, in which he published a series of emails on his RadioShack team’s website, allegedly between Landis, the Tour of California organiser Andrew Messick, and Landis’s sponsor, Dr. Brent Kay. Mr. Armstrong claimed that Landis had used the threat of making his allegations public in an attempt to secure inclusion in the RadioShack team for the Tour of California, which, as is mentioned above, was proceeding at the time when the furore erupted. More particularly it was alleged that Armstrong began to receive threatening text messages more than two years previously, to which Armstrong replied that he had “nothing to hide” and that he was not going to “submit to Landis’s baseless threats”. On the same day, it also emerged that an investigation could be launched not only by the sporting authorities, but also at the federal level. In an uncanny echo of the infamous BALCO affair, widely reported and discussed in these columns and elsewhere, the criminal investigations department of the US Food and Drug Administration was said to be examining the allegations made in a series of emails emanating from Landis, in which the latter implicated Armstrong and other former members of the US Postal Service team, for which he competed between 2002 and 2004 (The Guardian of 22/5/2010, p. S9).

The very next day, however, in yet another dramatic twist in this entire saga, Mr. Landis received support for his allegations from no lesser person than Greg LeMond, three-time winner of the Tour de France and an outspoken critic of doping practices. In a carefully-worded statement, he said: “I believe most of Floyd Landis’s...”
statements regarding the systemic corruption in professional cycling. I imagine from my own experiences that today he is paying a heavy price for his honesty and I support Floyd in his attempt to bring about a change in the sport. Too many lives have been lost or promising careers cut short and too many fans have been cheated. It isn’t about whether Rider X or Rider Y can be proven by physical evidence or otherwise to have doped. Floyd Landis is simply representative of many. Clean racing makes for a more exciting sport, and I encourage the fans to engage in dialogue surrounding Landis’s comments” (The Sunday Telegraph of 23/5/2010, p. S14).

In a separate development, but one which had some bearing on the Armstrong issue, Pat McQuaid, the president of world governing body UCI, admitted that, with hindsight, it was a mistake for the organisation to have accepted a $100,000 donation from the US champion eight years ago. The cash was used to purchase a Sysmex machine, being a piece of equipment used to analyse blood samples, although the governing body denied any suggestion that the seven-times Tour winner had used this in an attempt to bribe the UCI, as was being claimed by Landis. Mr. McQuaid said that the donation had been accepted in order to help develop the sport, and that, at the time, it did not occur to them that there was a conflict of interest involved. He added that the organisation would be “very careful” before accepting a donation from a rider in the future (The Guardian of 26/5/2010, p. S7).

At all events, all the indications were that the UCI was taking the Landis allegations very seriously, and announced that RadioShack manager Johan Bruyneel, Garmin-Transitions sports director Matthew White, Team Sky rider Michael Barry and BMC manager John Lelangue would all be investigated. This was in addition to the investigation which had already been commenced into the activities of Armstrong, Hincapie, Levi Leipheimer, Jom Ochowicz and David Zabriskie. Mr. Armstrong’s lawyer said that the cyclist looked forward to “once again being totally vindicated after a fair investigation” (The Daily Telegraph of 27/5/2010, p. S13). At the same time, however, the UCI revealed that it had warned Mr. Landis that he could be sued for defamation weeks before he made the allegations referred to above. Former UCI president Hein Verbruggen told the Associated Press that a letter was sent to the rider two or three weeks before his allegations became public (Associated Press, www.findlaw.com of 8/6/2010).

The present writer pledges, as ever, to keep his readership informed of any further developments in this regard.

“Mechanical doping” – a new plague visited upon the sport?

It has been said by some that the fight against doping amounts to the “pursuit of the uncatchable”. This thesis may gain some credibilty if there is found to be any substance to allegations made in late May 2010 in two Italian newspapers that riders were using small motors concealed in their bicycles in order to give them an illegal advantage. More particularly it was claimed that these batteries were hidden within bicycle tubing and that spot checks had been carried out in the 2010 Paris-Roubaix and Tour of Flanders races.

Initially, cycling officials denied such reports, but admitted that they were taking preventative measures in order to ensure that such “mechanical doping” does not occur (The Guardian of 20/5/2010, p. S8).

Two weeks later, the sport’s world governing body, the UCI, announced that it was to investigate these allegations. It has to be said that small batteries of this type have become commonplace in recreational cycling in recent years, with batteries the size of small sugar bags strapped to the frame or nestling in the saddle bag. The question now is whether this technology has been refined to the point where it could be used unlawfully in professional cycling (The Daily Telegraph of 3/6/2010, p. S20). It has since emerged that Chris Boardman, the British Olympic gold medallist, had warned the UCI a year previously just how easy it could be to power bicycles illegally in the peloton and avoid detection if riders chose to apply this technology. He said:

“We just need to be aware of what is technically possible these days. I sat at a meeting with the UCI last year and drew on the blackboard exactly how this might work. I showed them how some of the sophisticated boosting technology now available can get a kilowatt out of a single AAA battery. Don’t forget electrically-operated gears are legal these days so there is already a power source on many bikes. I think it would be fair to say there was a stunned silence after I said my piece. It would be very little trouble adapting a power source to give you
a couple of hundred watts for 20
minutes or so, which would basically
give you 40 percent more power
through the pedals in a time trial.
You could reduce that power and
spread it over a longer period of
time” (The Daily Telegraph of

However, Mr. Boardman added that he
remained sceptical as to whether “bike
doping” had already occurred (Ibid).

Riders barred from Giro
following suspicious blood
readings (Italy)
In early May 2010, it was learned that
one of the pre-race favourites was among three riders to have been barred from Giro d’Italia race after providing suspiciously high blood readings. Last year’s runner-up in the race, Franco Pellizotti of Italy, who was also the 2009 Tour de France “King of the
Mountains”, was banned from the race along with Jesus Rosendo Prado (Spain) and Tadej Valjavec (Slovenia). As from 2008, the International Cycling Union, the sport’s world governing body, has collected blood samples from professional riders to create a medical profile to be compared with data registered in doping tests (The Daily Telegraph of 4/5/2010, p. S20). Franco Pellizotti was cleared of doping by the Italian Olympic committee in October 2010 and said that he would sue the UCI over his ban. Tadej Valjavec was cleared by the Slovenian committee. The UCI, meanwhile, have said that they will appeal the Italian and Slovenian decisions to the CAS.

Other cases
(all months quoted refer to
2010 unless stated otherwise)

Danilo Di Luca. In early February, the Italian rider was suspended for two years for doping offences committed during the 2009 Giro d’Italia. The Italian Olympic Committee (CONI) imposed the ban after Di Luca tested positive for the advanced blood booster CERA following two stages of the 2009 race. The CONI anti-doping prosecutor has sought a three-year ban. Mr. Di Luca had already been suspended for three months in 2007 (the year in which he won the race) after having been involved in another doping case (Associated Press, www.findlaw.com of 1/2/2010). It was announced that Danilo Di Luca’s suspension was reduced to nine months and seven days in October 2010

Bernard Sainz. The French medical adviser, who was accused of inciting riders to doping offences, was sentenced to two years’ imprisonment, one of which was suspended, by the Paris Court of Appeal. He was convicted on charges not only of incitement to doping, but also of unlawfully practising medicine in 1998and 1999. Dr Sainz has repeatedly denied the charges, arguing that he was merely providing homeopathic therapy (The Times of 19/3/2010, p. 101).

Li Fuyu. The Team RadioShack rider was provisionally suspended in late April by the International Cycling Union (UCI) after having tested positive for a banned substance. A laboratory in Ghent, Belgium, accredited by the World Anti-Doping Agency (WADA), found that the Chinese cyclist had tested positive for the anabolic agent Clenbuterol at an in-competition test at the Dwars Door Vlaanderen race on 23 March (The Guardian of 23/4/2010, p. S6). The outcome of the B-sample test was not yet known at the time of writing.

Davide Rebellin. As was reported in an earlier issue of this Journal, the Italian rider was stripped of his road race silver medal at the 2008 Beijing Olympics, having been one of five athletes who tested positive for the blood booster CERA, in tests using retroactive blood samples. Mr. Rebellin has since appealed this decision, taken by the International Olympic Committee (IOC), before the Court of Arbitration for Sport (CAS). However, during the intervening period he has also been questioned by the ant-doping prosecutor of the Italian Olympic Committee (CONI). The latter has agreed to suspend proceedings until the CAS decision has been made (Associated Press, www.findlaw.com of 22/1/2010).

Alejandro Valverde. In late May, the Spanish rider was banned for two years by the Court of Arbitration for Sport (CAS) for his involvement in the Operation Puerto blood doping affair, extensively reported in earlier issues of this Journal. The suspension was backdated to 1 January. Mr. Valverde became involved in the case when his blood was taken during a “random” dawn test in the 2008 Tour de France on a day when it visited Italy. Valverde’s sample was subsequently found to match one of the blood bags containing the banned blood booster EPO from the 2006 raid on Dr Puerto’s premises. Although the 2008 test on the Tour de France did not constitute a “positive” result as such, the Italian Olympic Committee (CONI) still felt entitled to
impose its own two-year ban on Mr. Valverde from racing in Italy, a sentence which will expire in May 2011. However, the CAS also decided that there was no evidence to suggest that doping had contributed towards his results, meaning that his victories achieved prior to this year, including the 2009 Vuelta (Tour of Spain), will stand (The Daily Telegraph of 1/6/2010, p.S17).

**DOPING ISSUES AND MEASURES – ATHLETICS**

**Cock-up theory? Merritt banned despite “male enhancement product” claims**

LaShawn Merritt is not the first US sprinter to claim to have been a victim of unintentional doping incurred in the cause of human reproduction. In late April 2010, the reigning Olympic 400m champion tested positive for dehydroepiandrosterone (DHEA), but claimed that the anabolic steroid was contained in an over-the-counter male enhancement product which he had taken. When Dennis Mitchell, who won the 100m bronze medal in the 1992 Barcelona Games, troubled the drug testing system in 1998 he maintained that four cans of beer and “at least” four acts of copulation with his wife the night before explained the high level of testosterone found in his blood sample. This explanation failed to satisfy the International Association of Athletics Federations (IAAF), which banned Mitchell for two years (The Independent of 24/4/2010, p. S18). The same fate befell Mr. Merritt, who accepted a provisional ban after failing three tests for unlawful substances which included DHEA and pregnenolone. The athlete commented enigmatically that knowing that he tested positive for a product which he used for personal reasons was “difficult to wrap my hands around” (The Guardian of 23/4/2010, p. S6).

**Gradwohl ends career after refusing doping test (Austria/Croatia)**

In early May 2010, Austrian marathon runner Eva-Maria Gradwohl retired from the sport after refusing to take a doping test whilst in vacation in Croatia. The explained her decision by saying that she was “tired of indicating every day where I am and what I do”, and wait for an hour every day whether she would be subjected to a doping test or not. She was aware that her refusal would be an obvious breach of the relevant rules, and Austrian doping officials immediately opened proceedings against her, because refusing a doping test is considered tantamount to a positive test (Associated Press, www.findlaw.com of 4/5/2010).

**DOPING ISSUES AND MEASURES – AMERICAN FOOTBALL**

**Houston Texans’ Cushing suspended – owner criticises suspension process (US)**

In the wake of the suspension of Houston Texans linebacker Brian Cushing in mid-May 2010, Robert McNair, the team owner, made a plea for more information to be provided to teams whenever a player has a league suspension pending. He admitted that he knew during the 2009 season that Cushing had “an issue” with the NFL, but was given no details of the matter in hand. As it turned out, the issue surrounded the use by Mr. Cushing of a banned substance, for which he was suspended for the first four games of the 2010 season. He had appealed the ban, which was later confirmed. Mr. McNair, however, criticised the suspension process for keeping the club “completely out of the loop” over the suspension (Associated Press, www.findlaw.com of 11/5/2010).

**DOPING ISSUES AND MEASURES – TENNIS**

**Odesnik pleads guilty to importing HGH (Australia/US)**

In late March 2010, Wayne Odesnik, a US tennis player ranked no 98, pleaded guilty to importing human growth hormone (HGH) into Australia prior to a tournament leading up to the Australian Open. The player was stopped by customs officials in early January when he arrived in Australia ahead of the Brisbane International tournament. Eight vials, each containing 6 milligrams of the performance-enhancing substance, were found in the player’s luggage. Mr. Odesnik pleaded guilty in the Brisbane Magistrates Court, where he was fined $7,000 plus $1,040 by way of court costs (Associated Press, www.findlaw.com of 26/3/2010). The following month, the International Tennis Federation (ITF) announced that Odesnik had accepted a “voluntary provisional suspension” from all events, although it was unclear exactly how long he would be out of action (Associated Press, www.findlaw.com of 19/4/2010).
**DOPING ISSUES AND MEASURES – BASEBALL**

**McGwire “comes clean” over 1998 steroid use (US)**

In mid-January 2010, Mark McGwire, one of the sport’s superstars, admitted to having used steroids when he broke Major League Baseball’s home run record in 1998. During that year, Mr. McGwire hit a then-record 70 home runs in a compelling race with Sammy Sosa, who finished with 66. The player’s admission came as he prepared to return to baseball as the “hitting coach” for the St Louis Cardinals, for whom he played when he set the record (The Independent of 12/1/2010, p. 50).

**Brian Parker suspended (US)**

In early February 2010, it was learned that Baltimore Orioles pitcher Brian Parker was suspended for the first 50 games of the season following a second positive test for a drug of abuse under the minor league drug programme. This brought the number of players suspended under this programme to six (Associated Press, www.findlaw.com of 4/2/2010).

**DOPING ISSUES AND MEASURES – FOOTBALL**

**Mutu fails yet another drugs test – and loses court battle over first ban (Romania/UK)**

In late April 2010, Adrian Mutu, the Fiorentina and Romania striker, was suspended until the end of October of that year after testing positive for a prohibited appetite suppressant. A prosecutor of Italy’s anti-doping tribunal had applied for a one-year ban, but Mr. Mutu’s legal team argued for a much shorter suspension because they claimed the player had consumed the substance in question – sibutramine – by accident in a herbal laxative medicine. The tribunal issued the nine-month ban at a court hearing in Rome. But given that Mutu had been serving a provisional suspension since failing the tests in January, the player was able to return to competitive football after 29 October (The Daily Telegraph of 20/4/2010, p. 55).

However, this was not the first occasion on which Mr. Mutu had incurred a penalty for substance abuse. In 2004, he tested positive for cocaine, and was promptly dismissed by his then club, English Premiership side Chelsea. The world governing body FIFA subsequently ordered him to pay compensation to the English club, and his appeal against this order failed. The Swiss Federal Court temporarily suspended the fine, but, in June 2010, finally decided that the player should pay the amount – plus interest, which brings the total to £14.3 million (The Guardian of 15/6/2010, p. S12). However, it is unclear whether Mutu will be able to pay this amount, after reports in Romania suggested that the player was bankrupt (Daily Mail of 15/6/2010, p. 71).

**FIFA begin doping tests**

In February 2010, it was learned that world governing body FIFA was to start anti-doping tests in April, i.e. two months before the start of the World Cup in South Africa. Competing nations were required to submit their whereabouts to FIFA by 22 March, with testing in training camps operating from 10 April to 10 June. 320 tests were to be completed before the tournament, and at least 256 once it was under way (The Daily Telegraph of 23/2/2010, p. S6).

**CSKA Moscow players banned for substance abuse (Russia)**

In late January 2010, it emerged that two players of Russian champions CSKA Moscow had tested positive for the banned stimulant pseudoephedrine following their group stage draw with Manchester United in the Champions League. European governing body UEFA imposed a one-match ban on Sergei Ignashevich and Aleksei Berezutski after the team doctor had failed to declare that the pair had taken the medicine Sudafed before the game, but declined to expel the club from the tournament (The Mail on Sunday of 31/1/2010, p. S4).

**IOC to retest Turin Winter Olympics samples**

In early March 2010, The International Olympic Committee announced that it had begun retesting drug samples taken four years previously at the Turin Winter Olympics. The move came after intelligence was gathered by the World Anti-Doping Agency that some athletes may have been using CERA, a version of the blood-boosting hormone EPO. The World Anti-Doping Agency (WADA) discovered there may have been abuse of CERA before it was put on the market for legitimate medical
reasons. Testers have the authority to retest samples going back eight years and strip medals and awards. Five athletes were caught using CERA when drug samples were retested after the Beijing Olympic Games, including 1500 metres gold medallist Rahid Ramzi, of Bahrain (The Daily Telegraph of 11/3/2010, p. S14).

It will be recalled from previous issues of this Journal that the Turin Olympics were marred by a drug raid on the Austrian cross-country and biathlon team and the discovery of blood doping equipment. Six athletes were banned as a consequence of the raid, conducted by Italian police.

Pechstein loses battle to overturn doping ban (Germany)
In late January 2010, it was learned that five-time Olympic speedskating champion Claudia Pechstein lost her final chance to have her doping ban lifted in time to compete at the Vancouver Games. The Swiss Federal Tribunal refused temporarily to suspend Ms. Pechstein’s two-year ban for blood doping which was confirmed by the Court of Arbitration for Sport last November. The Tribunal has still to consider Pechstein’s legal challenge in its entirety, but stated that the 37-year-old German’s complaint was unlikely to succeed. Pechstein said she was not surprised by the ruling, but that it does not mean the end of her career. She had hoped to win an individual gold medal in Vancouver for the fifth straight Olympics. She declared herself “100 percent certain that, sooner or later” she would be completely rehabilitated (Associated Press, www.findlaw.com of 26/1/2010).

Switzerland’s supreme court is Ms. Pechstein’s final appeal route because CAS is based there. The World Anti-Doping Agency (WADA) welcomed the ruling and the Swiss court’s support for the existing drug-testing methods (Ibid).

Polish skier tests positive for EPO
In early March 2010, the Polish Olympic Committee announced that cross-country skier Kornelia Marek had tested positive for EPO at the Vancouver Winter Olympics. Ms. Marek, who helped Poland to a sixth place finish in the women’s 20,000m relay in February, tested positive for the substance following that race. At the time of writing, the result of the B sample test was as yet unknown (Associated Press, www.findlaw.com of 11/3/2010).

DOPING ISSUES AND MEASURES – WRESTLING

India bans 13 wrestlers for positive dope tests
In late March 2010, it was learned that India had suspended 13 members of its national Kabbadi wrestling team from the sport’s World Cup after they tested positive for banned substances. This disclosure has provoked an outcry in India and highlighted the intense pressures on players to win in one of the few sports which the country dominates (The Guardian of 31/3/2010, p. 18).
16. Family Law

FAMILY LAW

About-to-wed Shoaib admits to previous marriage (Pakistan/India)

In late March 2010, the news broke that former Pakistan cricket captain Shoaib Malik was to marry India’s leading tennis player, Sania Mirza. This would normally cause few ripples in the media beyond the nether regions of the gossip columns, except for a troubling little postscript – to wit, that at the time of announcing said nuptials he was “in dispute” with the family of another woman from Hyderabad who claims that he married her in 2002 – a claim firmly denied by Mr. Malik (The Daily Telegraph of 31/3/2010, p. 16).

However, in the next instalment of a developing saga which was probably beyond the creative powers of most soap opera writers, the stalwart all-rounder (in every sense) made a dramatic about-turn a week later, and admitted that he was actually married to Ayesha Siddique, after the latter alleged that she possessed clothing which bore traces of the cricketer’s DNA. He formally divorced her and reportedly agreed to pay maintenance of 15,000 rupees (£220) in accordance with sharia law (The Independent of 8/4/2010, p. 36).

More details of the controversy gradually became known to the world at large. At the time when the Mirza/Malik marriage announcement was made, Ms. Siddique claimed not only that she had wed the cricketer in 2002, but they were still officially man and wife. Malik initially denied this claim, stating that the two had merely become acquainted on the internet and had never tied the knot.

Ms. Siddique then made a formal complaint to the police and claimed that she had become pregnant by the cricketer, only to suffer a miscarriage, and that he compelled her to undergo weight-loss surgery. When that failed, he rapidly lost interest. Officers removed Malik’s passport and alerted all airports that he was not allowed to leave India. The negative publicity from this case threatened to scupper the cricketer’s marriage to mirza, at which point the families of the two women involved appealed to him to “do the decent thing” (Ibid).

The settlement reached was hailed as constituting “justice” by Ms. Siddique’s family, who stated that the imbroglio had damaged their community. However, before the settlement was reached, legal experts maintained that, even if Malik and Siddique had married, the former remained free to marry since Islamic law allows a man to take four wives as long as he is able to meet their needs. They also averred that the marriage certificate with Ms Siddique was invalid as it had not been signed by witnesses (The Daily Telegraph of 8/4/2010, p. 15).

Couple war over LA Dodgers baseball team in $1.2bn divorce battle

Even by the standards of the Los Angeles divorce courts, the case of McCourt vs McCourt has been eye-watering in the scale of the opulence on display. It will be recalled from previous issues of this Journal that a multi-millionaire businessman and his estranged wife are currently trading blows in a titanic battle that involves not only seven homes and a $1 million-a-month allowance demand but the fate of one of the most famous US baseball teams. Frank and Jamie McCourt are not just fighting over the usual baubles of super-rich break-ups. Mr McCourt, a former Boston property developer, is the owner of the Los Angeles Dodgers baseball team and his estranged wife was, until he sacked her last year, the team’s chief executive.

In a move that has sent nervous ripples through the sport, Mrs McCourt insists she is the Dodgers’ joint owner and disputes Mr McCourt’s claim that she signed away her rights to the team and its ground in return for the couple’s six houses and flat.

Quite apart from a half-share in the Dodgers she wants $988,845 (£650,000) a month in spousal support to maintain her existing lifestyle and to pay the $568,000 per month by way of mortgages on their homes. Mrs McCourt is also seeking $9 million to pay her divorce lawyers and accountants. The list of her demands also includes unlimited travel expenses, 24 hour security at her homes and flowers in her office. Oh and in addition, she would like to recover her previous position with the Dodgers, as well as guaranteed parking space at Dodger Stadium and the free use of players for events and speaking engagements. Her divorce filing puts the couple’s worth at $1.2 billion, much of it tied up in property and including $800 million for the Dodgers. Mr. McCourt, who claims to earn “only” $5 million per annum, has offered her $150,000 a month, dismissing her demands as unreasonable and insisting she could maintain her lifestyle by selling off some of their homes and tapping into some $11 million in liquid assets (The Daily Telegraph of 8/4/2010, p. 15).
The dispute over how much Mrs McCourt can expect from their 30-year-marriage – and how much her husband has to contribute – has led to extraordinary scenes in court, as even Mr McCourt’s own lawyer has painted them as a financially irresponsible couple living well beyond their means. The details poured out as the couple sat in court, refusing to look at each other but leaving their lawyers to expose each other’s extravagance and self-centred natures. Urging others not to rush to judgment on his client’s claims, Dennis Wasser, Mrs McCourt’s lawyer, argued that she deserved to keep a lifestyle that included private jets, five-star hotels and the almost daily visits they both enjoyed from hair stylists. Countering Mr McCourt’s claims that the economic downturn has severely dented his wealth, Mr Wasser said he had spent $52,000 on clothes since November as well as more than $80,000 on a holiday in the Caribbean. Mr Trope in turn compared Mrs McCourt to “Alice in Wonderland” and said she was the prime mover in the couple's extravagance. Of their two Malibu homes, she lived in one and used the other next door simply “to do her laundry”, he said. Out of two houses in Holmby Hills, a wealthy Los Angeles suburb, one was used just for its swimming pool and the other “is just a shack she uses to store furniture” (Ibid).

The McCourts, who met at university, have been married since 1979 and have four grown-up sons. According to Mr McCourt, their marriage started to sour after they moved from Massachusetts to California and their previously “very comfortable, very nice and family-oriented” lifestyle became “out-of-control, unsustainable and very uncomfortable”. Since she filed for divorce last October, both have accused each other of infidelity, with Mr McCourt claiming he dismissed her from her position with the Dodgers because she was having an affair with her driver. Mrs McCourt contends that the couple, who have four grown-up sons, bought the Dodgers jointly in 2004 for $430 million from Rupert Murdoch’s News Corp (Ibid).

The present writer will naturally continue to follow this saga with the keenest of interest.

**Paternity riddle will see Bobby Fischer exhumed (Iceland/US)**

In mid-June 2010, it was announced that the remains of chess genius Bobby Fischer are to be exhumed to determine whether he is the father of a 9-year-old girl, a lawyer representing the child and her mother said yesterday. Thordur Bogason, a lawyer based in the Icelandic capital of Reykjavik, said the country’s Supreme Court made the decision in order to allow for tests so his client, Jinky Young, can establish who her father is. If she is confirmed as the daughter of Bobby Fischer, then by Icelandic law, she will be his legal heir. It will be recalled that Mr. Fischer, 64, died in Iceland in January 2008. According to Bogason, he left no will, and legal disputes over who has the right to the US-born player’s estate were “ongoing”. The lawyer added that he had no information on the size of the estate left by Mr. Fischer. His long-time partner and relatives in the United States are also involved in the dispute, the lawyer said. Olafur Jonsson, who represents the American relatives, said his clients accepted the court’s decision and awaited results of the paternity tests. One of Iceland’s lower courts had originally been asked for permission to examine Fischer’s remains, Bogason said, but this was denied. They appealed to the Supreme Court, which released its judgment on Wednesday (The Independent of 18/6/2010, p. 31).

Mr. Bogason called the decision to ask for the exhumation of Fischer’s remains a “last resort”, and said that they had hoped blood samples from Fischer might have been stored in an Icelandic hospital. Fischer is buried in South Western Iceland, about 30 miles from Reykjavik. He had lived in the country since 2005. He claimed that evidence was presented to the court showing Fischer had sent Jinky and her mother, Marilyn Young, “considerable” amounts of money on eight occasions in the years before he died, ranging from €1,000 to €5,000. In the Supreme Court’s judgment – which uses no names – Jinky’s interest in determining her paternity was acknowledged as important. It said proof that more significant interests trumped that claim would have been required to prevent Fischer’s exhumation. Jinky, who lives in the Philippines with Young, flew to Iceland to provide her blood sample in December 2009. The judgment said Fischer had regular contact with Jinky and her mother and that they had visited him in Iceland (Ibid).

The pair’s lawyer in the Philippines, Samuel Estimo, stated that his clients were “very happy” with the way the Supreme Court of Iceland ruled on their request. The woman who was
described in the judgment as Fischer’s “partner for many years and a close friend and confidante until his death” said in court papers he never mentioned that he had a child with Young. She described that as being out of character because Mr. Fischer was “a very precise man” (Ibid).

The chess champion, who was born in Chicago and raised in Brooklyn, New York, became famous in 1972 when he defeated Boris Spassky for the world championship. He held the title until 1975.

**Estranged wife suing Wade’s girlfriend Gabrielle Union (US)**

In early May 2010, it emerged that, adding to an already contentious divorce battle, US basketball star Dwyane Wade’s estranged wife claimed that his relationship with actress Gabrielle Union is causing her and the star Miami Heat guard’s two sons emotional distress. Dwyane Wade described the lawsuit “baseless and meritless,” whereas Union issued a statement insisting the allegations are false. Siohvaughn Wade brought the action in Chicago earlier that week, the latest chapter in the lengthy, often-nasty divorce saga between the former high school sweethearts who separated in 2007. She and Dwyane Wade had two sons, ages 8 and 2, who are listed as plaintiffs. C. Anthony Mulrain, an attorney acting for Union, claims that “each and every allegation made was entirely false” The lawsuit alleges Union “engaged in sexual foreplay” in front of the sons, which “severely inflicted the Plaintiffs emotionally and mentally.” It also claims that the boys received “medium size gifts” from Dwyane Wade for Christmas last year, while Union received “the biggest gift of all.” Damages in excess of $50,000 are being sought by Siohvaughn Wade.

Mulrain, Union’s attorney, said the accusations were first made about a month ago in court, although the actress was not named as a defendant at that time. He added:

“The court ultimately rejected these claims as frivolous. Gabrielle apologizes to the Circuit Court of Cook County, Illinois for tying them up with erroneous claims when there are real victims who should be receiving the legal attention they need.” (Associated Press, at www.findlaw.com of 6/5/2010).

The suit also alleges that the Wade’s oldest son has suffered from anxiety, manifesting itself in “significant hair loss causing bald spots” and that the younger son “is suffering from feelings of rejection and depression.” Trial in the divorce case was initially scheduled for the summer of 2010, although a motion was pending to have that pushed back until September. Dwyane Wade’s side remains hopeful that a settlement could be reached beforehand; many have been offered in recent years, all of them refused. It is also possible that the court could rule on Dwyane Wade’s custody plea before the divorce case goes to trial or is settled. Several other matters involving the former couple are pending, including a request by Dwyane Wade for sole custody of his children and that his wife be psychologically evaluated. Siohvaughn Wade has alleged Dwyane Wade abandoned his children and that he was “guilty of extreme and repeated mental cruelty” toward her (Ibid.)

A perennial All-Star and former NBA scoring champion, Dwyane Wade has a number of other lawsuits pending which stemmed from failed business deals. He will opt out of the final year of his contract with the Heat and become a free agent on 1/7/2010, at which time he was to receive a six-year offer from Miami that could be worth about $127 million — far more than any other NBA club could pay him. The custody battle and divorce case, he said last week, could “overshadow” his free-agent manoeuvring. Siohvaughn Wade also recently filed a libel-slander lawsuit against former friend Andrea Williams, who claimed in a deposition that Mrs. Wade bought a man she was romantically involved with from 2004 through 2007 a car and a motorcycle, threatened to find a gun and shoot Dwyane Wade, and voluntarily entered an Illinois hospital to deal with anger-related issues. In addition, Nottage and Ward LLP, the Chicago law firm that was representing Siohvaughn Wade in the divorce, has been excused from that case after citing “an impasse” and “irreconcilable differences” between attorney and client (Ibid).

**David Ginola pays out £30,000 over ‘love child’**

In mid-May 2010, it was learned that David Ginola, the former footballer, had paid more than £30,000 in child maintenance to a woman who claims he fathered her daughter during a brief affair. Mr Ginola, 42, faced a court summons for “abandoning his family” after Joelle Pinquier, 41, claimed he was the father of Joy, 17, and had not handed over support payments. The former Newcastle United and Tottenham Hotspur midfielder was initially due in court, but criminal
proceedings were dropped after he paid the full amount. Miss Pinquier, a dog breeder from Marseilles, claimed Mr Ginola had failed to abide by a 2006 court ruling ordering him to pay child maintenance of £400 a month. The French court ordered him to pay the sum after he refused to take a DNA test to ascertain whether he was the father (The Guardian of 12/5/2010, p. 19).

Mr Ginola’s lawyer commented that it transpires that not only David Ginola had paid the maintenance fees, but had “done so six months in advance”. He has already made the final payment, as Joy turns 18 in September 2010. However, the girl’s mother insisted that the player who fans called “El Magnifico” was the father and that her daughter, Joy, would take him to court to force him to recognise his paternity when she turned 18 in September. Benedicte Puybasset, Mr Ginola’s lawyer, had initially denounced the allegations as “lies and fantasy” and had said Mr Ginola was “categorical that he has had no relationship with this woman”, that he was an “attentive father”, and intended sue Miss Pinquier for “slanderous denunciation”. However, she said Mr Ginola – married with children – now admitted to having had sexual relations with Mrs Pinquier, but that the conception date did not tally with that of the child’s birth.

She said she had no idea whether he would agree to a paternity test. “It is difficult to be rational in such circumstances,” she added (Ibid).
FOOTBALL

No action against Henry for World Cup handball (France/Ireland)
The handball by French international Thierry Henry which, in November 2009, preceded the goal that enabled his team to participate in the World Cup finals has almost acquired totemic symbolism as to the dishonesty which pervades much of the present-day competition. This was, predictably enough, followed by dark mutterings by leading sport officials as to the dire consequences which would and should be visited upon the then Real Madrid player for this dastardly act. In spite of this, the widespread sense of injustice at the Republic’s elimination from the World Cup was compounded in mid-January, when the world governing body FIFA refused to impose any penalty on the Frenchman in respect of this incident. Earlier, FIFA had already dismissed representations from the Football Association of Ireland (FAI) to have the fixture replayed or to allow them into the World Cup Finals as a 33rd team (The Daily Telegraph of 19/1/2010, p. S8). The FIFA decision also came after Henry had apologised, via Twitter, for his action and stated his view that a replay “would be the fairest solution” (but not until FIFA had already ruled out this option) (The Independent of 19/1/2010, p. 55).

This decision naturally led to a good deal of harrumphing in the media, particularly since the incident came just before a world tournament of which the sport’s leading administrators – not least FIFA’s leading officials – had pledged that it would strive to achieve exemplary standards of fair play and integrity. Nevertheless, the present writer cannot help feeling some unease at the obloquy heaped upon Mr. Thierry when those players whose diving tactics often mislead even the most experienced referees, whilst not escaping media criticism, are not pilloried in the same fashion as was the French striker.

French World Cup dream dissolves in acrimony and chaos
In the light of the developments described above, the expression “just desserts” came readily to the lips of commentators when contemplating the trials and tribulations visited upon the French national team during their eventual World Cup 2010 campaign. Placed in what was generally regarded as a relatively undemanding first-stage group, the team lamentably failed to live up to its reputation, with an uninspiring draw with Uruguay being followed by a humbling defeat at the hands of Mexico. That such disappointing performances should cause some disharmony in the dressing room was only to be expected, but not on the scale which is said to have occurred at half-time during the Mexico fixture. In the course of the said interval, team manager Raymond Domenech took issue with Nicolas Anelka dropping deep too frequently, whereupon the Chelsea striker launched a foul-mouthed tirade against the coach. He later refused to apologise, which left the French football authorities with no alternative but to remove him from the team for the remainder of the tournament (The Mail on Sunday of 20/6/2010, p. S8). This development naturally did little to improve morale in the French camp. However, few could have been prepared for the virulent reaction emanating from Mr. Anelka’s team mates, which took the form of a mass boycott of the team’s next scheduled training session, with Domenech being left to read out a players’ statement roundly condemning the French Football Federation (FFF) for rubber-stamping Anelka’s dismissal from the squad. It was beginning to emerge that the Anelka affair had merely acted as a catalyst for expressing the tensions which had built up within the national team under the reputedly divisive leadership of Mr. Domenech. The boycott also had consequences at the wider level of the football administration, since it caused one official of the FFF to tender his resignation, describing the decision by the players as a “scandal for French people” (The Daily Telegraph of 21/6/2010, p. S8). The French coach even expressed the fear that some of his mutinous team might refuse to compete in the final Group A fixture, against hosts South Africa (Daily Mail of 22/6/2010, p. 83). Following a direct appeal to the players by sports minister Roselyne Bachelot, this threat never actually materialised – even though, in the event, this availed the team nought, given that their yawn-inducing draw with the hosts eliminated from from further participation in the tournament.

Ribéry banned from Champions League final (France/Germany)
Clearly, the footballing gods have, during the period under review, been extremely miserly with their blessings for French footballers at the top level, as
one of their top stars Franck Ribéry, is well placed to testify. Having been linked with a prostitution scandal centred on a nightclub on the Champs Elysées earlier this year (see above, p. 90), he incurred the wrath of the referee by being shown the dreaded red card during the first leg of the Champions league semi-final between his team, Bayern Munich, and, ironically, French champions Lyon. However, the seriousness of the offence which gave rise to the dismissal, a high tackle on opponent Lisandro Lopez, caused European governing bodu UEFA to impose a three-match ban on Mr. Ribéry, which meant that the latter would have to miss the Champions League final against Inter Milan a few weeks later (The Independent of 29/4/2010, p. 72). His club, German side Bayern Munich immediately appealed against this decision before the Court of Arbitration for Sport (CAS). However, the latter dismissed the appeal, which meant that Bayern’s talented striker missed out on the tournament’s showpiece fixture (The Independent of 18/5/2010, p. 61).

**World Cup discipline: verdict positive, in spite of isolated incidents (South Africa)**

The 2010 World Cup has been universally hailed as a resounding success story from every point of view. Give or take a few tackles by Dutch defenders, this verdict extends to the discipline shon by the players and enforced by the match officials. One of the reasons for the latter is the series of precautions taken prior to the tournament to avoid some of the worst excesses of competitor misbehaviour. Such preventative measures even extended to said officials being coached in the linguistic excesses to which all too many players are prone in the current game. Thus it was learned that, as part of their preparation for the England v US fixture at Rustenburg in which they were due to officiate, the Brazilian referee and his assistants has made an assiduous study of English-language obscenities of which the participants might deliver themselves.

However, the initial resolve of FIFA, however, denied reports that match officials had been given lists of swear words to heed, but did say that proficiency in English was a requirement for referees and assistants officiating at the world tournament (Associated Press, www.findlaw.com of 10/6/2010). Many prominent figures in the game had also urged the officials to ensure maximum standards of fair play – including, enigmatically, Argentina manager Diego Maradona, who advocated that FIFA’s campaign to eliminate foul play should be “more than just a slogan” (Associated Press, www.findlaw.com of 11/6/2010).

However firm this initial resolve, the game’s authorities did not invariably and consistently pursue it to its logical conclusion. Thus, with the major final games looming, FIFA saw fit to change its rules on bans in order to minimize the number of big-name absentees from the Final. As it was, players initially received an automatic one-match ban where they incurred yellow cards in separate fixtures. However, the world governing body suddenly changed this position by stating that players taking part in the semi-final would only be at risk of missing the Final if they were dismissed from the field of play (The Guardian of 21/6/2010, p. S11). The relaxation of the officials’ resolve in matters disciplinary was also on display in the Tim Cahill affair. The Australian striker had incurred a red card during his country’s game against Germany, which automatically ruled him out for the next game, against Ghana. However, had FIFA remained true to their original resolve, they would surely have availed themselves of their right to impose a two-game penalty. Subsequently, FIFA seems to have buckled under the pressure of the relevant national association – not to mention the Australian player’s tears – and subsequently reprieved the player to continue his World Cup campaign (The Guardian of 18/6/2010, p. S9).

**Algeria v Egypt: the antagonism continues**

At least the World Cup finals were spared some of the unsavoury incidents which had marred certain games during the Africa Cup of Nations tournament, the final stages of which were played out earlier that year. The Algeria v. Egypt saga, already reported on in previous issues of this Journal, continued its violent progress in late January on the occasion of the semi-final match played in Benguela. During this fixture, Algeria had three players sent off as they slumped to a 4-0 defeat against their arch-rivals. Here again, in spite of the bare statistics, the match officials seemed to have erred on the side of clemency rather than consistency. When a penalty was awarded to Egypt, the Algerian players protested about Hosny Abd Ravo’s stuttered run-up to take the spot kick, in the course of which goalkeeper Faouzi Chaouchi appeared to aim a headbutt at referee Koffi Codjia. However, the official in question contented himself with issuing the offender with a caution (The Guardian of 29/1/2010, p. S4).
CRICKET

Ball-tampering row mars
England tour of South Africa

The past winter’s Test series between South Africa and England brought us some fine cricket, but was also marred by an unpleasant spat resulting from allegations of ball-tampering on the part of the visiting side. During the Third Test, television footage showed England all-rounder Stuart Broad standing on the ball with his spikes early during the South African second innings, after which fast bowler Jimmy Anderson could be seen apparently scratching the ball and playing with an errant piece of leather. This was linked to claims by the home side that the ball started to display signs of “reverse swing” sooner than they considered appropriate, and expressed reservations to the match referee about this. In order to achieve the mysterious ingredient of reverse swing, one side of the ball must be dry and rough, the other in pristine condition. The matter went before the International Cricket Council (ICC), which cleared the English side of any impropriety, stating that the umpires themselves had brought no complaint (The Independent of 7/1/2010, p. 56).

Pakistani internal troubles continue

It is the worst-kept secret in the world of international cricket that the Pakistan dressing room can at times be a somewhat turbulent place to be, with internal dissent never far from the surface. Such has been the negative effect of this tendency on team morale and performance that the national cricket authorities have had enough. In mid-March 2010, they banned their two most recent captains and most accomplished batsmen, Mohammad Yousuf and Younis Khan, effectively for life from ever representing their country again (subsequently overruled). Two others, Rana Naved and Shoaib Malik, as well as the brothers Kamran and Umar Akmal, were fined for various transgressions. At the root of these measures was the recent tour of Australia, where the Pakistani team contrived to lose all nine international matches (three Tests, five one-day internationals and a Twenty20 contest). In fact, Mr. Younis had already resigned the national team captaincy shortly before the disastrous tour commenced because of player unrest. However, the measures in question, severe as they may appear at first sight, need to be viewed in the context of the tendency on the part of the body which issues them, the Pakistani Cricket Board (PCB), to be somewhat flexible in the redemption they accord to those whom they have disciplined. Thus various alleged match-fixers from the 1990s have in the meantime been quietly rehabilitated. In addition, Mohammad Asif, a proven consumer of unlawful substances (although never convicted), is still playing after having had his penalty reduced (The Independent of 11/3/2010, p. 59).

The Pakistani cricket authorities seemed intent on emphasising this last point in their approach towards the Shahid Afridi affair. When television cameras noticed that the leg-spinning all-rounder in the process of putting the ball to his mouth and apparently biting down the surface of the ball, match referee Darryl Madugalle instantly suspended him from two Twenty20 internationals, and the PCB fined him £23,000 as well as placing him on probation for six months for bringing the game, and his country, into disrepute. Yet the PCB performed a spectacular about-turn when Mr. Afridi was not only awarded the highest central contract, but was also reinstated as captain following a meeting with Ijaz Butt, the PCB chairman (The Daily Telegraph of 24/3/2010, p. S13). It should be recalled that this is not the first occasion on which Mr. Afridi has been involved in incidents of this nature.

ICC approves decision review scheme – despite initial problems

Some sports – most famously tennis – have instituted a system whereby competitors may bring a limited number of challenges to the match officials’s decisions. The International cricket Council, the world governing body for the sport, decided to experiment with such a system over the 2009/2010 winter season. Under this scheme, called the Decision Review System (DRS), players may challenge decisions made on the field through the Third Umpire. It was first used in the 2009-2010 Test series between South Africa and England. Almost immediately, the system ran into problems – in particular during the crucial Fourth Test, when an appeal for caught-behind against the home side’s captain, the obdurrate Graeme Smith, was turned down by both the pitch-side official and the third umpire, Darryl Harper. This led to a furious protest by the touring team’s manager, Andy Flower, who claimed that the verdict might well have been different if Mr. Harper had turned up the sound level of the stump microphone to maximum level. The fact that the Sky match coverage team, whose sound system was...
at full volume, appeared to have clearly picked up the sound of the ball finding the edge of the bat seemed to justify this criticism (The Times of 16/1/2010, p. 96). There was also some controversy when the former Kent batsman Mark Benson, umpiring in the Australia v Pakistan Test in Adelaide, withdrew from the game after one day, citing illness – but leaving a suspicion that the real reason for his withdrawal was the number of challenges made to his decisions (The Independent of 12/2/2010, p. 55).

In spite of these difficulties, the ICC decided to approve the scheme following its provision introduction. According to the relevant statement: "In 13 Test matches the percentage of correct decisions has risen from 91.3 per cent to 97.44 per cent. The Board supported a desire for work to continue to build on the encouraging results from the first 13 matches and will discuss further technological improvements with broadcasters and refine the DRS further" (Ibid).

It should be added that one particular limitation of the entire system is the reliance on host broadcasters – not all of whom are sufficiently wealthy to afford such technological wizardry as the “hot spot” or “snickometer” facilities.

RUGBY

Gouging issues continue to beset the sport

It has been apparent from the sporting press, some of which has been reflected in these columns, that the problem of the despicable act which consists in players attempting to take advantage of a confused stage of a game to visit ocular mayhem on members of the opposition is one which has exercised the minds of the sport’s invigilators for some considerable time now. Unfortunately, the period under review has not been free from such incidents, whilst showing welcoming signs that the relevant authorities to administer appropriate disciplinary penalties on the perpetrators. This became particularly evident in late December 2009, when the Stade Français and France scrum-half Julien Dupuy received a 24-week ban for having gouged Stephen Ferris, of Ulster, during a fixture at Ravenhill earlier that month. More particularly the European Rugby Cup’s independent judicial officer, Jeff Blackett, considered that the player’s actions merited a high-level entry and imposed a 40-week suspension, which by virtue of mitigating circumstances was reduced by 40 per cent. Mr. Blackett commented that anything less than 24 weeks would have failed to address the concern by the world governing body, the International Rugby Board (IRB), at the increasing number of such offences (The Guardian of 22/12/2009, p. S5). Mr. Dupuy appealed against this ban, but this only resulted in the suspension being reduced by one week (The Daily Telegraph of 14/1/2010, p. S14).

An even more drastic penalty was meted out to another Stade Français player just a week after Dupuy’s appeal verdict. Daniel Attoub, the club’s prop, was also found guilty of eye-gouging, but this time his penalty was a 70-week suspension – meaning he would not be available for competition again until late April 2011. Once again, the official issuing the ban was Mr. Blackett. This time there were no mitigating circumstances, and, unlike his teammate, Mr. Attoub had failed to admit to the offence (The Independent of 20/1/2010, p. 60). The Frenchman appealed against both the finding of foul play and the level of the penalty, but this failed. The Stade club had claimed that a photograph of Attoub gouging his opponent – who, once again, was Ulster’s Stephen Ferris – which was used as evidence by the European Rugby Cup disciplinary officer, had been doctored. This assertion was rejected after forensic examination (The Daily Telegraph of 5/3/2010, p. S11).

US COLLEGE SPORTS

NCAA gets tough with University teams for code violations (US)

The NCAA is the governing body which invigilates sports at US colleges, and has become concerned at the increasing number of infringements of its rules committed by various universities. This concern has been expressed in a number of severe decisions taken of late. In late March 2010, the governing body denied the university of Alabama’s appeal against a ruling vacating 21 football victories from 2005-07 and records from three other sports for widespread violations involving free textbooks. More particularly the NCAA Division I Infractions Appeals Committee announced that the Committee on Infractions’ ruling in June 2009 should stand. Alabama had argued that no other case involving textbooks had resulted in vacated victories and that
the penalties were “so excessive as to constitute an abuse of discretion”. The NCAA vacated the football wins, one postseason win for men’s tennis and several individual and team records in men’s and women’s track. It stated that “two cases are seldom exactly alike” and that the Committee on Infractions must have latitude to tailor the penalties to the specific facts of each case (Associated Press, www.findlaw.com of 23/3/2010).

The Alabama case involved 201 athletes in 16 sports who obtained textbooks to which they were not entitled under their scholarships, including 22 “intentional wrongdoers” in (American) football, track and tennis who knowingly exploited the system to obtain books for others. Alabama President Robert E. Witt expressed disappointment with the “inconsistent decision”. He added:

“The Appeals Committee acknowledged that their decision in our case is not consistent with the NCAA’s prior textbook and vacation-of-wins cases, which was the heart of UA’s appeal. Despite that acknowledgment, however, the Appeals Committee did not find an abuse of discretion. We are disappointed by the committee’s inconsistent decision given the negative impact the decision has on hundreds of uninvolved student-athletes and their coaches” (Ibid).

As a result of the decision, Alabama must vacate all 10 wins from the 2005 season - including the Cotton Bowl victory over Texas Tech - all six wins in 2006 and the first five in 2007, when the textbook violations were discovered, leading to the suspension of five players before the Tennessee game. Alabama had been placed on three years’ probation and fined $43,900 in addition to the vacated records and wins. The university did not appeal the other sanctions. Alabama had also argued that its cooperation with the NCAA was not factored into the penalties. The appeals panel noted that the Infractions Committee’s public report noted that cooperation several times (Ibid).

Similarly severe measures were taken against the University of Southern California a few months later. The USC’s was no ordinary football program over the past decade, winning seven straight Pac-10 titles and two national championships while annually fielding a gleaming array of NFL prospects. That was just one reason why the “Trojans” received no ordinary penalties when the NCAA finally announced on Thursday the results of its four-year investigation. The NCAA threw the book at storied USC, imposing a two-year bowl ban, four years’ probation and significant scholarship losses which are likely to damage the program’s foundations. The Trojans also must vacate 12 wins from the 2005 season, all stemming from improper benefits given to Heisman Trophy winner Reggie Bush by fledgling sports marketers dating back to the 2004 national championship. The NCAA also castigated USC for a lack of institutional control, condemning the star treatment afforded to Bush and former basketball player O.J. Mayo, who spent just one year with the Trojans before bolting to the NBA and leaving the men’s program in shambles. With pointed language, the NCAA said in its report that USC’s oversight of its top athletes ran contrary to the fundamental principles of amateur sports. In a particular slap to the Hollywood-friendly Trojans football team, the NCAA banned most non-essential people from attending practice or standing on the sidelines during games, a favourite pastime of actor Will Ferrell and other wealthy alumni.

According to the NCAA report:

“Elite athletes in high profile sports with obvious great future earnings potential may see themselves as something apart from other student-athletes and the general student population. Institutions need to assure that their treatment on campus does not feed into such a perception.” (Associated Press, www.findlaw.com of 11/6/2010)

The penalties imposed include the loss of 30 football scholarships over three years and forfeiting 14 victories in which Bush played from December 2004 through the 2005 season. USC beat Oklahoma in the BCS title game on Jan. 4, 2005, and won 12 games during Bush’s Heisman-winning 2005 season, which ended with a loss to Texas in the 2006 BCS title game. The rulings are a sharp repudiation of the Trojans’ decade of stunning football success under Carroll. From the NCAA’s findings, it emerged that Bush received lavish gifts from two fledgling sports marketers hoping to sign him. The men paid for everything from hotel stays and a rent-free home where Bush’s family apparently lived to a limousine and a new suit when he accepted his Heisman Trophy in New York in December 2005. The NCAA found that Mr. Bush, identified as a “former football student-athlete,” was ineligible beginning at least by December 2004, a ruling that could open discussion of the revocation of the New Orleans Saints star’s Heisman.
Members of the Heisman Trust have said they might review Bush’s award if he were ruled ineligible by the NCAA.

USC, which plans to appeal some of the football-related penalties, later released details of its defence arguments. The school believes the NCAA discovered only two flimsy connections between USC and the extra benefits provided by outside parties, resulting in the damaging finding of a lack of institutional control, which led to harsh sanctions. The NCAA cited a 2 1/2-minute phone call in January 2006 between fledgling marketer Lloyd Lake, who allegedly provided many of Bush’s illegal benefits and USC assistant coach Todd McNair, who said he could not remember the call. The NCAA also believed Bush’s $8-an-hour internship with sports marketer Michael Ornstein – which was approved by the NCAA at the time, according to the school – constituted illegal benefits and erroneously classified Ornstein as a booster.

The NCAA took no further action against the men’s basketball team, which had already banned itself from postseason play last spring and vacated its wins from Mayo’s season. The women’s tennis team also was cited in the report for unauthorized phone calls made by a former player, but the NCAA accepted USC’s earlier elimination of its wins between November 2006 and May 2009. The football team barely avoided further punishment that would have removed one of the sport’s most popular teams from television. The committee discussed a TV ban, but decided the penalties handed down “adequately respond to the nature of violations and the level of institutional responsibility” (Ibid).

Earlier, the NCAA has placed the men’s basketball program on probation for two years after finding “major” academic violations. The organisation announced that an unnamed former assistant coach provided course work and in some cases completed the work for the two players from 2007-08. As a result, Georgia Southern must vacate all wins in which the two players competed during the two seasons. The school loses one scholarship for three years. Former coach Jeff Price resigned on March 30, shortly before athletic director Sam Baker announced the program was being investigated by the NCAA.

Then, in late May, University of Connecticut announced that the NCAA has found eight violations in the school’s men’s basketball program. The alleged violations include improper telephone calls and text messages to recruits, and giving recruits improper benefits. Coach Jim Calhoun was cited Friday for failing to “promote an atmosphere of compliance.” The school released an infractions letter it received from the NCAA following a 15-month investigation. UConn is to appear before the governing body in October to respond. The announcement on the Storrs campus came a day after assistant coach Patrick Sellers and director of basketball operations Beau Archibald resigned. UConn as an institution was cited for not adequately monitoring “the conduct and administration of the men’s basketball staff in the areas of: telephone records, representatives of the institution’s athletics interests; and, complimentary admissions or discretionary tickets” (Associated Press, www.findlaw.com of 28/5/2010).

The NCAA and the school had been investigating the program since shortly after a report by Yahoo! Sports in March 2009 that former team manager Josh Nochimson helped guide basketball recruit Nate Miles to Connecticut, giving him accommodation, transportation, meals and representation. As a former team manager, Nochimson could be considered a representative of UConn’s athletic interests by the NCAA and prohibited from having contact with Miles or giving him anything of value. Documents released by the school showed pages and pages of telephone and text message correspondence between Nochimson and UConn coaches Calhoun, Tom Moore, who is now head coach at Quinnipiac, and Sellers. Miles was expelled from UConn in October 2008 without ever playing a game for the Huskies after he was charged with violating a restraining order in a case involving a woman who claimed he assaulted her. He played during the 2008-09 season for the College of Southern Idaho, and was dismissed last November by the NBA Development League’s Sioux Falls Skyforce (Ibid).  

All information is correct as at Autumn 2010.
Thus far in its short history, the area of European Union sports law and policy has undergone several stages of progression. During the period which began with the Court granting its first sports-related decision in 1974 and which slowly ended by mid-1990’s there was no significant academic writing on the subject. This was a consequence of there being no defined EU sports law and policy, which in itself was understandable given the lack the competence to intervene into what was perceived as the private affairs of sports. The next period was characterized by a profound change in the structure of the broadcasting sector and the trend of commercialization at all levels of the sports market. Consequential juridification of the sports sector signified by the number of Commission decisions and the Court’s jurisprudence, notably in Bosman, was followed by a corresponding proliferation in the academic writing on the subject. In the past 10 years, a number of academic journals were established and many book titles were published, including the first edition of this book – it appeared in 2000 under the title Professional Sport in the EU: Regulation and Re-regulation, edited by Andrew Caiger and Simon Gardiner. Since then, new developments have taken place in the industry and together with judgments in Meca-Medina (2006) and MOTOE (2008), and the 2007 White Paper on Sport, have brought the whole of the sports law far beyond the existential skepticism seen in post-Bosman discussions and into the realm of an established legal discipline.

The book under review represents a tribute to this novel phase in the regulatory regime. It consists of twenty-nine high-quality articles contributed by prominent academics in the area. The opening articles provide a theoretical underpinning to the subject. The rest of the topics cover a wide range of legal issues falling into one of the following five categories:

1. Sports governance – This is a topic that has been discussed ever since the Commission FIA/Fi investigation but has recently gained a lot of attention in academic circles after the publication of the White Paper on Sport and MOTOE judgment. This is a topic that has been discussed ever since the Commission FIA/Fi investigation but has recently gained a lot of attention in academic circles after the publication of the White Paper on Sport and MOTOE judgment.
2. Regulation under the EU internal market and competition provisions – Comprised of articles on liberalization of the players market with special attention to the well-known issues such as: home-grown players’ rule, transfer rules, contractual stability, Kolpak and Bosman cases and subsequent developments, but also, as a matter of digression from EU law, analysis of Webster case in the CAS jurisprudence, and power struggles in football and influence of former G14 clubs and UEFA on European policy-makers. In addition, an article on the regulation of sports services in the Community law, and an article on Piau and status of players’ agents are also included. Regarding the issues of sports law other than governance and the players’ status under the EU competition law, this part covers two topics; the first is related to the application of the Court’s case law under Article 81 to sports media rights and issues of exclusivity and collectivity in light of specificity of sports, and the second to the study of prospects for granting state aid to football clubs and its (in)compatibility with the Article 87 EC Treaty. Although some of these discussions have been ongoing for some time, all the contributions provide fresh insights and points of view that are more aligned with the modern state of affairs.

3. Representation – Social dialogue between the two sides of the industry in professional football is a category which provides the reader with details on the process and progress that has been made on a European level thus far while placing it into a broader regulatory context. This is the only title on the market which treats the topic of representation in football in such detail. Apart from European sports lawyers, anyone interested in collective bargaining and European social policy should find this a valuable and interesting contribution to the developments in the EU system of industrial relations. Issues covered by this topic should also prove an important source of analogy for the studies of representation and social dialogue in other European sports, as some methodological transplants can certainly be used from the practice employed in the sport of football.

4. Anti-doping – Two articles are dedicated to the topic of anti-doping policy and the EU. They touch upon legal basis in the EC Treaty and go over important developments in the 1980’s and 1990’s, the creation of WADA, the role of the Council of Europe, Meca-Medina, the details of the White Paper proposals on the fight against doping, and beyond.

5. Football hooliganism – Three articles with differing emphasis look into the social psychology of a football supporters and their role and influence as stakeholders, policy action on European level, and examine the success and legality of football banning orders in the United Kingdom as a means to combat hooliganism.

The last article is dedicated to EU sports betting law. The analysis centres on the treatment of the subject under EU internal market law in particular in light of relevant cases (from Schindler to Placanica) decided under the provisions of the EC Treaty on freedom to provide services and freedom of establishment. In this book, the topic of sports betting stands on its own outside the other identified categories. It is a ‘purely business pursuit’ and a gambling service rather than an activity that has to do with sports and its specificities. However, sports betting can be closely linked to corruption in sports, and the regulation of the services plays an important role in this respect.

In sum, this is the best and the most comprehensive edited book in the area of EU sports law and policy currently on the market, providing excellent legal analyses and up-to-date treatment of the legal issues in sports in light of, inter alia, the recent jurisprudence, new developments, and changed mentality in looking at the enforcement of EU law in the sports sector. It would not hurt to draw attention to its very competitive price. I highly recommend this book to academics and everyone else working in the field of European sports law and policy, as well as students on advanced levels of study.

To end this review with a small remark, and with all due respect to the editors’ choice of contributors, I could not help but notice the fact that only one of the twenty nine articles has been written by a woman! The field of sports law is not that male dominated and having only one woman on board such a big project helps enhance the gender stereotypes in a field we all love, dear colleagues.

Katarina Pijetlovic, Law School of International University Audentes, Tallinn University of Technology, Estonia

(First Published in: International Sports Law Journal (ISLJ) 2009/1-2, p. 146).
Mark James (2010), *Sports Law*  
Basingstoke: Palgrave Macmillan,  
Basingstoke 2010  
(pp. 336)

This recent publication represents a welcome addition to the reading of this area of law. James describes the aim of his book as giving an introduction to readers to the controversies and challenges, which arise when sport interacts with law, in order to settle a wide range of sporting disputes. The public often calls upon sports lawyers to explain why sport is sometimes regarded as being special, which results in different treatment given by the law from that recognized when ordinary non-sporting issues come before the courts.

The structure of the text differs from earlier books on this subject in that it is divided into four separate parts; with each part consisting of three or four related chapters. Part 1 concerns sporting decision making procedures both domestically and globally. In Chapter 1 the author looks at the decisions of sports governing bodies and tribunals explaining how these procedures have become more legalistic in their approach. This situation has led to fewer disputes being the subject of proceedings in the courts and instead being dealt with ‘in house’. Chapter 2 gives a more extensive consideration of the challenges made to these procedures which under-pin the decisions of various sports governing bodies. In addition James looks at the role and status of such bodies and their relationship with the English courts. European law and the impact of the Court of Arbitration for Sport regarding the settlement of sporting disputes forms the substance of Chapter 3. Consideration is also given to the ways in which the European Court of Justice has dealt with matters concerning competition and freedom of movement of sports players in the context of the European Treaties.

Part 2 provides an examination of disputes involving sports injuries occurring within contact sports and includes an analysis of some of the important case law (e.g. Condon v Basic and also Caldwell v Maguire). This area of Sports Law attracts much media attention, especially if high profile players/athletes are involved. Chapter 4 gives a clear exposition of the problems arising from the above cases and also looks at the general development of sports negligence. The author in Chapter 5 considers the wider aspects of negligence regarding the duties of care owed to and by participants, including match officials and coaches. The criminal liability arising from violence on the field of play is covered in Chapter 6, including a discussion on the apparent reluctance of the courts to become involved with instances of assaults by participants within the course of match play. Refreshingly, the pros and cons of boxing as a legitimate though violent sport are given an airing in Chapter 7 and fit easily in the context of the matters dealt with in Part 2 of this book.

The legal aspects of organising and hosting sporting events form the substance of Part 3. Here the general duties of care owed by owners and/or occupiers of venues are highlighted. In this connection James looks at matters arising from some of the major disasters which have occurred at various stadia. In Chapter 8 he discusses the claims made under the Occupiers Liability Acts regarding issues of negligence and nuisance. The general problems arising from crowd disorder and spectator safety are dealt with in Chapter 9. The question of football hooliganism is examined in Chapter 10, including an instructive analysis of the nature and purpose of the Football Banning Order, which is regarded as a major response to hooliganism at designated football matches.

The important issue of commercialisation in sport is the subject of Part 4. Here the author highlights the ways in which sporting organisations and individuals have used the law when exploiting new income which has become available.

James looks at the role and status of such bodies and their relationship with the English courts. European law and the impact of the Court of Arbitration for Sport regarding the settlement of sporting disputes.
through television and other media. Chapter 11 concentrates on contractual matters, with particular emphasis on restraint of trade. The European dimension is explored in Chapter 12 and includes comment on competition and freedom of movement. In Chapter 13 the issues concerning commercial exploitation and merchandising rights, together with the regulatory process involved in ticketing, are analysed. The final chapter of this book examines the protection of Olympic Games rights, and the restrictions on advertising produced in order to curb ambush marketing are closely followed in the light of the London Games in 2012.

A major feature of James’ work is his use, for study purposes, of a ‘hot topic’ of current interest which he places towards the end of each chapter. In addition he includes a summary of content together with a selective reading list at the conclusion of every chapter.

In conclusion it is suggested that Mark James has fulfilled his aim, stated at the beginning of this review. This book provides a well written introduction for readers who are meeting Sports Law for the first time yet additionally he provides an updated view of the current law for those more familiar with this subject. The materials are appropriately referenced throughout the text, therefore negating excessive use of footnotes or lengthy indexing. Importantly, and unusually for law texts, this book is relatively inexpensive, therefore providing another incentive for purchase. In the context of this review one expects that the shelves of university libraries and private sports law practitioners will soon contain copies of this excellent text.

David Dovey, Buckinghamshire New University
Respondent: We declare that Kevin Keegan was constructively dismissed by Newcastle United Football Club Ltd for which Newcastle United Football Club Ltd must pay to Kevin Keegan damages in the sum of £2 million plus interest to be assessed if not agreed.

Reasons for the decision
The Tribunal’s reasons for arriving at the Award set out above are as follows:

1. Introduction

In these proceedings, Kevin Keegan claims damages for what he says was his constructive dismissal by Newcastle United Football Club Ltd (the Club) in early September 2008.

He contends that when he was appointed as the Manager of the Club on 16 January 2008 (until 30 June 2011) it was a term of his Contract or otherwise agreed that he would have the final say as to transfers of players into the Club (“the final say”).

He says that on 31 August 2008, the Club breached that term by signing an Uruguayan player, Ignacio Gonzalez, expressly against his wishes, that this breach amounted to a repudiation of his Contract and that he was therefore entitled to resign which he did on 4 September 2008.

As a result, he claims that he has not only lost the salary and other benefits which he would otherwise have received under the Contract, amounting in total, he says, to £8,607,534 but he also claims “stigma damages” on the basis that as a further consequence, he has found it and will continue to find it difficult, if not impossible, to obtain work again as a top flight manager as a result of which he will lose up to a further £16.5m representing the income which he would otherwise reasonably have expected to receive up to his 65th birthday.

2. The Club denies that it was a term of his Contract that he would have the final say on transfers of players into the Club. The Club further denies that he was justified in resigning. The Club contends that he chose voluntarily to resign and that he is thus entitled to no compensation. Indeed, the Club counterclaims as against Mr Keegan the sum of £2m which it contends is payable to him under the Contract.

3. Background

Mr Keegan was appointed the Manager of the Club (for the second time) under a written Contract signed and dated 16 January 2008.

He had been approached about the position a few days before by Chris Mort, then the Chairman of the Club, and he had asked to meet (the owner) before deciding whether to take up the appointment. (He was then running his Soccer Circus business in Glasgow).

A meeting was therefore arranged to take place in London on 16 January 2008.

It was attended by Mr Keegan, Mike Ashley, Mr Mort and Tony Jimenez who was shortly to be appointed Vice President (Player Recruitment).

After lengthy discussions and negotiations, the Contract was signed and Mr Keegan was appointed the Manager of
the Club at an initial salary of £3 million pa.

4. Mr Keegan’s primary case is that under the terms of the contract, he was to have the final say and that he would never have agreed to accept the appointment as Manager on any other basis.

Whether this is what the Contract provides is the subject matter of the first of the issues which we address below.

He also contends that at this meeting, he was expressly assured by Messrs Ashley, Mort and Jimenez that he would have the final say.

This represents his alternative case and we address it below under Issue 2.

5. The Club’s case is that nothing was said expressly at the meeting as to whether Mr Keegan should have the final say but that it was implicit from the discussions, in particular from the structure of the Club as it was explained to Mr Keegan and from a number of scenarios which were discussed, that he would not have the final say.

The structure to which they refer and which they say was explained to him was what has been described as the Continental model under which the Club proposed to appoint a Director of Football, who would have a seat on the Board and to whom the Manager would report.

The Club’s case is that Mr Keegan was told that it was likely that Dennis Wise, then the Manager of Leeds, would be appointed to this post.

The Club’s case was that under this structure, the Director of Football and Tony Jimenez would be responsible for player recruitment and they, and not Mr Keegan, would have the final say.

6. Although we heard a considerable amount of evidence as to events which took place in the months which followed Mr Keegan’s appointment, in view of our conclusions, we can proceed at once to the events which culminated in Mr Keegan’s resignation on 4 September 2008.

On 30 August 2008, almost at the end of the transfer window (the final day of which was 1 September 2008) Mr Wise telephoned Mr Keegan and told him that he had a great player for the Club to sign, namely Ignacio Gonzalez, and that he should look him up.

Mr Keegan tried to locate him on the internet but could find no reference to him.

Mr Wise told him that he had been on loan at Monaco but having checked out the details, Mr Keegan was unimpressed and told Mr Wise that he did not think the player was good enough.

Mr Wise then told him that the player was on “You Tube” and that Mr Keegan could look him up there but he found that the clips were of poor quality and provided no proper basis for signing a player to a Premier League Club.

Moreover, no one at the Club had ever seen him play.

However, notwithstanding that he made it clear not only to Mr Wise but also to Mr Jimenez and to Mr Ashley that he very strongly objected to the signing of Mr Gonzalez (he was to be signed on loan with an option to purchase), the Club proceeded with the deal and the transfer was concluded the following day, on 31 August 2008.

The Club did so, according to its witnesses who gave evidence before us, because it was in the Club’s commercial interests to do so.

It was what the Club described as a “commercial deal” by which the Club meant a deal which was in the commercial interests of the Club.

The “commercial interests”, according to the Club, were that the signing of the player on loan would be a “favour” to two influential South American agents who would look favourably on the Club in the future.

The loan deal cost the Club nearly £1m in wages for a player who was not expected to play for the first team but no payment was made by the Club to the agents in respect of the deal.

7. Although it is clear that Mr Keegan also had concerns about the nature of this deal, his primary objection to it was that it breached what he described as “the golden rule”,

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i.e. the term of his contract by which he, the Manager, would have the final say and that notwithstanding that he had strongly objected to the proposed transfer, the Club nonetheless had proceeded with it.

8. The upshot was that despite several attempts by both sides to find a way forward, Mr Keegan concluded that he had no option but to leave the Club because, to use the language of the law, in breaching what he maintained was a fundamental term of the Contract, the Club had thereby repudiated it as a result of which he was entitled to resign. Hence this claim.

9. The Hearing During the course of the Hearing, which lasted for nearly two weeks, we read the statements of and heard oral evidence from the following witnesses - Mr Keegan, Mr Ashley, Mr Mort, Mr Jimenez, Mr Wise, Mr Lee Charnley (the Secretary of the Club), Derek Llambias (who succeeded Mr Mort as Chairman in June 2008) and Jeff Vetere (who joined the Club in January 2008 as its Technical Co-ordinator having previously been a scout at Real Madrid, Charlton Athletic and West Ham).

We were also provided with a considerable amount of documentary material which included, of course, most importantly the Contract and we were referred to a considerable number of legal authorities which we have carefully considered.

The Hearing was held in private as is the custom and practice in arbitration proceedings such as these but we were asked by both parties to allow our decision to be made public, indeed we were invited ourselves to take appropriate steps to publish it.

We are satisfied that we have power to do so and we agree with the parties that in the circumstances of this case, it is desirable that our decision should be made public.

Accordingly, we propose to give certain directions as to the publication of our decision which are set out at the end of this Judgment.

10. The Key Issues At the end of the evidence we identified what seemed to us to be the seven principal issues in the case and invited the parties to focus their closing submissions on those issues.

We did not understand the parties to disagree that these were the key issues and thus we propose to set out our reasons for making our Award by reference to each of those issues in turn.

11. The First Issue: What were the duties usually associated with the position of a Manager of a Premier League Football Team in January 2008, in particular as to having the final say/final approval as to transfers into the Club?

Clause 3.1.1 of Mr Keegan’s Contract provided as follows:- “During the continuance of his employment, Kevin Keegan will … perform such duties as may be usually associated with the position of a Manager of a Premier League Football Team (including but not limited to those specific duties set out in Schedule 1) together with such other duties as may from time to time be reasonably assigned to him by the Board”.

12. Paragraph 1 of Schedule 1 provided: “Kevin Keegan will be responsible for the training, coaching, selection and motivation of the Team”.

13. The first question which arises, therefore, for our determination is as to what were, at the time that the Contract was signed, “the duties as may be usually associated with the position of a Manager of a Premier League Football Team”.

14. The Club does not contend that Mr Keegan was expressly told at the meeting on 16 January 2008 that he would not have the final say.

As we have pointed out above, the Club’s case, ultimately, was that this was implicit (Mr Ashley said “blindingly obvious”) in what Mr Keegan was told at the meeting on 16 January 2008 about the structure of the Club (the model being used) and the various scenarios which were explained to him, that the words in the Contract must be construed against this specific background and this specific structure/model and thus that the “duties usually associated with the position of a Manager of a Premier League Football Team” as used in this Contract did not include the Manager having the final say. For the reasons set out below, we reject the Club’s case on this issue.

15. We readily accept that at the meeting, Messrs Ashley, Mort...
and Jimenez told Mr Keegan about Mr Ashley’s plans and vision for the Club, in particular his plan to find and bring in younger players some of whom might later be sold on at a profit and we accept that Mr Keegan was told something of the proposed structure of the Club, in particular that there would be a Director of Football who was likely to be Dennis Wise. (Mr Keegan’s evidence was that Mr Wise was one of the names mentioned in connection with this post). We also accept that these discussions may have included reference to a number of scenarios.

However, we do not accept that it was implicit from these discussions that Mr Keegan would not have the final say.

16. First, we do not consider that it was implicit in the proposed structure of the Club, or the model being used (the Continental model) as it was explained to Mr Keegan and as it was explained to us, that Mr Keegan would not have the final say.

On the contrary, we note that Mr Keegan’s successor, Joe Kinnear, asked for and was given the final say yet the structure and the model remained the same and Mr Wise continued in his position as Director of Football without any change to the terms of his contract.

Moreover, the evidence which we heard shows that the Director of Football and his responsibilities can come in many guises and those responsibilities may differ from one club to another.

17. Secondly, none of the Club’s witnesses were able to identify any of the scenarios relied upon, let alone identify a scenario from which it would have been implicit that Mr Keegan would not have the final say.

18. Thirdly, we do not believe that Mr Keegan would have accepted the job as Manager if it had been implicit in what he was told that he would not have the final say and we unhesitatingly accept his evidence on this point.

Indeed, it seems to us to be inconceivable that he would have done so having been told, according to the Club’s witnesses, that it was likely that Dennis Wise would be appointed as Director of Football given his inexperience as top flight manager. (Mr Keegan had picked him as a player in the England team when he was its Manager).

19. Finally, the Club’s own witnesses themselves seemed to be unclear as to what was the position as to who would have the final say and we had, and continue to have, real difficulty in understanding the Club’s position on this point.

The Club repeatedly stated that Mr Keegan did not have the final say but in the letter dated 4 September 2008 from Mr Llambias to Mr Keegan setting out the Club’s proposals for trying to dissuade Mr Keegan from resigning, Mr Llambias stated: “It will continue to be the position that no player will be bought for the first team without your approval, save of course for commercial deals (which we refer to as financials) which will remain within the sole discretion of the Board”.

20. This was repeated by some of the Club’s witnesses (i.e. that the position was that Mr Keegan had the final say save for financial or commercial deals) but some of those same witnesses then asserted later in their evidence that Mr Keegan never had the final say and Mr Wise was not prepared to accept that Mr Keegan ever had the final say, even apart from financial and commercials deals.

This lack of clarity, indeed confusion, in the understanding of the Club’s own representatives as to this critical issue makes it, in our view, even less likely that it would and should have been clear to Mr Keegan from what he was told at the meeting on 16 January 2008 that he would not have the final say.

21. We turn, therefore, to consider what were the duties usually associated with the position of a Manager of a Premier League Football Team. On this issue, the evidence was effectively all one way. Mr Keegan’s own evidence was that these duties included controlling the players that come into (and out of) the Club (subject, of course, to the financial restraints set by the Board) and significantly he was not cross examined on this evidence (in other words, it was not suggested to him that he was wrong about this). Evidence to the same effect was given by three of the Club’s witnesses, Mr Mort, Mr Charnley and Mr Vetere. We heard no evidence to the contrary effect. This also accords with both the understanding and long experience of the non lawyer member of the Tribunal, Mr Merrett, and, for what it is worth, the understanding of the two lawyer members.
Accordingly, we have concluded that the duties usually associated with the position of a Premier League Manager included the right, indeed duty, to have the final say as to transfers into the Club and thus that was the position under this Contract.

22. We should add that very late in the day the Club sought to rely on the definition of “Manager” set out in paragraph 1 of Section A of the Rules of the Premier League under which “Manager” is defined as meaning “the Official of a Club responsible for selecting the Club’s first team”.

However, in our view this takes the Club nowhere.

True it is that paragraph 1 of Schedule 1 stated that he would be responsible for the training, coaching, selection and motivation of the Team but Clause 3.1.1 expressly provided that his duties would include but not be limited to the specific duties set out in Schedule 1. It follows that the definition of “Manager” to be found in the Premier League Rules does not assist in the proper interpretation of the Contract.

23. As it happens, this was also what the Club itself and its representatives (and Mr Keegan) were saying to the public in various interviews and press statements beginning soon after Mr Keegan’s appointment.

In a report in the Times of 29 January 2008, which Mr Charnley confirmed as having been accurate, it was stated that “Wise and Vetere will make the initial assessment before calling in Jimenez to do the deal, though Newcastle insist that Keegan will have the final say”.

Two days later, on 31 January 2008, Mr Wise gave an interview in the Chairman’s office at the Club which was intended to be and was published on the Club’s website (and reported in the national Press) on the following day.

In the course of that interview he stated: “I’m not here to be involved in the first team. I am not here to manage. I am here to help Kevin as much as possible in bringing young players through and also recommending certain players to him and he’ll say yes and no.

“He has the final word and then no one else. I’m not gonna do things like bring players in behind his back. I’m not into that and everything that happens will be run past him and he’ll say yes, as I say, or he’ll say no”.

24. Two days later, in the Club programme for 3 February 2008, the website interview was included with the headline: “Dennis Wise “I’m here to help Kevin - he has the final word””

25. On 23 February 2008, Mr Mort gave an interview with “The Mag” (published independently by the Club’s supporters) in which he stated: “Everything that sits below Kevin, everything associated with the first team is his responsibility … Dennis and Jeff will help identify players and Kevin will then say yes or no”.

26. The Club’s explanation for these statements, which, on their case, were simply untrue, was that they were nothing more than an exercise in public relations carried out so as not to undermine Mr Keegan’s position and made necessary, in the first place, by statements made by Mr Keegan himself to the press.

We found this explanation to be profoundly unsatisfactory.

27. First, the Club did not, we find, explain in any way to Mr Keegan that they felt compelled to make these statements notwithstanding that they were untrue or to clarify and confirm with him that despite what the Club was saying publicly in these statements, he did not have the final say.

Nor did the Club speak to him in advance and explain to him what they were proposing to do and the reasons for it. If the Club’s explanation were true, we fail to understand why they did not do so.

28. Secondly, we do not understand why the Club could not set out publicly and truthfully what they maintain was the true position.

After all, Mr Ashley’s vision for the Club involved a change to a Continental structure and it is clear from the evidence that there are managers of some Continental clubs who do not have the final say.

We do not understand why the Club felt unable to make this clear publicly from the outset, regardless of what Mr Keegan himself may have said.
29. Thirdly, for the Club to have made these statements, when they were, according to the Club, untrue, was, in our view, simply to store up trouble for the future.

30. Finally, we do not accept that these statements were made as a result of anything that Mr Keegan himself had already stated publicly.

31. The Second Issue: What was said and agreed at the meeting on 16 January 2008, if anything, as to whether Mr Keegan would have the final say/final approval as to transfers into the Club?

As we have noted in paragraph 4 above, Mr Keegan’s alternative case is that at the meeting on 16 January 2008 he was expressly assured by Messrs Ashley, Mort and Jimenez that he would have the final say. This was denied by all three in their evidence.

In view of our conclusion on Issue 1, it is unnecessary for us conclusively to determine this issue but we consider that it is probable that although when he left the meeting Mr Keegan reasonably and genuinely inferred that he would have the final say since the Contract provided that he should perform the usual duties of a Premier League Manager, nothing was said expressly to that effect by the Club’s representatives.

32. The Third Issue: Why did Mr Keegan leave the Club? We are satisfied that Mr Keegan left the Club (i.e. resigned) because the Club sought to impose upon him a player, namely Gonzalez, whom he did not want, in breach of the term in his Contract which we have found entitled and required him to have the final say. This was his evidence, which we accept, and it is supported by the timing of his resignation.

33. True it is that he was plainly unhappy with some aspects at the Club, in particular the small size of the squad and the lack of signings which he believed were required to bolster its size, both of which were making him frustrated, and true it is that he plainly had a difficult relationship with Mr Wise and Mr Jimenez but we are satisfied that what triggered his resignation was the Club’s signing of Gonzalez notwithstanding Mr Keegan’s strong opposition to it.

Both at the time and to us he described the Gonzalez signing as the final straw and the evidence shows that the Club appreciated that proceeding with it against this wishes might well lead to his resignation.

34. It follows that we do not accept the Club’s case which is that Mr Keegan resigned because he could not continue to operate within the structure of the Club and that the Gonzalez deal may have represented a convenient excuse for him to do so.

First, he told us, and we accept, that he wanted to stay at the Club.

Secondly, there were very good reasons for him to want to do so. He had a valuable Contract worth £3m for the first year, £3.2m for year two and £3.4m for year three, plus benefits and he was managing a Club about which he clearly felt passionately and whose fans supported him no less passionately.

Thirdly, the Club had had an encouraging start to the new season: in the Premiership, they had drawn away to Manchester United and then won at home to and in the Carling Cup they had since won away at Coventry.

True it is that they had just lost away at Arsenal but that cannot have come as any great surprise. And the atmosphere in the dressing room was described as excellent.

Finally, as we set out in more detail below, he was being told by the Club that they wanted him to stay.

35. The Fourth Issue: Was Mr Keegan justified in leaving the Club?

We have concluded that he was for the following reasons.

36. First, it is settled law that if one party to a contract is in fundamental breach of that contract, for example, by breaching one of its fundamental terms, that breach can amount to a repudiation of the contract entitling the other party to resign. This is what is known as constructive dismissal. In the present case, we have no hesitation in accepting that the Club’s breach of contract in signing Gonzalez contrary to Mr Keegan’s wishes
amounted to a fundamental breach of his Contract. We have no difficulty in understanding how, in a case where he has been given the final say, a Manager's position, for example, his authority over the players, would be undermined if a player whom he did not want was brought in by the Club over his head.

37. Secondly, as Mr Wise accepted in his evidence, Mr Keegan had made it clear how strongly he opposed the signing of Gonzalez, yet the Club nonetheless went ahead with the deal.

38. Thirdly, we do not accept that, as the Club has argued, “the taking of a minor player on loan (without a fee) for the purposes of cementing commercial ties with agents was not a repudiatory breach”. Not only was this inconsistent with the emphasis which the Club placed upon the fact that Gonzalez was a Uruguayan international, but it also misses the point.

Gonzalez was a signing which Mr Keegan had opposed, in breach of what we consider to have been a key term of his contract.

39. Fourthly, the Club also argued that he should have discussed the matter further with it and “taken up the olive branch which was offered” but the difficulty with this submission is that what the Club were offering was not what had been agreed under the Contract.

40. Finally, we do not accept that Mr Keegan either waived the Club's breach of contract or affirmed it by confirming on 1 and 2 September that he had not resigned and releasing a statement to the press on 3 September to the same effect.

His willingness to see if the position could be resolved could not, in our judgment, involve any waiver on his part.

In any event, it is clear that the “final final straw” occurred on 4 September when the Club handed to him the letter to which we have referred above in which it made it clear that were he to remain at the Club he would still not have the final say.

41. In view of our conclusion on this issue, we do not need to address Mr Keegan's case as to the propriety or otherwise of the Gonzalez transfer and we do not propose to do so save to note that although it was suggested on Mr Keegan's behalf that the arrangement was improper and irregular, it was not suggested that it was in breach of any of the Rules of the Premier League or any other applicable or relevant rules.

42. The Fifth Issue: Would the Club have been entitled, at the time when Mr Keegan left it in September 2008, to dismiss him if he had not resigned? If so, on what grounds?

The Club raised a number of grounds upon which they submitted they would have been entitled to dismiss Mr Keegan had he not resigned on 4 September 2008. We reject them all. Moreover, it is clear on the evidence that the Club had no intention of dismissing Mr Keegan either then or in the foreseeable future. On the contrary, they wanted him to stay, they believed that he was doing a good job and, as was recorded in the letter of 4 September 2008 and in evidence by Mr Llambias, they believed that he was crucial to the future of the Club. We consider that the grounds relied upon should never have been raised and it does the Club no credit for having chosen to do so.

43. For these reasons, we have concluded the Mr Keegan was constructively dismissed by the Club. We turn, therefore, to assess the compensation to which he is entitled. The Club contended that under the Contract, specifically Clause 14.8.1, Mr Keegan's damages are limited to £2m. Mr Keegan contends that this clause does not apply, alternatively that it is unenforceable, with the result that he is entitled to damages assessed on the basis and in the sums which we have set out in paragraph 1 above. It follows that we need, first, to determine the issues which arise in relation to Clause 14.8.1 of the Contract.

44. The Sixth Issue: Is Clause 14.8.1 applicable to the circumstances of this case and, if so, is it enforceable?

Clause 14.8.1 provided as follows:- “In the event that the Club terminates this Agreement or requires Kevin Keegan to cease being the Manager of the Club at any time during the Term, other than where the Club has grounds to dismiss Kevin Keegan pursuant to Clause 14.1, the Club shall pay to Kevin Keegan pursuant to Clause 14.8.4 a sum of £2million . . . (“Payment in Lieu”)”.
45. It is also necessary to set out Clauses 14.8.3 and 14.9: “14.8.3 The parties agree and declare that the Payment in Lieu is a genuine pre estimate of the damages that Kevin Keegan may suffer as a result of the Club terminating this Agreement and takes into account the provisions of Clause 14.9 hereof and shall be in full and final settlement of all claims in respect of such early termination… 14.9 If this Agreement is terminated by the Club other than pursuant to Clause 14.1 and Kevin Keegan receives the payment specified in Clause 14.8 then, in consideration of such payment, Kevin Keegan agrees and warrants he will not work nor be employed in any capacity for any other United Kingdom Premier League Football Club for a period of six months from the Date of Termination.”

46. Mr Keegan contended that Clause 14.8.1 did not apply because he left the Club not because the Club had terminated the Agreement but because he had been constructively dismissed. We reject that argument. We consider that, properly interpreted, Clause 14.8.1 is wide enough, and was intended by the parties to be wide enough, to include constructive dismissal. We do not consider that the parties intended that in the event that as a result of a dispute such as this Mr Keegan left the Club the financial circumstances would depend on whether he was constructively dismissed or whether the Club terminated his Contract. Nor do we consider that the parties intended that in the event that as a result of a dispute such as this Mr Keegan left the Club the financial circumstances would depend on whether he was constructively dismissed or whether the Club terminated his Contract. Nor do we consider that the parties intended that he should be in a better position financially were he to be constructively dismissed by the Club than were the Club to have terminated the Agreement which, we note, the Club would have been entitled to do either for a bad reason or for no reason at all. Indeed, we can see no good reason why the parties should have so intended.

47. We also reject the argument that the clause does not apply because the Club has not, in fact, paid to Mr Keegan the agreed sum of £2m. In our judgment, the effect of this part of Clause 14.8.1 is merely that such sum is now owing to Mr Keegan thereby creating a debt which he is entitled to recover.

48. Next, Mr Keegan contended that Clause 14.9 was unenforceable on the basis that it was an unlawful restraint of trade and that because the two were inextricably linked, Clause 14.8.1 was unenforceable also. Specifically, Mr Keegan argued that the restriction in Clause 14.9 on Mr Keegan working or being employed for any other United Kingdom Premier League Football Club for a period of six months following the termination of the Contract, was unreasonably wide because it would prevent him from working or being employed for such a Club in any capacity, for example, it would prevent him from carrying out any journalistic, administrative or corporate hospitality work for any such Club. In our judgment, there are two answers to this contention. First, we consider the prospect of Mr Keegan accepting work for another Premier League Club in such a capacity (rather than as the Manager, Coach or Director of Football) to be more theoretical than real but, secondly, we do not consider such a restriction to be unreasonable. We can well understand that Mr Keegan may have been of value to another Premier League Club to the detriment of Newcastle United in some capacity other than as Manager, Coach or Director of Football and he would have taken with him, of course, his knowledge of the Club, its players, their salaries, details of their contracts and their position at the Club (for example, whether they were unsettled there or not) all of which might have been of value to the other club. Even his association in some capacity with another club may have given that club a boost which might be reflected by the performance of its team on the pitch.

49. We also note that the restriction applied only to working for or being employed by any other United Kingdom Premier League Football Club (and thus excluded foreign clubs and international teams and, of course, Championship clubs) and that it applied for only six months. Moreover, the restriction did not prevent Mr Keegan from looking for another job as a United Kingdom Premier League Club Manager during those six months, only from taking up such employment. Accordingly, he would have been fully entitled to enter into negotiations to take up such a position provided that his employment with such other club did not begin until after the six months had expired.

50. Finally, Mr Keegan contended that the sum of £2m to be paid under Clause 14.8.1 was unenforceable because it was a penalty in that it was not a “genuine pre estimate” of loss, notwithstanding that by Clause 14.8.3 the parties had agreed and declared that it was. We reject this argument also. In our judgment, it would have been impossible to provide anything remotely approaching a
precise pre estimate of loss in this case. For example, Mr Keegan might have begun employment with another club immediately after the expiry of the six month period but he might not have done so for, say, a further year or two in which event his loss would be very different. However, on analysis, what the parties in substance agreed was that in the event that Clause 14.8.1 applies, Mr Keegan would receive the equivalent of six months' salary (i.e. £1.5m at least in year one) plus a further £500,000 to provide a cushion in the event that he did not take up other employment as soon as the six month period expired. In our view, the parties were entitled to assume that, if he wanted to, Mr Keegan would be likely to find further employment, if not immediately after the expiry of this period, then within a reasonable time thereafter, given his experience. In view of the near impossibility of estimating precisely what his loss would be, we consider such an approach to be reasonable and to represent a reasonable pre-estimate of his loss to the extent that it was possible to carry out this exercise at all. It follows that, in our judgment, Clause 14.8.1 does not amount to a penalty clause. We note, although we do not base our conclusion on this, that when cross-examined, Mr Keegan very fairly accepted that Clause 14.8.1 was fair and reasonable.

51. We conclude, therefore, that Clause 14.8.1 applies and is enforceable and thus Mr Keegan is entitled to damages in the sum provided for in this clause, namely £2m.

52. The Seventh Issue: Is Mr Keegan entitled to any further damages, that is to say, over and above Clause 14.8.1 and, if so, why?

In view of our conclusion on the Sixth Issue, it follows, as was accepted on behalf of Mr Keegan, that he is entitled to no further damages. However, if we had had to address this issue, we would have decided that the publication of a finding by us that Mr Keegan had resigned because he had been constructively dismissed by the Club and not because he had decided to walk away, would restore his reputation and in evidence he agreed with that proposition. Moreover, he also accepted that he did not know whether or not anything that happened at the Club was going to stop him getting a job. Thus, even if he had been entitled to seek further damages (i.e. stigma damages), which we have found he is not, they would have amounted to very little.

53. An eighth issue would have arisen as to the Club’s counterclaim for damages against Mr Keegan but this issue does not arise given our finding that he was constructively dismissed.

54. Conclusion As recorded in the award, we, therefore, assess Mr Keegan’s damages for his constructive dismissal by the Club at £2m subject to determining whether there should be any discount for early receipt or for earnings received since Mr Keegan’s constructive dismissal about which we have yet to receive the submissions of the parties. To this must be added interest which we will assess if it cannot be agreed by the parties. It has been agreed that we will determine the question of costs once the parties have been notified of our award and have had an opportunity to make written submissions about costs to us. We will also determine the questions whether there should be a discount for early receipt and/or any deduction for earnings received since Mr Keegan’s constructive dismissal once we have received written submissions on these issues.

55. Publication As indicated at the outset, we agree that both our Award and the reasons for it should be made public. To that end, we direct that both the Premier League and the Club should publish both on their respective websites. It also follows that the parties are at liberty themselves further to disclose and publish the Award and our reasons for it as they choose.

Commentary
Where a club is in breach of an express term in an employment contract and such a breach is repudiatory, this can provide the basis for a constructive dismissal. This argument was at the heart of Kevin Keegan’s successful claim against Newcastle FC. The background to the case is the introduction into the English game over the past decade of a continental-style management structure where the team manager operates alongside a director of football. Obviously this can create tensions where the lines of responsibility are not clear and/or not kept to.

At Newcastle, Kevin Keegan was the manager and Dennis Wise was the director of football. The tribunal found that it had been expressly agreed with Keegan that he was to have the final say regarding the recruitment of players, and that his contract should be interpreted accordingly. Subsequently, Newcastle entered into a loan agreement for the Uruguayan
International, Ignacio Gonzalez, on the recommendation of Dennis Wise, but contrary to the wishes of Kevin Keegan. The latter made several attempts to resolve the ensuing conflict with the Newcastle board before deciding he had no option other to resign. The tribunal found that there had been a fundamental breach of Keegan’s contract and thus he had been constructively and wrongfully dismissed.

As can be seen from the earlier Lou Macari case (Macari v Celtic Football and Athletic Co Ltd Court of Session, Case 0/309/6/98), delay in resigning can constitute affirmation of the employer’s breach and the right to claim constructive dismissal is consequently extinguished. However, it is well established in case law (see Lewis v Motorworld Garages Ltd [1986] 1CR 157, CA; Omilaju v Waltham forest LBC [2005] ICR 481, CA.), that a series of events culminating in one event which can be regarded as constituting the final straw can justify a decision to resign. The tribunal found that Keegan’s attempts to ascertain whether the dispute could be amicably resolved resolve the dispute did not constitute affirmation, and that the final straw was provided by a letter to Keegan stating the Board did not accept that he had a right to the final say over the recruitment of Gonzalez.

One additional point is the clause in specified his contract that, should he be entitled to compensation from Newcastle, he would receive £2 million. Keegan argued that his actual loss was greater than this amount, and that the clause constituted a penalty which should be set aside. For example, following his constructive dismissal, Kevin Keegan could have almost immediately entered into a contract with a new club, or could have remained unemployed for a significant period of time. The sum of £2 million reflected his salary over a six month period (the duration of the restraint in his contract plus a cushion of £500,000 were he unable to obtain employment once this period had expired. In the circumstances, the clause constituted a valid attempt to provide for liquidated damages and could not be regarded as a penalty.

Report: RW

(2010) SLJR 2
Sport; Intellectual property; Copyright; Database right; Football; Infringement; Preliminary issues; References to European Court

FOOTBALL DATA CO LTD V BRITTENS POOLS LTD; FOOTBALL DATA CO LTD V STAN JAMES (ABINGDON) LTD; FOOTBALL DATA CO LTD V YAHOO! UK LTD

High Court, Chancery Division, Judge Fysh Q.C. 26 November 2009

Facts
The appellants (F) appealed against a decision of a master to order the trial of a preliminary issue in three joined actions against the respondent companies (S, B, and Y). The respondents included the Scottish and English football leagues. The respondents’ commercial activities concerned the use of football-related data for betting. The common causes of action in the actions were copyright infringement and infringement of the database right, and the proceedings concerned rights in two sets of data, namely fixture lists and live data relating to matches. The fixture lists issue was affected by the decisions of the European Court of Justice in and joined cases. The live data issue raised novel points of law. The case against B and Y concerned only the fixture lists issue. The case against S concerned both issues, but S undertook not to pursue the live data issue if the fixture lists issue went against it. The master ordered the trial of the fixture lists issue as a preliminary point. F submitted that the master had erred in principle in the exercise of his discretion, in that he had failed to take into account the delay to the determination of the live data issue, had wrongly taken into account the financial burden on B as a small company, and had given insufficient weight to the fact that the order would prevent probable ECJ references on the two issues being heard together.

Held Appeal dismissed
(1) An appeal based purely on the exercise of discretion was to proceed by way of review and not rehearing. The court had to be satisfied that the master had been seriously wrong in the exercise of his discretion and that he had erred in principle, while bearing in mind the overriding objective, and applied. The master had not wrongly exercised his
discretion, nor had he erred in principle. (2) The resolution of the fixture lists issue would be potentially decisive. If the issue was determined in the respondents’ favour, the claims against B and Y would be dismissed and the only triable residue would be S’s live data issue. That had rightly played an important part in the master’s discretion. The case concerned the subsistence of rights relied on, and they were questions of law. Many of the facts were agreed. Although the master had been unaware of agreement as concessions had been made since his order, the agreement supported the order. The trial window began within four months, and the order had been made following a case management conference, applied. (3) It was extremely unlikely that such an experienced Chancery practice master would not have taken timing into account. Timing had been debated at the case management conferences and the master had referred to McLoughlin in which delay had been brought up, in his judgment, McLoughlin considered. (4) The master had not erred in taking B’s position into account. The law had to cater for both large and small parties. (5) The possible references to the ECJ did not necessarily have to be made conjoint references or made together: different subject matters were involved and they could thus be separate references. In any event, there were evidently ECJ procedures to enable references which had been made at different times to be resolved simultaneously. In Fixtures Marketing, the different references had spanned a year, but they had been heard at the same time, Fixtures Marketing referred to. It was unclear what period of delay F considered to be realistic and damaging to their interests. The period of delay involved in ECJ references in general could be lengthy, but F had been exaggeratedly pessimistic as to when the live data issue could be got on and its probable duration.

Commentary
This ruling highlights that although there is no database right in the annual fixture lists of the English and Scottish football leagues, such lists are protected as databases by copyright under the Copyright, Designs and Patents Act 1988 (c.48). The decision regarding database rights needs to be seen in context of a number of preliminary references to the ECJ including British Horseracing Board Ltd v William Hill Organisation [2001] RPC 612. In this case at the High Court, it was held that the database information of BHB, including lists of runners, names of jockeys, jockey’s colours and the racing calendar, which William Hill was posting on its web site for online betting purposes, infringed BHB’s rights. The Court of Appeal, hearing William Hill’s appeal, referred certain points of law to the European Court of Justice (ECJ) concerning the interpretation of the European Database Directive 96/9 which provides legal protection to databases.

The ECJ case was heard in parallel with cases from the Swedish, Finnish and Greek courts relating to football fixture databases. On the facts, the ECJ concluded that BHB’s activities and investment related to the creation of racing data and not the database and as such they did not constitute an investment in ‘verifying’ the contents of the database. The ECJ found that William Hill use of a very small amount of information (e.g. the names of horses and times of races) from the BHB database did not amount to an infringement of the BHB’s database rights. The ECJ ruled that the obtaining, verification or presentation of the contents of a football fixture list or a schedule of horse races does not constitute substantial investment giving rise to protection against the use of the data by third parties.

The English Court of Appeal allowed William Hill’s appeal, in so far as BHB’s database consisted of the officially identified names of riders, and runners it was not within the sui generis of Art.7(1) of the . The purpose of database right is to encourage investment in particular types of data gathering.

The High Court in this instant case has similarly ruled that the Directive does not apply and does not protect databases such as football fixture lists where the work lies primarily in creating the data, as opposed to obtaining, verifying or presenting the data. In a subsequent Court of Appeal hearing, ([2010] EWCA Civ 1380), a preliminary reference has been made to the ECJ and this will be subsequently reported.

Reporter: SG
Facts
The appellant association (S) appealed against a decision that it was liable for damages for personal injuries suffered by the respondent (B). B, who was 13 years old at the time, had been injured whilst playing a game called “Objects in the Dark” at a scout meeting. The game was organised by the scout leader; blocks were placed in the centre of a room whilst players ran around. Half the main lights were turned off and, at any given moment, the remainder of the lights would be turned off and the players would rush to the middle of the room and grab a block; there were not enough blocks for every player. Rounds were played until one boy was left holding a block and declared the winner. The game was similar to another game which was played with the lights on. In the course of playing the game, B collided with a bench, injuring his head and left shoulder. He recovered from his head injury within two weeks, but the shoulder injury persisted and required physiotherapy. In the event, he made a full recovery. The judge determined that turning the lights off had introduced an unacceptable degree of risk to the game. S submitted that (1) the risks associated with playing the game were no different to those that existed when playing with the lights on; (2) in his evaluation, the judge failed to take account of or failed to give sufficient weight to the social value of the activity.

Held (Appeal dismissed)
(1) The risks associated with playing the same game in a lighted room were increased when the lights were switched off. It could not be said that B would have suffered the same accident if there had been full illumination (see paras 22-25 of judgment). (2) (Jackson L.J. dissenting) It was clear that the judge had very clearly in mind the well-established principle that the social value of an activity was a relevant consideration, and applied. Everyone accepted that scouting activities were valuable to society and that they often, and properly, carried some elements of risk. However, that did not render every scouting activity, however risky, acceptable.

In the instant case, the judge rightly concluded that playing in the dark significantly increased those risks and that the only justification was the additional excitement. Darkness added no other social or educative value. The fact that the judge did not say so explicitly could not undermine his overall conclusion. Whether the social benefit of an activity was such that the degree of risk it entailed was acceptable was a question of fact, degree and judgment, which had to be decided on an individual basis. The judge did that and his conclusion should be respected (paras 38, 46-49, 60).

Commentary
Although based on play and in a game activity, this case is relevant to sporting activity too. It highlights the variety of issues that need to be considered when establishing that there has been a breach of duty in a negligence action. Whether the ‘social benefit’ of an activity is such that the degree of risk it entailed is acceptable is a question of fact, degree and judgment, which had to be decided on an individual basis. In that context, the judge had been correct to conclude that playing a potentially risky game in the dark unacceptably increased the foreseeable risk of injuries occurring.

This ruling where liability has been imposed can be compared usefully with the classic case of Bolton v Stone and Others [1951] 1 All ER 1078, where a visiting cricketer struck a six which had cleared the boundary, 75 feet from the wicket, a 17 foot fence and had travelled a further 100 yards before striking the plaintiff standing on the highway. The cricket ground had been used for 90 years and evidence from the last 30 revealed only six incidents of escaped balls with no damage having been caused by any. The House of Lords allowed the appeal concerning liability on the basis that the likelihood of injury occurring was so slight that a reasonable man would be justified in ignoring it.

The fact that the ball had left the ground previously, and the chances of it doing so again had been guarded against to some extent by the fencing, shows that the decision was not based on foreseeability alone. The House of Lords was able to look at the history of cricket balls leaving the ground and concluded that there were some foreseeable risks (involving social benefits) that it was possible to ignore.

[ BW ]
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