

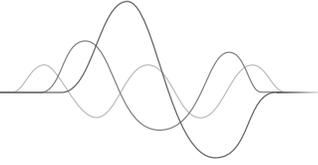


# Sport and the Law Journal



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# Editorial

BY SIMON GARDINER, EDITOR

**This issue concerns a number of on-going and current topics. The Opinion and Practice section provides comment on three topical issues. First, Rachel Seabright's 'Immigration for the long game' focuses on recent changes in the visa process and classification of international sports men and women wishing to pursue their career in Britain. Second, Neeraj Thomas' 'Separation of Powers – Key to Sports Decision Making', focuses on the importance of strict due process within sports-related disciplinary procedures. Third, Walter Cairn's interview with the leading expert on anti-doping in the UK, Michele Veroken.**

The Analysis section has two articles. The Journal is very happy to be able to republish an article which appeared in the *Tulane Law Review* in 2010. Matthew J. Mitten and Hayden Opie's "Sports Law": Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution', provides an ambitious taxonomy and analysis of the development of an international legal order for the resolution of disputes within international sport. As the authors argue, "the evolving law of sports is having a significant influence on the development of international and national laws ... establishing a body of substantive legal doctrine ripe for analysis from a comparative law perspective, and has important implications for global dispute resolution". Ken Foster's 'Global Administrative Law: the Next Step for Global Sports Law?', provides something of a reponse suggesting that the greatest significance for international sports is the development of a 'global sports law' comprised of CAS decisions. Foster argues that this *lex sportiva*, "as a transnational legal order has begun to internalize sufficient principles of substantive and procedural justice, through a process of juridification, to be able to argue for a limited immunity from intervention by national states and their judicial process."

The Reviews section has the usual items, the Sport and the Law Journal Reports and book reviews. In addition, please find new regular features of 'Walter's Country' which will focus on the principal tenets of sport and the law in a particular country - this issue has a focus on France; additionally Walter Cairn's 'Corruption watch', will be a regular survey of recent developments, both at home and abroad, of corrupt activity in sport.

It is clearly appreciated that financial corruption in international sport federations including vote rigging and bribery, fraudulent betting including match fixing and spot fixing (manipulation of an event in a sporting event), money laundering and other criminal phenomena have become a dangerous threat to sport. Mitten and Opie use WADA and the WADA Code (and its application by CAS) as an example of "an advanced global system of justice, which creates a more or less uniform set of internationally respected and enforceable legal rules. The popularity and reach of sports across cultural, economic, political and social divides has the potential to confer on this system of justice a global profile rarely, if at all, shared by other international systems of justice establishing, for example, criminal law, anti-discrimination law, or other human rights legal norms. As such, it has a significant capacity to foster appreciation of the need for a uniform international rule of law, particularly in parts of the world where international legal norms generally are not recognized, as well as a sense of global connectivity and legal harmony."

In recent years sport has confronted some of the wider issues of corruption, through supporting good governance, new regulatory frameworks, wider representation within sports bodies and explicit ethical guidelines. However match fixing has been less engaged with, but central to all these concerns in developing effective responses to match fixing and the surrounding financial corruption and criminal activity, has been an emerging debate on the merits of the creation of a

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global organisation for the battle against sports-specific corruption, which for the purposes of this editorial will be called the Global Sports Anti-Corruption Body. This would be similar in aims and objectives to the World Anti-Doping Agency (WADA).

The argument supporting the creation of such a Global Sports Anti-Corruption Body is predicated on the belief that it would be able to adopt a more coherent and wide-ranging approach to this problem than has been evident up to this point with a variety of disparate structures within sports bodies. And as with WADA, the body would be able to be part of a multi-agency approach together with law enforcement bodies such as Interpol. There would also be the opportunity to pool resources and allow the type of forensic investigation that is required to unravel the financial complexities inherent in corrupt financial dealings. Such a body if it came to fruition, would clearly be able to adopt the good exemplars, which have been developed within specific sports such as international cricket and tennis to fight corruption and match fixing. As such it would have a harmonising effect across all sport.

However, the efficacy of this approach has been questioned by some: for example elements within the betting industry believe that essentially a self-regulatory approach based on memoranda of understanding between betting companies

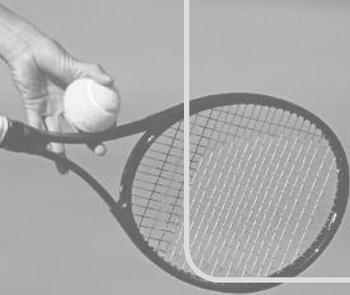
and sports bodies on sharing of information is an effective way of detecting nefarious activities. In addition it is questioned whether it is realistic that such a body could adequately respond to inherent criminality of money laundering and other activities of criminal gangs connected to match fixing. Additionally, unlike WADA that was very much a creation of the IOC and its then existing anti-doping infrastructure, it is not obvious to see where the specific political impetus will come from for the creation of an equivalent anti-corruption organisation such as the Global Sports Anti-Corruption Body. More research and thought needs to be carried out to determine whether this would be the best way forward for sport to engage with financial corruption in sport.

**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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# Opinion and practice



# Immigration for the long game

**BY RACHEL SEABRIGHT, REGISTERED AT LEVEL 3 WITH THE OFFICE OF THE IMMIGRATION SERVICES COMMISSIONER, LUX WORLD**

**When representing an international sportsperson, it is essential to consider their immigration status and to understand that by laying the correct foundations, the client's interests can be best protected for the future. This article will look at elements of relevant immigration law and the importance of compliance with it, both from a player and sponsor perspective, and consider how recent and proposed changes by the United Kingdom Border Agency (UKBA) may affect this area of law.**

## **Obtaining Permission to Work in the UK**

In order for a foreign non-EU sportsperson to work in the UK, they must have permission to do so from the UKBA. Before they can make an application for leave to enter or remain in the UK on the basis of their employment as a sportsperson, they must first be assigned a Certificate of Sponsorship (CoS) by a licensed sponsor. A licensed sponsor is an employer who has been awarded a licence from the UKBA to employ foreign non-EU nationals. This involves an application process whereby the employer must demonstrate that they have suitable procedures in place to ensure that the migrant will be monitored throughout the duration of their leave to remain in the UK. A licensed employer will be given a certain number of CoS each year which they then allocate to the particular migrant. In some cases, before issuing a CoS, the employer must demonstrate that either they could not find a suitably qualified person in the UK to undertake the role, or the job is on the UKBA list of shortage occupations. Once the migrant has the CoS, they will make an application for leave to enter or remain in the UK under the appropriate tier of the UKBA's Points Based System (PBS). It is important to note that possession of a CoS does not automatically entitle a migrant to leave to enter or

remain and they must meet the other requirements of the Immigration Rules HC 395, which are made under s.3(2) of the Immigration Act 1971.

Sportspeople have specific routes to apply through under the PBS. In order for a licensed employer, such as a football club, to issue a CoS to a player, they must have obtained an endorsement for the player from the sport's governing body, such as the Football Association (FA). Endorsements can only be issued if the player in question is internationally established at the highest level and the governing body will have agreed with the UKBA how this requirement can be met. Requirements vary widely between governing bodies, but can include factors such as the number of matches played at international level.

If a sportsperson is only employed by a licensed sponsor for a period of less than 12 months, they will make an application under Tier 5 (Temporary Worker – Creative and Sporting). It is then possible to extend the stay for another temporary period. If the employment is for a longer period, they will need to apply under Tier 2 (Sportsperson). In March 2012 the UKBA changed the immigration law relating to how much time a person can spend as a Tier 2 (Sportsperson) migrant. Some sportspeople who already have Tier 2 visas or leave to remain will not have a limit on the amount of time they can spend in the UK under the Tier 2 requirements. However, those who obtained entry clearance to the UK under the law in place after April 2011 will only be able to spend six years with Tier 2 (Sportsperson) leave before having to leave the UK and waiting for at least twelve months before applying to come back under Tier 2. Therefore when looking at a sportsperson's long-term future and contracts in the UK, their immigration status must be considered and indefinite leave to remain (ILR) obtained as soon as possible or they could find themselves having to leave the UK after six years.

## IMMIGRATION FOR THE LONG GAME

However, although both Tier 5 and Tier 2 allow a sportsperson to work in the UK, time spent under Tier 5 cannot be counted towards an application for permanent settlement in the UK. Under current rules, one of the requirements for obtaining ILR in the UK is that the applicant must have spent five continuous years in the UK with leave to remain in certain categories, and Tier 5 is not one of those categories.

### Case Study

For example, a football player may sign a contract with a club for 3 years and be granted leave to remain under Tier 2. The club may then decide not to extend the contract so the player is considering other offers and travels to Europe whilst negotiations with other clubs are taking place. While they are abroad, their Tier 2 visa expires. They are then offered another contract by a UK club for 12 months and come back in to the UK under Tier 5 and play for 12 months. The club then decides to extend the contract for another 2 years and an application for leave to remain under Tier 2 is made. Towards the end of the 2 years, it becomes apparent that the player is unlikely to get another contract with a Premiership club and is considering retiring from playing and wants to remain in the UK. However, the player cannot do so for two reasons. Firstly, they spent 12 months on a visa which is not in a category taken into account for settlement. Secondly, their initial visa expired whilst they were abroad so they have not had continuous residence in the UK. Therefore they can only remain in the UK if they continue to be employed by a licensed sponsor or meet the requirements of another section of the Immigration Rules. This can have deep ramifications for players who find that in order for them to get ILR in the UK, they have to accrue additional years under Tier 2 and find that the only licensed sponsor who will sign them is a lower-league club.

It is also necessary to note that one of the legal requirements for a visa under Tier 2 is that the sportsperson must show a certain level of English. This requirement is met by either being a national of a majority English-speaking country, having undertaken a degree in English, which is recognised by the National Academic Recognition Information Centre, or by passing a speaking and listening test with an approved test-provider. This requirement does not exist for Tier 5. Therefore, sportspeople who cannot meet the English language requirement necessary for Tier 2 are sometimes advised to enter the UK under Tier 5. This is of course understandable when costly contracts are under negotiation. However, it must be borne in mind that Tier 5 is only for temporary period, and time spent on such a visa will not count towards settlement. It is therefore advisable that the sportsperson is assisted with learning English to the required level as soon as they arrive in the UK and that their leave to remain is transferred from Tier 5 to 2 as quickly as possible.

It is essential to ensure that sportspeople are aware of the ramifications of their immigration status when undertaking contract negotiations. It is also in the best interests of the sportsperson to have ILR in the UK as this means they can work for whomever they choose and are not required to obtain a CoS from a particular employer. Furthermore, under current rules a person can apply for British Nationality 12 months after they were granted ILR which can be particularly relevant for many sportspeople.

### Compliance with Immigration Law

The sportsperson and the licensed sponsor both have duties under immigration law. The sponsor may lose their licence to employ foreign workers if they do not undertake specific duties as stipulated by the UKBA. This includes reporting such things as the migrant moving address or not turning up for work. The sponsor must also keep meticulous records and have certain policies and procedures in place to demonstrate that they can keep a track of their migrant worker. The UKBA has the authority to conduct unannounced visits to sponsors and can demand to see these records and policies. If a sponsor loses their licence, the migrant only has a set time to find another sponsor before they are required to leave the UK. This could constitute a break in their continuous residence and could result in them seriously delaying their ability to apply for ILR, and consequently British Nationality.

The sportsperson must also be aware that if they breach any immigration rules, such as overstaying their visa or working for another employer without permission, they may have their visa revoked. It could also result in them being banned from being granted entry to the UK again for up to ten years.

### **European Sportspeople**

European nationals are not subject to the Immigration Rules and are instead covered by the Immigration (EEA) Regulations 2006 which emanate from the Free Movement of Persons Directive (2004/38/EC). They are entitled to reside in the UK if they are working and do not require sponsorship for this. In addition, they can remain in the UK if they can show that they are self-sufficient, but they must provide additional evidence such as specific health insurance policies.

These rights are automatic and do not require any application to be made to the UKBA. However, it is advisable that a migrant applies for a Registration Card from the UKBA to demonstrate when they started residing in the UK. This is because they obtain Permanent Residence (similar to ILR) once they have been residing in the UK in accordance with the 2006 Regulations for a period of five years, and a Registration Card is good evidence of this.

Permanent Residence is also an acquired right and does not require an application to be made. However, once a migrant has had Permanent Residence for one year, they can apply for British Nationality and will need to demonstrate that they have been living in the UK in accordance with the 2006 Regulations for five years and that they have had Permanent Residence for one year.

### **Dependents of Sportspeople**

The Immigration Rules allow for the dependent family members of Tier 2 and Tier 5 migrants to make applications for leave to enter the UK. It is usually not possible to make an application for leave to remain in this category so the application must be made abroad. The applicant must demonstrate that they meet a number of requirements, such as the substantive nature of their relationship and that there are enough funds available to support them whilst in the UK.

As with all applications relating to the Points Based System, the UKBA stipulates exactly what format much of the evidence must take. It is very specific guidance and following recent appeal cases, much of the guidance has been incorporated into the law and failure to provide documents in the exact format will result in a refusal of an application. For example, the UKBA states how a letter from a bank showing evidence of funds must be laid out. It is important to obtain expert advice for clients seeking to make applications because by failing to provide something as simple as the bank's logo on a letter may result in a refusal. This has very important ramifications as the client may need to reapply out of country – which is costly and could constitute a break in their continuous residence for ILR purposes.

Dependents of EU nationals who are not themselves European are also covered by the 2006 Regulations which are far easier to meet. The definition of dependent also extends beyond spouses and children to include other family members. Family members such as spouses and children are automatically entitled to reside in the UK with an EU national who is in the UK in accordance with the 2006 Regulations, but some others, such as unmarried partners, are required to obtain a residence card or a family permit before they are given this right. EU law can not only be helpful to European sportspeople, but also to sportspeople who are married to EU nationals who are residing in the UK in accordance with the 2006 Regulations. However, it is again important to seek expert advice if pursuing this route as there are a number of important requirements to take into account for the long-term.

## IMMIGRATION FOR THE LONG GAME

### Recent changes and the future

Last year the government issued a consultation paper regarding employment related settlement in which the Home Secretary clearly stated 'We want the brightest and best, those who contribute to our economy and who are really needed by the UK, to be able to stay here permanently. However Tier 2 of the points-based system will in future be regarded as a temporary, not a permanent migration route', (Employment-Related Settlement, Tier 5 and Overseas Domestic Workers: a Consultation, June 2011, UK Border Agency). Basically the UKBA is making it harder for sportspeople to obtain ILR in the UK.

As stated above, sportspeople coming to the UK under Tier 2 from April 2011 will be subject to a cap on the time they can spend in that category. Therefore, all efforts should be made to ensure they can obtain ILR as soon as they qualify or they will have no choice but to leave the UK. Therefore, taking a short-term contract abroad which breaks their continuous residence and makes them ineligible for ILR may not be in their best long-term interests.

The UKBA has also published the new rules relating to obtaining ILR from 2016 for sportspeople in the UK under Tier 2. They will have to demonstrate that they are paid a certain amount each year. This will either be at the rate published by the UKBA in a code of practice, or £35,000pa – whichever is the highest. They will also need to show that they are still required for the employment by the club who last gave them a CoS. They are currently required to pass the

Life in the UK Test and this requirement will remain.

To pass this test, an applicant must have a very good grasp of English and therefore it is again essential to consider this when a sportsperson first comes to the UK and arrange for lessons if necessary.

Finally, the UKBA recently introduced a requirement that a person with one or more unspent convictions within the meaning of the Rehabilitation of Offenders Act 1974 will not be entitled to ILR. This definition includes many offences, including some road traffic offences such as driving without a full UK license or speeding. Many foreign sportspeople continue to drive on international licenses which can result in a relevant offence. They must be made aware of this when first coming to the UK as it may have extremely detrimental consequences.

### The best course of action

As mentioned above, considering a sportsperson's immigration matters is necessary to protect their long-term interests, and securing expert immigration advice at the outset is the best way to do this. It is not as simple as getting a visa to come to the UK for one professional contract – the long game needs to be looked at straightaway. We often have football club secretaries consulting us before signing players to ensure that they stand a chance of getting the player for the long-term, not just for a twelve month contract. Furthermore, in addition to an immigration adviser being an expert in Tier 2 (Sportsperson) applications, it must be ensured that they understand the context of the sporting world. **BASL**

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The applicant must demonstrate that they meet a number of requirements, such as the substantive nature of their relationship and that there are enough funds available to support them whilst in the UK

# Separation of Powers – Key to Sports Decision Making

BY NEERAJ THOMAS, SOLICITOR BURNES LLP, EDINBURGH

**The specifically high profile nature and intense media interest which comes with certain decision making in sport is nothing new. Those charged with making regulatory decisions in a sporting context are often subjected to a greater degree of scrutiny than judges on the bench.**

The recent landmark case of *R(on the application of Kaur) v Institute of Legal Executives Appeal Tribunal*<sup>1</sup>, The Institute of Legal Executives has reiterated and, to a certain extent redefined, the doctrine of separation of powers which must be maintained between the day to day disciplinary functions of sporting bodies and the overall governance function of the sporting association.

Following the judgement, all sporting organisations involved in making disciplinary decisions must give active consideration to whether or not those involved in governance and strategy should also be the judges of individual disciplinary cases. This note will be of interest to all those bodies, sporting and otherwise, who are faced with such decisions.

## Background of the case

Mrs Kaur was a student member of the Institute of Legal Executives (“ILEX”). She, along with some other candidates, was accused of cheating in certain examinations. She was found guilty of cheating in one of the exams, excluded from ILEX for a minimum of five years and ordered to pay costs of £1,700. Mrs Kaur appealed to ILEX’s Appeal Tribunal on 24 June 2009, but was unsuccessful. Under ILEX’s rules, the possible avenues for appeal were solely limited to issues of law or fresh evidence including the question of whether the decision of the first instance tribunal involved a breach of natural justice. This issue was dismissed and it was noted in

the Appeal Tribunals decision that Kaur’s complaint did not include a complaint that an ILEX council member sat on the first instance tribunal, nor was that complaint raised before the first instance tribunal.

Mrs Kaur then sought judicial review of the decision and took the case to the English High Court. There Foskett J. declined her application for judicial review. Undeterred, Kaur sought permission from Lloyd LJ to appeal the High Court’s refusal and to take the case to the Court of Appeal.

The short issue which was being challenged was whether the presence of an ILEX council member on the first instance tribunal and presence of the council’s vice president on the appeals tribunal was a breach of natural justice, in particular following the doctrine that no one may be a judge in their own case. Kaur argued that because council members were involved in high level decisions of strategy and governance, their ability to make a decision on day to day disciplinary matters was likely to be impaired or at least clouded by their council membership. Mrs Kaur also argued apparent bias.

## Judicial Interpretation

The leading cases on apparent bias reiterate this doctrine, and also extend to instances where it can be demonstrated that there is a personal or pecuniary interest in respect of decision makers and the outcome of their decisions.

In *R V Bow Street Metropolitan Stipendiary Magistrate (ex parte Pinochet)*<sup>2</sup> (Pinochet No 2) it was held that Lord Hoffman had been automatically disqualified to sit on the House of Lords judicial committee hearing (Pinochet No 1) because he was an unpaid director of a subsidiary of Amnesty International, when that organisation had intervened as a party in the proceedings. There was no suggestion that Lord Hoffman had a personal interest in the case, but it was clear

## SEPARATION OF POWERS – KEY TO SPORTS DECISION MAKING

that both the subsidiary organisation and Amnesty International were part of a movement working towards the same goals with an interest in the proceedings' outcome.

In that case Lord Browne-Wilkinson said:

*“If the absolute impartiality of the judiciary is to be maintained there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit...of fundamental importance [is] that justice should not only be done but should manifestly and undoubtedly be seen to be done.”*

Two other important but short passages were quoted by Rix LJ. Firstly in *In re Medicaments and Related Classes of Goods (No2)*<sup>3</sup> [2001] it was stated:

*“The question is whether the fair minded and informed observer, having considered the facts would conclude that there was a real possibility that the tribunal was biased.”*

Further, in *Davidson v Scottish Ministers*<sup>4</sup>, Lord Bingham of Cornhill said:

*“What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgement to bear, which could distort the judge's judgement.”*

### Appeal Court's Judgement

Pointing to the cases outlined above, Rix LJ said that judges should face recusal or disqualification where there is a real possibility on the objective appearances of things, assessed by the fair-minded and informed observer, that the tribunal could be biased. There was no suggestion that the tribunal members of ILEX engaged in actual bias but the fact that there was a suggestion of apparent bias to the informed observer, was sufficient to allow Mrs Kaur's appeal to succeed.

Resultantly, the ILEX council members were implicitly involved in the governance and regulatory policies of the organisation. Rix LJ went on to state that self-regulation is undermined if those engaged in the governance of a professional body are allowed to move from representative to regulatory functions by being permitted to sit on disciplinary or appeal tribunals. Accordingly the decisions of the tribunals were quashed.

### What are the implications of the decision?

It is noteworthy that by the time of the appeal hearing, ILEX had changed their policies (partly due to the implementation of the Legal Services Act 2007) so that council members could no longer sit on disciplinary hearings. It was however, those who sat on the Kaur Tribunals at the material time, who were significant for this case.

Going forward, any sporting body, must give active consideration to ensuring actual separation of duties between those responsible for governance and regulatory policies and those dealing with representative (i.e. disciplinary) functions of that body.

Certain sporting associations may find that there are long-standing council members who wish to have involvement in a particularly contentious and high-profile disciplinary matter – especially given the potential impact such a decision may have on the sport (and the potential ramifications which may be played out in the media). This case shows that for the decisions reached by the specific disciplinary tribunal to stand, every effort should be made to ensure that those in the decision-makers role, and those over-bearing council members, are kept far, far apart. ■ **BASL**

1 [2011] EWCA Civ 1168

2 [2000] 1 AC 119

3 [2001] 1 WLR 700 (CA)

4 [2004] UKHL 34

# The Journal Interview: Michele Verroken

BY WALTER CAIRNS

Michele Verroken LL.M Sports Law, MA (Ed), B.Ed Hons, Cert. Ed, PGC Sports Law is the founding director of Sporting Integrity, a unique sporting consultancy. She can claim almost three decades as one of the world's top officials in the field of ethics in sport. Formerly Director of Ethics and Anti-Doping at UK Sport, Michele was responsible for and implementing internationally-accepted standards for doping control, results management and education. Ms Verroken also created the Drug Information Database, national anti-doping policy and independent doping control officer training standards for the UK.

Her efforts have earned the recognition and support of some of the most powerful figures in world sport and have helped shape the campaign against doping in sport. Her expertise in developing anti-doping programmes has been sought by a number of countries, including Ireland, Saudi Arabia and South Africa. She was also instrumental in the organisation of drug testing programmes at major international events, such as the 2002 Commonwealth Games in Manchester, the 2003 World Indoor Athletics Championships in Birmingham, Euro '96, successive Rugby Union World Cups and Six Nations' tournaments. As Secretary of the Commonwealth Games Federation Medical Commission, Michele was responsible for the high quality medical and anti-doping services in Melbourne 2006 and Pune 2008. She was honoured by the British Orthopaedic Association with the Alan Apley Memorial Medal.

An accomplished writer, broadcaster and public speaker, Michele is a regular commentator on 5 Live and is regularly employed as an advisor by a number of national and international sports federations and businesses. A former teacher and lecturer in sports science, physical education and human biology, Michele achieved sporting honours in netball as an international umpire, advanced coach and county player as well as representing England in handball and korfbal.

**First, a general question. The campaign against the use of doping in sport is frequently referred to as “the pursuit of the uncatchable”. What is your reaction to this view?**

I feel that the terminology currently used in the anti-doping world is not very helpful, and does not show our anti-doping efforts in a good light. There is a major principle involved here – it is about playing by the rules, the athletes' commitment to play by the rules, and the sports' commitment to ensure that these rules are observed. However, we do seem to have turned this into the terminology of warfare, which I do not think is truly representative of the way in which the athletes themselves view their participation in sport.

**But let me press you on this point. Just suppose that the gap between invention and detection, and the ability to inspect athletes for the consumption the latest designer drug, becomes too great. Would that be the point at which we have to rethink our entire position on the issue of doping in sport?**

I am certainly never going to advocate that we stop our anti-doping efforts and allow everyone to take whatever substances they wish. Instead, I think we should be focused

THE JOURNAL INTERVIEW:  
MICHELE VERROKEN

on two clear areas: (a) cheating, i.e. the use of performance-enhancing drugs, for which we must be absolutely clear which drugs actually do enhance performance, and (b) the health of the athlete. We really want to make sure that we make clear to our athletes that what we are fighting is damaging sport – it is corrupting sport in exactly the same way as has been the case with the gambling scandals which have been brought to light. What we are unfortunately being dragged into is an undercurrent of substances about which it is totally unclear as to whether it does provide a performance-enhancing benefit or not, and others about which the athletes cannot explain how the substance came to be found in their bodies. Thus we have been drawn away from the main issue, which is that cheats should not be allowed to take part in sport, and the use of doping substances which enhance performance is cheating!

**Doping has now, of course gone beyond the field of the actual consumption/absorption of substances, with such technological developments as low-oxygen tents and blood transfusions. Will it not become increasingly difficult for the drug testers to keep pace with these innovations?**

This is where we have to be absolutely practical as well. If we don't define clearly what we consider to be cheating, then some of these additional methods used by athletes in order to enhance performance will always be viewed with suspicion by someone. The use of hyperbaric chambers to increase the oxygen supply to the body is perfectly acceptable – it might not be ethical, but it's acceptable. So again, it is a question of being absolutely clear about that which sport intends to rule against and then ban it from the sport.

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we have now created so many tripwires that it is at times quite difficult to convince the athletes that this is actually in their own interest

**What about the view that the current restrictions and assignments imposed on athletes in order to remain on the right side of the doping regulations, such as the doping passport and out-of-competition testing, are either deterring some potentially good athletes from taking up the sport at the highest level, and even causing some to retire early?**

One of the difficulties we have here is the over-regulation of anti-doping. This has made the issue overcomplicated for something which is quite straightforward, the focus should be how do we continue to ensure that the vast majority of athletes remain drug-free. The balance is all wrong in my view, we have now created so many tripwires that it is at times quite difficult to convince the athletes that this is actually in their own interest. If we are to continue to enjoy the support of athletes we have to ensure that the response from anti-doping authorities is proportionate, and that we engage athletes with those programmes that will actually help to catch those who cheat, that this will, in my view, help us considerably.

**So do you take the view that the current regulations on, for example, doping passports, out of competition tests, etc., are proportionate to the object pursued?**

I certainly think that the doping passport is a new way of being able to demonstrate that an athlete actually remains drug-free. The key issue here is, of course, the kind of sanction that we would choose to apply, if we can determine that there was earlier use of drugs on the part of the athlete. The ban is applied from the moment an anti-doping rule violation is confirmed – why aren't we capable of taking out previous performances? If we are going to have a passport that covers an athlete over a period of time, we have to be prepared to apply a much, much longer ban to athletes who are blatantly cheating.

**Is the penalising of using recreational drugs by sporting performers justified if it can be proved that these substances have no effect on performance – indeed, may have an adverse effect on performance? Is this something that could be looked at again in the future?**

Yes, the inclusion of illicit, recreational drugs must be looked at again. The issue is what we are trying to control here? Is this about cheating, or are we looking at athletes' conduct? I am absolutely convinced that, unless we deal with recreational drugs in terms of conduct, we are very much in danger of losing the anti-doping message to our athletes, i.e. that doping controls are about cheating. It certainly seems to many athletes that treating illicit, recreational drugs like doping is disproportionate, it seems to be a way of controlling their lifestyle. No one should approve of elite athletes using recreational drugs. If they choose to use them this should be a conduct issue – it could be dealt with by contractual clauses to govern personal conduct, either in their contracts of employment or in the terms that govern their eligibility to compete in that sport. But it is certainly not part of doping as far as I'm concerned.

**There is, of course, also a legal angle to this, in that a number of countries have legalised certain categories of recreational drugs – so this could give rise to a clash between various laws and jurisdictions. Has this aspect been considered at all in the relevant circles?**

I don't think that sufficient consideration has been given to the way the anti-doping code sits alongside many of the legal frameworks around the world – and that is certainly something to consider for the future. We talk about harmonisation, but we could certainly take a very close look at what we are trying to harmonise in terms of prohibited substances, and whether the inclusion of recreational drugs on this list really makes sense.

**Another issue which was heavy with legal consequences, of course, was the Diane Modahl affair, which not only cost the British Athletics Federation a huge amount of money but also caused it to collapse. Do you have any thoughts or regrets about the part you were compelled to play in this affair?**

I certainly have no regrets about my part. The Modahl case was very interesting in terms of due process, and what should be in place to manage the disciplinary process with athletes

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on a personal level. At the time when the initial finding of doping was made, I decided to go to meet Diane and arrange further investigations which might have helped to explain the presence of testosterone. The difficulties that this case caused the governing body were indicative of the state of governance and regulation in sport at that time. I do think we should be looking for a possible explanation, rather than focus only on punishment.

The difficulty in such cases is that much of the anti-doping system is conducive to a rush to judgement, to condemn, without really understanding whether or not there is an explanation of how an adverse finding arose. Over the years, Diane – who has become a very good friend – I have talked a great deal about how the due process and the way in which we deal with our athletes can be improved. If we are to be able to understand why athletes cheat, that sometimes athletes cannot explain the presence of substance in their urine or blood, and certainly how we can learn from situations in order to prevent doping among our athletes in the future, the anti-doping system would have more humanity.

**It has been suggested that, in the Diane Modahl affair, some attention should also have been paid to the role played by her husband...**

Well, all I can say is that it comes back to the question of what we are prepared to consider in the anti-doping process. We should really be able to investigate all the possibilities. But I repeat – the process we currently have rushes to judgment on the offence itself, the determination of a violation, and the application of a sanction. It does not give

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any scope for understanding what has happened, and sometimes we may be in a situation – and I am not referring specific to the Modahl case here – where we are extremely uncertain whether there was an attempt to cheat. We may know that the official verdict is guilty because of the strict liability aspects of the current regime, yet one nevertheless does not always think that there is an intention to cheat, although an ‘illegal’ substance is present. Somehow, this is an issue that has not yet been resolved in the anti-doping world.

**Of course, the more substances are caught by the definition of illegal doping, the greater the danger that they find themselves in all kinds of medication and that this could be pleaded as an excuse by the athlete concerned. Even though there has to be an element of strict liability about this – in the sense that ignorance is no excuse – is this also an area where more education is required on the part of the athlete?**

There is certainly a need for better quality education in this field. However, I cannot see the benefit of trying continually to educate athletes about the prohibited substances list. To be perfectly honest, it’s a complicated list of pharmacological substances and methods, and it is not necessary for an athlete to become familiar with all those terminologies and substances. Instead, our focus in terms of education should be on what is permitted and how you find out that it is permitted. Therefore it should be very positive education about how the athletes look after themselves health-wise, and how they make sure that they remain within the rules. So we should be focusing athletes’ attention on the permitted substances and playing by and staying within the rules.

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The moment anti-doping organisations, or the individuals in those organisations become the story we lose the focus on athletes and our interest in protecting their rights to drug-free sport

**Let us turn to an issue which may still be somewhat painful for you. In late 2003 the UK Sport organisation decided to dispense with your services. Were they justified in so doing? Were the reasons for your departure ever clarified or explained to you?**

Well, I regard this as a matter of history. I do not in any way regret the 20 years during which I tried to establish, develop and put into effect an adequate anti-doping programme. Certainly I will never agree that the manner in which I left that organisation was fair. However, I remain proud of the fact that my integrity was never going to be negotiable when it came to the way in which the UK should run its anti-doping programme. I always felt that we needed to have an independent anti-doping organisation. There were, I feel, too many conflicts of interest involved. I would still like to see improvements even now, in the sense of having an anti-doping organisation that is able to partner with sport, being able to protect athletes by engaging with them in the partnership – and I certainly don’t believe that you locate your anti-doping organisation in the offices of the Department for Culture, Media and Sport!

**Was there, perhaps, some scapegoating going on?**

Well, as I said, I think that all this is in the past now. The real issue now is this – even though there have been a number of improvements, I continue to regret that we are still not in a good partnership with sport and the athletes.

**Whether coincidentally or not, the UK sport imbroglio came at the same time as the Rio Ferdinand affair. For a long time, the world of football stood aloof from doping controls. This is currently being remedied – nevertheless, this leaves a feeling that not all sports are being treated equally in the campaign against doping, and that in some cases even “money talks”. Is that your view also?**

In fact, football is a very interesting case study in the field of anti-doping. It embraced the fight against doping and did so on its own terms. In so doing, football subsidised much of the anti-doping programmes through its financial contribution to testing; this increased what was certainly not affordable under the public funding available. Also, of course, football was responsible for bringing in the first social drugs testing programme. In certain respects, football money has contributed towards achieving a better quality programme because there was preparedness to invest in their own health

and safety system. Also, we need to recognise that, when you are dealing with professional sports and athletes who are employees of clubs run as businesses, the anti-doping system, which may have the same aims, has to achieve this through different means. I fear, this is not understood with the application of the “one-size-fits-all” approach which applies at present.

**On the subject of “one-size-fits-all” solutions – since the formation of the World Anti-Doping Agency (WADA), the entire issue of doping control has fully assumed an international dimension. In this respect also, the question has been raised whether a “on size fits all” strategy can ever be effective and efficient, in a world where there may be different cultural attitudes towards these matters from one continent to another – indeed, from one country to another. What are your views on this issue?**

I think it is a question of recognising that sports are different, the problem of doping is different can be different so the solution may also need to adapt. For example, if we apply one consistent sanction, we are not recognising the fact that, a sanction consisting of a ban of two years or of four years means different things to different sports. We are not really engaging with actually tackling the problem for a particular sport in a sensible way. It is all very well having international support for the principle of drug-free sport and, accordingly, having international regulations on the subject. However, the nature of those regulations must recognise the differences between the various sports. I am not so convinced about the need to take account of “cultural differences”. If it is acceptable in one country to use recreational drugs such as cannabis, that doesn't mean that it should be acceptable worldwide. It is all about what we are regulating in sport, and we have to look beyond cultural differences in achieving that.

**The WADA leadership have sometimes been accused of “grandstanding” and to project themselves as individuals on the world stage – at the expense of the organisation's overall image. Do you agree with this criticism?**

The important thing about the fight against doping is that it should at all times be about the athletes and keeping them drug-free. The moment anti-doping organisations, or the individuals in those organisations become the story we lose the focus on athletes and our interest in protecting their rights to drug-free sport. Our focus should be the athletes

Our focus in terms of education should be on what is permitted and how you find out that it is permitted.

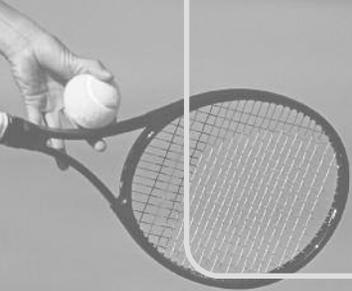
who are, and wish to remain, drug-free, and the achievement of drug-free sport.

**Has the transition from operating in the public sector to working in the private sector changed your perspective on these issues in any way?**

It is interesting that now I am able to consider the anti-doping campaign from a quite different perspective. I have been able to consider this question as an athlete, as an administrator in a national anti-doping organisation and now as someone involved in the administration of sport at an international level and for international bodies. It helps considerably to understand doping regulation from the point of view of professional sports and athletes, to contribute to resolving potential problems of corruption and misconduct. It is a tremendous experience for me to work with professional sports and to be able to make a real difference to the sports and athletes I work with.

**Thank you very much for a highly informative and reflective interview.** 

# Analysis



# “Sports Law”: Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution

BY MATTHEW J. MITTEN AND HAYDEN OPIE

In this article we observe that legal regulation of national and international sports competition has become extremely complex and has entered a new era, which provides fertile ground for the creation and evolution of broader legal jurisprudence with potentially widespread influence and application.

Our principal aim is to draw these developments to the attention of legal scholars and attorneys not necessarily familiar with sports law. Specifically, the evolving law of sports is having a significant influence on the development of international and national laws, is establishing a body of substantive legal doctrine ripe for analysis from a comparative law perspective, and has important implications for global dispute resolution. For example, the global processes used to establish an international sports anti-doping code and to resolve a broad range of Olympic and international sports disputes (which is rapidly creating a body of private international law) provide paradigms of international cooperation and global law-making. In addition, judicial resolution of sports-related cases may develop jurisprudence with new applications and influence.

Our objective is to generate greater awareness of the importance of sports, not only as a worldwide cultural phenomenon and a significant part of the 21st century global economy, but as a rich source of international and national public and private laws that provide models for establishing, implementing, and enforcing global legal norms.

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### Introduction

This article is written primarily for legal academics whose teaching and scholarship does not focus on sports law as well as lawyers and judges unfamiliar with the subject. Our purpose is not to provide an introduction, overview, or primer to sports law.<sup>1</sup> Rather, it is to alert others to the potential of sports as a driver of legal change and to encourage participation in the development of sports law by a wide range of lawyers as an integral part of their diverse professional and scholastic pursuits.

Legal regulation of national and international sports competition has become extremely complex and has entered a new era. Its study requires consideration of multiple areas of law (which may be conflicting) and an interdisciplinary perspective.<sup>2</sup> This new era of sports regulation provides fertile ground for the creation and evolution of jurisprudence with potentially widespread influence and application. However, significant legal developments originating in sport often are not recognized—much less carefully analyzed—by academics other than a relatively small group of sports law professors. Because of their broad implications for the development of law and public policy in other areas, particularly international and comparative law, as well as global dispute resolution, it is important that legal scholars, attorneys, and judges be aware of and carefully consider sports-related legal developments.

Despite the fact that virtually all areas of law (individually and in combination) regulate sports competition (including broad, important areas such as antitrust, contract, intellectual property, and labor law), relatively few academics teach a sports law course or are sports law scholars.<sup>3</sup> Although sports-related cases are well represented among landmark decisions in many areas of law and export important legal principles into jurisprudence with broader application,<sup>4</sup> academic study of the law regulating sports is relatively new.<sup>5</sup> In fact, there is no consensus among scholars who regularly study the rapidly developing body of law that governs the sports industries whether “sports law” is a separate body of law or merely the application of general laws more properly termed “law and sports.”<sup>6</sup> Nevertheless, regardless of the nomenclature used, “sports law” has a legitimate place in a law school curriculum because of its challenging legal issues, multi-disciplinary aspects and practical relevance to a large sector of society, as well as the significant student interest which it generates.<sup>7</sup>

This article’s primary objective, however, is not to interest more law professors in teaching sports law, using sports examples to aid their teaching in other courses<sup>8</sup> or becoming sports law scholars (although it may have some or all of those effects). Nor is this discussion targeted at academics already having a keen interest in sports law. Rather, this article is addressed to a wider audience of legal scholars. We believe that the evolving law of sports is having and will continue to have a significant influence on, and implications for, the development of broader international and national laws (e.g., intellectual property and human rights laws) and provides a rich source of substantive legal doctrine for analysis from a comparative law perspective. Moreover, the global processes used to establish an international sports anti-doping code and to resolve Olympic and international sports provide paradigms of international cooperation between private parties and governments and law-making as well as effective and respected global dispute resolution. We suggest that awareness of and participation in sports law debates and developments has become an unavoidable dimension to the pursuit of scholarship in a growing number of other fields.

To illustrate our thesis, we have identified four significant sports law developments and themes, which we will describe, analyze, and explain why each one merits academic study: 1) international sports anti-doping rules, especially the World Anti-Doping Code, provide a paradigm for rapidly creating and implementing globally accepted legal norms and an example of an international legal system; 2) the process by which “lex sportiva,” a developing body of international sports law based largely on private agreements and dispute resolution processes, is being created by the Court of Arbitration for Sport and becoming globally accepted has wide-ranging implications for global dispute resolution and the establishment of international legal norms; 3) the emerging propensity of private agreements between international sports governing federations, a form of global legal pluralism, to displace national laws raises important issues regarding national sovereignty; and 4) judicial resolution of sports-related disputes and sports-specific legislation may foreshadow how more general national and international laws will develop and/or how broader public policy issues will be resolved.

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## I. International Sports Anti-Doping Law: A Model For Global Law-Making

### A. Overview

International anti-doping measures in sport form an impressive system of global law and regulation. This system is notable because of its large scale and rapid establishment. Other less readily apparent but nonetheless significant features include a successful international partnering of private and governmental bodies, the very high degree of compliance achieved in enforcement of the penalties meted out for breaches of anti-doping rules, and the ways in which some controversial issues of human rights have been addressed.

The centerpiece of the anti-doping system is the *International Convention against Doping in Sport 2005*.<sup>9</sup> Adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Convention opened for signature on October 19, 2005 and became effective on February 1, 2007. As of December 7, 2009, the Convention had 130 State Parties.<sup>10</sup> The Convention is intended to commit States domestically and at the international level to “the fight against doping in sport” and obligates signatories to “adopt appropriate measures” which “may include legislation, regulation, policies or administrative practices”.<sup>11</sup> While the creation of this treaty obligation correctly implies that significant legal and regulatory work is necessary to combat sports doping effectively, the Convention is the culmination of an immense effort led by the International Olympic Committee (IOC), the “supreme authority” of the Olympic Movement,<sup>12</sup> to develop a harmonized, worldwide set of laws and rules against sports doping. A doping scandal surrounding the 1998 *Tour de France* cycling race<sup>13</sup> spurred a worldwide effort to eradicate sports doping, which in a period of less than a decade, resulted in the following significant events leading to the adoption of the Convention. The 1999 establishment of the World Anti-Doping Agency (WADA), a private international organization whose mission is to coordinate, monitor, and promote the worldwide fight against doping in sport, as a joint effort of the Olympic Movement and national governments; the making of the March 2003 *Copenhagen Declaration on Anti-Doping in Sport*, which evinced an international commitment to develop and implement worldwide anti-doping rules;<sup>14</sup> and the promulgation of the *World Anti-Doping Code* (WADA Code),<sup>15</sup> which became effective on January 1, 2004 and

established a model for international and national sports anti-doping policies and practices.<sup>16</sup>

### B. A Brief Review of Anti-Doping Measures to the late 1990s

Doping (i.e., briefly, the use of chemical substances and certain other artificial methods to enhance athletic performance) is not new in sport.<sup>17</sup> The principal arguments against doping have concerned the need to prevent cheating by athletes and adverse effects on their health.<sup>18</sup> At the Olympic level, doping was condemned by the IOC in 1938. It resolved that any person “accepting or offering to supply dope” was to be excluded from the Olympic Games and amateur sports meetings.<sup>19</sup> In the postwar years, concerns over doping grew.<sup>20</sup> The deaths of some cyclists from suspected drug use in the 1960s were influential in the IOC establishing a Medical Commission charged with the task of controlling doping.<sup>21</sup> Prohibition of and testing<sup>22</sup> for specific drugs commenced in 1968 at both the Olympic (Mexico City) and Winter Olympic Games (Grenoble).

In the years that followed, anti-doping measures expanded in response to the emergence of new forms of doping and a growing interest in and understanding of the nature of the problem. Some key features of this expansion included growth in the number of sports and events subject to doping controls, the development of reliable scientific techniques for the detection of prohibited substances<sup>23</sup> and methods,<sup>24</sup> the accreditation of testing laboratories by the IOC,<sup>25</sup> the introduction of out-of-competition testing<sup>26</sup> and increased reporting (often in sensational terms) in the news media of incidents of doping.<sup>27</sup> The importance and increasing complexity of anti-doping rules attracted the attention of national governments. In turn this led to judicial<sup>28</sup> and parliamentary<sup>29</sup> inquiries, domestic legislation prohibiting doping,<sup>30</sup> dedicated anti-doping agencies<sup>31</sup> and international treaties<sup>32</sup> and arrangements.<sup>33</sup>

Despite this activity, anti-doping efforts were seriously balkanized, possibly compromised, and faced major shortcomings by the mid to late 1990s. This was largely because of differences in approach among sports and across national legal systems as well as the circumstance that not all sports and competitions were affiliated with the Olympic Movement. Although the IOC had provided significant leadership there was no uniform list of prohibited substances and methods world-wide. Some sports had no anti-doping

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rules whatsoever. Furthermore, concerns were widespread that some states and sports paid lip-service to the anti-doping cause while systematically pursuing doping practices or shielding transgressing athletes from the full weight of disciplinary processes by displaying ‘home-town’ favoritism.<sup>34</sup>

At the center of this somewhat fractured anti-doping system rested a number of key legal disputes. In particular, there was disagreement regarding how to define the elements of doping offenses (especially the requisite fault or intent and defenses). The behavior required to commit a doping offence had become more tightly defined but there was vigorous disagreement over allowing athletes to avoid responsibility because of ‘exceptional circumstances’ such as an absence of knowledge of the prohibition of a substance or absence of knowledge of the presence of a prohibited substance in ingested medicine, food, supplements or drink.<sup>35</sup> There was also significant divergence on the issue of penalties (both as to length and whether discretion should be granted to the sentencing authority). Most significantly, seemingly inconsistent rulings by national courts on the enforceability of lengthy suspensions<sup>36</sup> resulted in an uncertain environment for the development of an internationally coherent approach.

### C. 21st Century World Anti-Doping Regime Evolves Into International Legal System

Viewed in this historical context, the past decade has been one of momentous development in the international fight against sports doping. Built on the foundations provided by WADA, the Copenhagen Declaration, the WADA Code, and the UNESCO Convention, a tightly knit and, with few exceptions, comprehensive world-wide system now regulates international and Olympic sports’ anti-doping efforts. The IOC and all international sports federations (IFs), the worldwide governing bodies for each Olympic sport, have adopted anti-doping rules that are “WADA Code compliant.”<sup>37</sup> The national governing bodies (NGBs) for each sport affiliated with the corresponding IF have acted similarly.<sup>38</sup> Many national sports governing bodies independent of the Olympic Movement have either voluntarily, or under public and governmental pressure, adopted the model established by the WADA Code as the basis of their respective anti-doping codes.<sup>39</sup>

The second edition of the WADA Code, which became effective on January 1, 2009, is a relatively brief document of 25 articles. It defines various doping offences (termed “rule violations”),<sup>40</sup> establishes procedures for collecting and testing samples provided by athletes,<sup>41</sup> sets minimum standards of due process,<sup>42</sup> prescribes penalties<sup>43</sup> and regulates appeals.<sup>44</sup> Additionally, the WADA Code specifies the roles and responsibilities of all major stakeholders<sup>45</sup> and provides for education and research functions.<sup>46</sup> To facilitate detailed implementation of the WADA Code, WADA has established a set of international standards covering the list of prohibited doping substances and methods,<sup>47</sup> testing,<sup>48</sup> laboratories,<sup>49</sup> therapeutic use exemptions<sup>50</sup> and the protection of privacy and personal information.<sup>51</sup>

Collectively the anti-doping rules adopted by sports governing bodies constitute a system of worldwide private rule-making which may be without peer in reach and social significance. As such, it constitutes an important but largely overlooked element in the emerging concept of “global law.”<sup>52</sup> This predominately private legal system is complemented by significant public law elements, including the UNESCO Convention and other international documents,<sup>53</sup> domestic anti-doping legislation,<sup>54</sup> and specialized national anti-doping agencies.<sup>55</sup> It is significant that the WADA Code, a private arrangement, and the extensive system of international and domestic private rules based on the WADA Code have been rapidly granted important legal recognition by the UNESCO Convention and many national governments.

Some have claimed that “[n]owhere is the interconnection between sport and law more evident than in relation to doping.”<sup>56</sup> Anti-doping measures arguably provide a rich source of interesting (and often legally controversial) issues warranting the close attention of academics who might not necessarily look to sport as a fertile ground for scholarly inquiry.

The success and speed with which global anti-doping regulation has been constructed make a valuable case study for scholars studying the development of international laws and legal systems. Two features are particularly noteworthy. First, it establishes an international rule of law applicable to Olympic and international sports competition as well as domestic athletic competition in most countries. The WADA Code, as interpreted and applied by the Court of Arbitration

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for Sport,<sup>57</sup> establishes an advanced global system of justice, which creates a more or less uniform set of internationally respected and enforceable legal rules. The popularity and reach of sports across cultural, economic, political and social divides<sup>58</sup> has the potential to confer on this system of justice a global profile rarely, if at all, shared by other international systems of justice establishing, for example, criminal law, anti-discrimination law, or other human rights legal norms. As such, it has a significant capacity to foster appreciation of the need for a uniform international rule of law, particularly in parts of the world where international legal norms generally are not recognized, as well as a sense of global connectivity and legal harmony.

Second, scholars may be interested in exploring the reasons for this success, which may provide a paradigm for solving other pressing international legal issues on which progress may be foundering (e.g., global warming) or worldwide solutions are needed (e.g., global banking regulation). A possible distinctive feature of the process for developing an international body of sports anti-doping law has been the important leadership role played by the private sector. This is apparent in the ability to initially command support for specific anti-doping measures within the ranks of sports worldwide and then to convince governments to participate in meaningful working partnerships.<sup>59</sup> Private international interest groups may have an inherently superior ability and the necessary flexibility to react more effectively to worldwide problems compared with national governments which may lack international vision, be constrained by domestic politics, and/or be subject to adverse domestic political consequences if nationalistic interests are compromised. This is not to preempt other explanations and lessons but merely to suggest some lines of scholarly inquiry when examining environmental, economic, and cultural issues with an international dimension.

## II. “*Lex Sportiva*”: Lessons For Global Dispute Resolution and the Creation of International Legal Norms

### A. Adjudication of Olympic and International Sports Disputes: The Need For A Specialized International Tribunal

There are national Olympic committees (NOCs) in 205 countries or territories throughout the world that promote, sponsor, and oversee Olympic and international sports competitions. Each of them must comply with the IOC Charter and bylaws as well as the laws of their respective countries. In addition, NGBs, which oversee and regulate a particular sport in their respective countries, are required to adhere to the rules of their respective IFs, which oversee and regulate the sport worldwide, as well as applicable national laws.<sup>60</sup> Thousands of athletes are members of the corresponding NGB for their respective sports, which provides them with various contractual rights and duties.

Each international or national sports governing body as well as each individual athlete who participates in Olympic or other international sports competitions has a “home” country on account of incorporation, domicile or residence therein and is both subject to and protected by its domestic laws. Because their respective home countries and national laws are different, resolution of Olympic and international sports disputes among two or more of these entities (e.g., IOC, IF, NOC, or NGB) and/or individual athletes by national courts is inherently problematic and raises complex jurisdictional and choice of law issues. For example, in *Reynolds v. Int’l Amateur Athletic Federation*,<sup>61</sup> the Sixth Circuit held that an Ohio district court lacked personal jurisdiction over a London-based IF in litigation brought by a U.S. athlete

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A strong potential for conflicting judicial views exists because of the divergent approaches of the world’s different legal systems

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domiciled in Ohio who challenged a Paris laboratory's finding that a urine sample he provided in Monaco tested positive for a banned performance-enhancing substance and claimed that his suspension from competition violated Ohio state law.

Because the IOC and each IF seeks to apply and enforce a set of uniform rules consistently worldwide, the prospect of different national courts reaching inconsistent conclusions on the merits of Olympic and international sports disputes is a significant problem.<sup>62</sup> A strong potential for conflicting judicial views exists because of the divergent approaches of the world's different legal systems (e.g. common law or civil law), possible bias stemming from nationalism and ethnocentrism, and the strength of the principles of judicial independence and rule of law in the relevant jurisdictions as well as cultural differences concerning the role and importance of sports and different national and transnational models of sport (e.g., European, North American, and Australian).<sup>63</sup>

If national courts adjudicate these disputes, there is an inherent tension between internationalism (i.e., the need for international sports to operate under a consistent, worldwide legal framework), and nationalism (i.e., the desire of each nation to preserve its sovereignty and ensure that its athlete citizens are protected by its laws). Olympic and international sports competition requires uniform and generally accepted rules governing on-field competition that are interpreted, applied, and enforced by independent and impartial referees, umpires, or judges whose decisions are final. Similarly, the resolution of disputes arising out of Olympic and international sports competition also requires an off-field legal system pursuant to which an independent international tribunal or court with specialized sports law expertise renders final and binding decisions having global recognition and effect.<sup>64</sup>

### B. Court of Arbitration for Sport

In 1981, Juan Antonio Samaranch, who was the then-current IOC president, envisioned a “supreme court for world sport.”<sup>65</sup> On April 6, 1983 the IOC established the CAS, a private international arbitral body based in Lausanne, Switzerland, to provide a forum for resolving sports-related disputes.<sup>66</sup> The CAS is the product of a 1982 working group chaired by Judge Keba Mbaye, who was an IOC member and judge on the International Court of Justice.<sup>67</sup> Despite the first word of its name, the CAS is not an international court

of law. Rather, it is an arbitration tribunal whose jurisdiction and authority is based on agreement of the parties.

The Code of Sports-Related Arbitration (“Code”),<sup>68</sup> which is drafted by the International Council of Arbitration for Sport (ICAS), a group of twenty high-level jurists,<sup>69</sup> governs the organization, operations, and procedures of the CAS. The Code empowers the CAS to resolve sports-related disputes in the first instance (i.e., *ordinary arbitration*, which usually involves commercial matters) and those arising out of the appeal of a decision of a sports governing body such as the IOC or an IF (i.e., *appeals arbitration*).<sup>70</sup> The CAS operates an ad hoc Division at the site of each Olympic Games as well as other major international sports events<sup>71</sup> to resolve disputes in connection with the event in an expedited manner. It also is authorized to issue non-binding advisory opinions on sports-related matters.

The ICAS appoints the CAS's member arbitrators for four-year renewable terms and is obligated to “wherever possible, ensure fair representation of the continents and of the different juridical cultures.”<sup>72</sup> In appointing CAS arbitrators, the Code states that ICAS “shall respect, in principle, the following distribution:” 1/5th from among persons nominated by the IOC; 1/5th from among persons nominated by the IFs; 1/5th from among persons nominated by the NOCs; and 1/5th from among persons independent of those sports governing bodies; and 1/5th “with a view to safeguarding the interests of the athletes.”<sup>73</sup> They must have legal training, recognized competence in sports law and/or international arbitration, and have good command of at least one CAS working language (i.e., English or French).<sup>74</sup> In addition, CAS arbitrators must be objective and independent in their decisions and adhere to a duty of confidentiality. Presently, there are approximately 270 CAS arbitrators<sup>75</sup> who generally sit in three-person panels to hear and adjudicate cases.

Regardless of its geographical location, the “seat” of all CAS arbitration proceedings is Lausanne, Switzerland.<sup>76</sup> This ensures uniform procedural rules,<sup>77</sup> provides a stable legal framework,<sup>78</sup> and facilitates efficient dispute resolution in locations convenient for the parties. The CAS panel issues a written award (majority vote governs) giving the reasons for the decision, which is final and binding on the parties. CAS *appeals arbitration* (unless the parties agree otherwise) and ad hoc Division awards are publicly disclosed.

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Unlike common law judicial precedent, “[i]n CAS jurisprudence there is no principle of binding precedent, or stare decisis.”<sup>79</sup> Ironically, although the CAS is an arbitral tribunal and the majority of its arbitrators have a civil law background, the rapidly developing body of CAS awards collectively is forming a body of international sports law, which has been described as *lex sportiva*.<sup>80</sup> For consistency, although it is not bound to do so, “a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel.”<sup>81</sup> This is similar to the judicial process utilized by common law appellate judges. The CAS Code provides that a CAS award is final and binding on the parties,<sup>82</sup> but is subject to limited judicial review by the Swiss Federal Tribunal (“SFT”), which has ruled that the CAS is sufficiently independent and impartial for its awards to have the same force and effect as judgments rendered by sovereign courts.<sup>83</sup>

### C. The CAS: A Fertile Ground for Academic Study

The 25-year history of the CAS demonstrates how civil and common law legal systems can function effectively together within an international tribunal to resolve a wide variety of complex, time-sensitive disputes between parties of different nationalities. CAS arbitration awards are globally respected adjudications, which generally are validated and enforced by national courts. The CAS offers guidance regarding the effective structure and operation of international and transnational dispute resolution bodies,<sup>84</sup> which are increasing in number with globalization.

One commentator has observed that “the CAS represents one of the world’s most successful attempts at bringing order to transnational issues”<sup>85</sup> and is a “valuable example of how an international tribunal can succeed.”<sup>86</sup> He notes that “[t]hrough creativity and cooperation, sports officials have created a working, functioning international tribunal that can serve as an example for future efforts at transnational dispute resolution.”<sup>87</sup> The CAS has been successful because it is a superior dispute resolution forum than available alternatives, and its decisions are generally accepted and will be enforced by national courts if necessary.<sup>88</sup> Alternative dispute resolution scholars would find it interesting to compare the structure and operation of the CAS to other international arbitral bodies such as the International Court of Arbitration (which resolves commercial disputes) and the ICANN

Arbitration System (which resolves disputes regarding the ownership of internet domain names) and to evaluate their relative effectiveness in resolving disputes fairly, efficiently, and consistently.

For legal theorists, the evolving body of *lex sportiva* established by CAS awards is an interesting and important example of global legal pluralism without states<sup>89</sup> arising out of the resolution of Olympic and international sports disputes between private parties. It is an emerging body of international law with some similarities to *lex mercatoria*,<sup>90</sup> a much older and well established body of international commercial law that has developed in the essentially private domain of commercial activity based on custom and arbitration awards. However, the *lex sportiva* being developed by the CAS often is not recognized as an illustrative example of legal pluralism that appears to work well, even by those who staunchly advocate private adjudication of disputes.<sup>91</sup>

Now that CAS *appeals arbitration procedure* and ad hoc Division awards are becoming more readily identifiable and accessible to the public,<sup>92</sup> there are several broad issues worthy of in-depth academic study regarding the development of this body of international sports law by a diverse group of international arbitrators with civil law or common law backgrounds. For example, to gain a comparative perspective, alternative dispute resolution and international law scholars may want to study the following issues:

- 1) How do CAS arbitration panels decide cases, and does the panel’s role vary according to the type of dispute?<sup>93</sup> Do CAS panels simply construe the parties’ agreement and applicable rules, exercise “equity jurisdiction” as deemed appropriate, and/or perform other functions similar to a common law, civil law, or hybrid legal system? Is there discernable empirical evidence of any factors that significantly influence which party prevails in particular types of disputes?
- 2) Considering the plenary power of monolithic Olympic and international sports governing bodies, which require athletes to submit to final and binding CAS arbitration as a condition of participation,<sup>94</sup> what should be the appropriate role of the CAS? Should CAS arbitrators have a broad scope of equitable power and function more like a court by acting as an external regulatory constraint and ensuring that the legal rights of particular parties (e.g.,

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Olympic and international sport athletes) are protected adequately?<sup>95</sup>

- 3) Is CAS jurisprudence functioning as a *de facto* body of common law legal precedent<sup>96</sup> and, if so, what are its effects? For example, is it reducing the volume of CAS arbitration proceedings in particular types of disputes as it establishes a body of *lex sportiva*?
- 4) Should the CAS Code be modified (and if so, how) to improve the fairness and effectiveness of CAS arbitration as a method of international sports dispute resolution with global implications?<sup>97</sup>

Examination of these issues by academics other than sports law scholars may provide not only valuable research specific to the CAS, but it also may contribute some important insights regarding the development of alternative dispute resolution systems and/or international legal norms outside the context of sports.

### III. International Sports Law, A Form of Global Legal Pluralism, and Prospects for Displacing National Law<sup>98</sup>

In section IIA, we identified an inherent tension between internationalism and nationalism in the adjudication of sports disputes arising out of international athletic competition. The establishment and development of the CAS has provided an effective mechanism for resolving Olympic and international sports disputes in an expert and internationally coherent manner, thereby largely avoiding the problems of inconsistent rulings by national courts unfamiliar with international sports association governance and rules. In this section, we will explore another aspect of the tension between internationalism and nationalism in sports, namely an actual or potential clash between a developing body of international sports law and national law.<sup>99</sup> This conflict arises primarily in two situations: 1) when international sports governing body agreements and rules are directly challenged in domestic courts as contrary to national law; 2) when CAS awards are challenged as inconsistent with national law in a judicial forum.

It is inevitable that sports governing body rules based on private international agreements and/or CAS awards at times will create tensions with national laws. Because sports is a

microcosm of society,<sup>100</sup> an examination of how these conflicts are being resolved and the corresponding effects is fertile ground for academic discourse. Sport is a crucible for consideration of important global legal issues and presents an opportunity to examine the intersection between global alternative dispute resolution, international law, and national sovereignty.<sup>101</sup>

In their introduction to a recent American Journal of Comparative Law symposium issue on “Beyond the State: Re-thinking Private Law” the authors observe that “it is precisely because globalization moves us ‘beyond the state’ that we are, more than ever, forced to rethink private law and its relation to the state.”<sup>102</sup> One of the issue’s 15 articles recognizes—in a cursory and rather oblique manner—that international sports federation ethical codes and disciplinary sanctions for violations are a form of global private law.<sup>103</sup> Another article briefly notes that rules regulating economic transactions among sports federation members such as player transfers also constitute global private law.<sup>104</sup> However, although Olympic and international sports competition gives rise to a paradigm example of global legal pluralism,<sup>105</sup> neither article recognizes the two contexts in which a developing body of international sports law arising primarily out of the resolution of disputes between private parties interacts with national law much less considers or analyzes this phenomenon from a scholarly perspective.<sup>106</sup>

#### A. Evolving Judicial Treatment of International Sports Agreements and Rules: Traditional v. Deferential Approach

As the scope and detail of Olympic and international sports rules continue to expand, they may conflict with national laws, thereby motivating athletes and others to seek the aid of a national court to overturn the adverse effects of those rules at least within their respective home countries. Unless doing so would contravene valid and applicable choice of law provisions, a domestic court generally will apply its substantive national law in resolving disputes within its jurisdiction. Therefore, Olympic and international sports agreements and rules must comply with national law, and some domestic courts have ruled accordingly. On the other hand, other courts have adopted a deferential approach by refusing to apply national law to the challenged rules or agreements.

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The following 1988 case illustrates the traditional judicial approach. In *Barnard v Australian Soccer Federation*,<sup>107</sup> the Federal Court of Australia ruled that the Australian Soccer Federation (ASF) violated Australian competition law by banning the plaintiff, who played both semi-professional indoor and outdoor soccer, from competing in outdoor soccer competitions. At the time, the Federation of International Football Associations (FIFA), the IF for soccer, and the Federação Internacional de Salão (FIFUSA) were rivals for governing authority over the emerging game of indoor soccer. FIFA sought to extend its control to encompass indoor as well as outdoor soccer by directing its national affiliated bodies, including the ASF, to impose bans on players who played in FIFUSA sponsored indoor soccer competitions. In turn, the ASF directed its regional affiliate, the Queensland Soccer Federation, to ban the plaintiff from playing in its outdoor competitions. Recognizing the primacy of Australian national law, the court rejected the ASF's defense that it is contractually obligated to follow FIFA's rules and may be disciplined by FIFA for failing to ban the plaintiff.

An analogous example of the traditional approach is the European Court of Justice (ECJ)'s 1995 ruling applying European transnational laws in *Union Royale Belge des Sociétés de Football Association ASBL v Bosman* (“Bosman”),<sup>108</sup> perhaps the world's most famous sports law case.<sup>109</sup> It involved a successful challenge to the core labor market rules of soccer, the world's most widely played and followed sport. The plaintiff was an out-of-contract Belgian professional player who was offered a contract to play for a French soccer club. The rules of the defendant Belgian soccer governing body incorporated European Union of Football Associations (UEFA) regulations establishing a transfer fee system and limiting the number of non-nationals who could play for domestic professional clubs. Despite plaintiff's uncontracted status he needed his former club's approval to play for a new club, which was conditioned upon the latter's payment of a prescribed player transfer fee. The player transfer fee requirement was part of an elaborate international system (of which FIFA and UEFA were the main proponents) governing the movement of soccer players between clubs - a system which an English court some years earlier had described as “a united monolithic front all over the world”.<sup>110</sup> The ECJ held that these rules contravened Article 48 of the then European Community Treaty (now Article 45 of the Treaty on European Union (EU Treaty)), which guarantees European workers freedom of movement between member countries and

prohibits discrimination on grounds of nationality.<sup>111</sup> Bosman generated a ‘welter of publicity’<sup>112</sup> but it was an unsurprising result to informed observers<sup>113</sup> because the court ruled that international sports rules and agreements are subject to applicable transnational laws; here, a regional international treaty given domestic application.<sup>114</sup>

In contrast to the foregoing traditional view is the deferential approach of some courts, which demonstrates a judicial reluctance to apply national laws to Olympic and international sports rules and agreements. For example, some national courts have refused to apply national laws protecting human rights to international sports competitions held within their respective country's borders.

United States courts generally have rejected claimed violations of federal or state law in connection with Olympic Games hosted by American cities. For example, in *Martin v. IOC*,<sup>115</sup> the Ninth Circuit affirmed the denial of a preliminary injunction to require the organizers of the 1984 Los Angeles Summer Olympic Games to include 5,000- and 10,000-metre track events for women as existed for men. The court rejected plaintiffs' claims that the failure to include these events constituted illegal gender discrimination, even though “the women runners made a strong showing that the early history of the modern Olympic Games was marred by blatant discrimination against women.”<sup>116</sup> The majority explained, “we find persuasive the argument that a court should be wary of applying a state statute to alter the content of the Olympic Games. The Olympic Games are organized and conducted under the terms of an international agreement - the Olympic Charter. We are extremely hesitant

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An analogous example of the traditional approach is the European Court of Justice (ECJ)'s 1995 ruling applying European transnational laws in *Union Royale Belge des Sociétés de Football Association ASBL v Bosman*

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to undertake the application of one state’s statute to alter an event that is staged with competitors from the entire world under the terms of that agreement.”<sup>117</sup>

Consistent with *Martin*, the British Columbia Court of Appeals rejected a similar gender discrimination claim under Canadian law in connection with the 2010 Vancouver Olympic Games. In *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games*,<sup>118</sup> the court ruled that the IOC’s decision not to include women’s ski jumping as an event in the Vancouver Games (while including men’s ski jumping events) does not violate the Canadian Charter of Rights and Freedoms. The court held that the Charter, which regulates only government conduct, did not apply to the IOC’s selection of events for the 2010 Olympics because this is private party conduct. Although the Canadian government, province of British Columbia, and cities of Vancouver and Whistler were parties to an agreement with the IOC to host the 2010 Olympics, none of these government entities or the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games (VANOC), a federally chartered non-profit corporation, had the authority to determine which events are part of the Vancouver Olympics. Rather, the “Host City Contract stipulates that it is the IOC that sets the Programme,”<sup>119</sup> and VANOC is subject to the “supreme authority of the IOC.”<sup>120</sup> The court concluded “the IOC’s decision not to hold a women’s ski jumping event at the 2010 Games is a decision that has not been endorsed by VANOC, or by any Canadian government body.”<sup>121</sup>

It is important for comparative and international law scholars to be aware of and analyze the underlying jurisprudential issues raised by Barnard and Bosman,<sup>122</sup> which reflect, on the one hand, the traditional judicial view recognizing that private international sports federation agreements and rules are subject to national and transnational public laws, and *Martin* and *Sagen*, which, on the other hand, represent a deferential judicial view. For example, are *Martin* and *Sagen* simply aberrations from the traditional judicial view, or do these cases constitute the “camel’s nose under the carpet” or the “thin end of the wedge,” thereby signaling an increasing willingness of courts to defer to private international agreements such as the rules of international and Olympic sports organizations that may conflict with national law?<sup>123</sup> If the latter, are there sound public policy reasons for this judicial approach, and what are the future implications for

the development of global law based on other agreements between private parties (including those involving governmental participation or acquiescence)?

B. CAS Awards, *Lex Sportiva*, and the  
Displacement of National Law

The Code establishes the following rules regarding the substantive “law” to be applied by a CAS arbitration panel. In CAS ad hoc Division arbitration, the governing law is “the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate.”<sup>124</sup> For CAS *appeals arbitration* proceedings, absent agreement of the parties, it is “the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the [CAS] Panel deems appropriate.”<sup>125</sup>

Despite having express authority to do so, the CAS rarely relies on national law other than Swiss law (the IOC, WADA, and most IFs are domiciled in Switzerland) to invalidate Olympic and international sports governing body agreements and rules.<sup>126</sup> For example, recognizing the need for a uniform body of global sports law, CAS panels generally have refused to rule that athlete doping rules and sanctions violate the national laws of an athlete’s home country.<sup>127</sup> Similarly, in appeals arbitration resolving other types of disputes, the CAS generally has declined to apply national laws other than the domestic law of an international sports governing body’s home country.<sup>128</sup>

The Swiss Federal Code on Private International Law<sup>129</sup> provides for judicial review of a CAS arbitration award by the SFT on very narrow grounds. The SFT is authorized to vacate an arbitration award if the CAS panel was constituted irregularly, erroneously held that it did or did not have jurisdiction, ruled on matters beyond the submitted claims, or failed to rule on a claim.<sup>130</sup> An award also may be vacated if the parties are not treated equally by the CAS panel, if a party’s right to be heard is not respected, or if the award is incompatible with Swiss public policy.<sup>131</sup>

To date, the SFT has uniformly rejected all challenges to the substantive merits of a CAS panel’s decision.<sup>132</sup> A CAS award may be challenged on the ground that it is incompatible with Swiss public policy, but such a claim has not been successful.

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The SFT has explained that this defense “must be understood as a universal rather than national concept, intended to penalize incompatibility with the fundamental legal or moral principles acknowledged in all civilized states.”<sup>133</sup> The SFT has ruled that “even the manifestly wrong application of a rule of law or the obviously incorrect finding of a point of fact is still not sufficient to justify revocation for breach of public policy of an award made in international arbitration proceedings.”<sup>134</sup> It has characterized this standard as “more restrictive and narrower than the argument of arbitrariness.”<sup>135</sup>

Because the “seat” of all CAS arbitrations is designated as Lausanne, Switzerland regardless of the geographical location of the hearing, a CAS award is a foreign arbitration award in all countries except Switzerland. Thus, CAS arbitration awards require judicial recognition by national courts to be legally enforceable outside of Switzerland. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”),<sup>136</sup> a treaty to which the United States, Australia, and more than one hundred other countries are signatories, provides for judicial recognition and enforcement of foreign arbitration awards, including CAS awards, by national courts.<sup>137</sup>

Article V (2)(b) of the New York Convention states that a national court may refuse to recognize and enforce an arbitration award if doing so “would be contrary to the public policy of that country.”<sup>138</sup> Consistent with the SFT, U. S. courts have strictly construed the “public policy” defense and have uniformly recognized the validity of foreign sports arbitration awards, including CAS awards, if the parties had agreed in writing to be bound by it or participated in the arbitration proceeding.<sup>139</sup>

Judicial recognition and enforcement of CAS awards under the New York Convention has the potential to legitimize the development of a body of *lex sportiva* thereby supplanting conflicting national laws in 144 countries, which have signed this treaty.<sup>140</sup> The *lex sportiva* established by the collective body of CAS awards, is accorded important legal international standing pursuant to the New York Convention’s requirement that the integrity of foreign arbitral awards generally be respected and enforced by national courts. This is a very significant development, especially given the following factors: the monolithic global governing authority of IFs; required consent to CAS

jurisdiction as a condition of a NOC’s recognition by the IOC or athlete’s eligibility to participate in Olympic and other international sports competitions; and potential conflicts with national laws that may provide greater substantive legal protection to individuals than are recognized by a CAS award.<sup>141</sup>

*Gatlin v. U.S. Anti-Doping Agency, Inc.*<sup>142</sup> illustrates how international law may enable a CAS award to effectively displace otherwise applicable national laws of an athlete’s home country<sup>143</sup> by precluding a court from remedying their alleged erroneous interpretation or application by an arbitral tribunal. In *Gatlin*, a federal district court ruled it did not have jurisdiction to consider Justin Gatlin’s claim that his four-year suspension imposed by CAS for a 2006 doping offense violated the Americans With Disabilities Act (ADA). In an arbitration proceeding held in the U.S., the CAS panel determined that Gatlin’s 2006 positive test for exogenous testosterone was his second doping offense (thereby subjecting him to an eight-year suspension pursuant to an IF’s anti-doping rule) because he previously tested positive for amphetamines in 2001, which was his first doping violation. Gatlin asserted that characterizing his 2001 positive test, which resulted from taking prescription medication for his attention deficit disorder, as his first doping offense (even though the IAAF had restored his eligibility because he was taking it for a legitimate medical reason) violated the ADA, which the CAS panel rejected.<sup>144</sup> However, the CAS panel reduced Gatlin’s suspension to four years based on its finding that the circumstances surrounding his 2001 doping offense constituted exceptional circumstances justifying a reduction from the rule’s prescribed eight-year duration.

The court characterized the CAS panel’s rejection of Gatlin’s ADA claim as an “arbitrary and capricious” decision.<sup>145</sup> The court found this error did not “rise to the level of moral repugnance” required by the New York Convention’s public policy exception,<sup>146</sup> which would justify judicial refusal to recognize a CAS award. Rather, the court effectively recognized and enforced the CAS arbitration award by refusing to permit Gatlin to re-litigate its merits under the ADA.<sup>147</sup> Expressing concern that its ruling “is quite troubling” because . . . United States Courts have no power to right the wrong perpetrated upon one of its citizens,<sup>148</sup> the court observed that Gatlin’s only judicial recourse is to request that the Swiss Federal Tribunal vacate the CAS award.<sup>149</sup>

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*Gatlin* is consistent with the general refusal of U.S. courts to review the merits of claims resolved by arbitration awards.<sup>150</sup> Of interest to comparative and arbitration law scholars is the apparent conflict between U.S. courts and the European Court of Justice (ECJ) regarding public international law and its relation to the state, specifically whether a final and binding arbitration award should preclude judicial reconsideration of the merits of the dispute it resolves.<sup>151</sup>

In *Meca-Medina and Majcen v. Comm'n of European Communities*,<sup>152</sup> the ECJ allowed two professional swimmers (a Spaniard and a Slovenian) to re-litigate the merits of their claim that the Federation Internationale de Natation (FINA)'s rule regarding the minimum level of nandrolone (a banned substance) in one's system sufficient to establish a doping offense violated European Union law. A CAS panel had previously rejected their contention,<sup>153</sup> but reduced on other grounds the four-year suspension imposed on both swimmers by FINA, the Swiss-based IF for swimming, for testing positive for nandrolone during the 1999 World Cup swimming competition in Brazil.<sup>154</sup> Rather than appealing the CAS panel's award to the SFT, the swimmers brought separate litigation alleging that the subject anti-doping rule contravened European Union competition and freedom to provide services laws.

The ECJ ruled that European Union law applied because FINA's doping rules have the requisite effect on economic activity by regulating professional swimming. However, it rejected the swimmers' claims on their merits because they failed to prove that the rule regarding the minimum level of nandrolone sufficient for a doping violation was not disproportionate to FINA's legitimate objectives of ensuring that athletic competitions are conducted fairly and protecting athletes' health. However, it is remarkable that the ECJ did not consider that their European Union law claims had been expressly rejected by a prior CAS award, which the swimmers had agreed would be final and binding, or whether the fact that Switzerland, Spain and Slovenia are parties to the New York Convention should preclude re-litigation of their merits. Although the ECJ's decision effectively upheld the CAS award, *Meca-Medina* establishes precedent that permits future judicial challenges to the merits of CAS awards based on European Union law.

The potential for a CAS award to displace otherwise applicable national laws of an athlete's home country is also

illustrated by an Australian court's decision in *Raguz v Sullivan*.<sup>155</sup> Citing irregularities in an Australian NGB's application of the selection criteria, the CAS ruled that Raguz's selection for the Australian Olympic Team should be revoked and that another competitor should be selected instead. The New South Wales Court of Appeal rejected Raguz's request that it reverse the CAS ruling because the court lacked jurisdiction to do so. Curiously, the court did not base its ruling on the New York Convention, to which Australia is a party, or the federal legislation which implements it.<sup>156</sup> Instead, it relied on nationally uniform arbitration laws enacted by Australian state legislatures.<sup>157</sup> Raguz contracted with the Australian Olympic Committee to resolve any disputes by CAS arbitration rather than litigation in an Australian court, which is permitted by the uniform state arbitration laws for an arbitration "in a country other than Australia." Because the seat of all CAS arbitrations is Lausanne, Switzerland irrespective of where the arbitration proceeding is conducted, the court held that state arbitration law precluded it from considering the merits of Raguz's claims.<sup>158</sup> The implication of this case is that, provided the parties to CAS arbitration agreement properly invoke the Australian state arbitration laws, the *lex sportiva* being developed by the CAS has the potential to displace contrary Australian laws.

Because one of the primary objectives of establishing a private legal regime to resolve international sports disputes is to create a uniform body of *lex sportiva* that is predictable and evenly applied worldwide,<sup>159</sup> it is problematic if CAS awards are not judicially reviewed pursuant to a generally accepted international standard.<sup>160</sup> Because Olympic and international sports competition occurs on a global basis and involves consensual (and often long-term) relationships, universally accepted rules and dispute resolution methods appear to be necessary.<sup>161</sup>

On the other hand, the displacement of sovereign national law by *lex sportiva* raises important issues worthy of scholarly study.<sup>162</sup> For example, is a very limited scope of judicial review of CAS arbitration awards appropriate based on public policy considerations, including the need for an international legal regime that effectively protects all parties' respective rights and interests? Should an international treaty formally designate the CAS as the world court for sport with a permanent bench of judges, and would it likely function better than a private international arbitral tribunal? Although

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these are sport specific issues, they may have broader implications for the resolution of conflicts between national laws and the developing body of decisions of international tribunals established by private agreement as well as the identification and establishment of a legal system for developing a global body of uniform law in particular areas that will be universally respected.

#### IV. Sports as a Harbinger of Future National and International Law and a Forum for Public Policy Debate

Sports are an important cultural phenomenon in all countries of the world<sup>163</sup> and have a unique ability to attract, entertain, inspire, and challenge a global populace.<sup>164</sup> For example, in the United States and Australia (the authors' respective home countries) sports are a national obsession with millions of participants, spectators, and fans. Despite geographical distance and language barriers, international sports competitions (e.g., Olympics, FIFA World Cup, World Baseball Classic) and other transnational sports events (e.g., Commonwealth Games, Pan American Games) are commonplace. Sports have been envisioned as 'a world language with many dialects'.<sup>165</sup>

Across geo-political boundaries, sports provide a forum for increased understanding, appreciation, and respect for mutually agreed upon rules, fair play, and resolution of disputes among diverse cultures and societies.<sup>166</sup> At present more countries are members of the International Olympic Movement (205) than the United Nations (192).<sup>167</sup> As Nelson Mandela, the former President of South Africa and recipient of the 1993 Nobel Peace Prize, has stated: "Sport has the power to change the world. It has the power to inspire, the power to unite people that little else has . . . It is more powerful than government in breaking down barriers."<sup>168</sup>

Related to sports' cultural, economic, and political value, the combination of extensive media coverage and strong public interest in sports provides enormous power to convey educational messages to diverse global audiences (i.e., "sports sell"). Sports are a means to educate citizens about important social values and to encourage the public to pursue desirable standards of behavior. Positive values and ideals, which are intrinsic elements of sports or closely associated therewith, are promoted to the world's youth (and older generations)

through sports participation or viewing.<sup>169</sup> Sports competition also generates opportunities for academic discourse and public debate on social and ethical issues with broader implications and effects.<sup>170</sup>

#### A. Domestic Sports Law's Influence on the Development of General National Laws and Public Policy

Leading court rulings in a wide variety of legal fields have originated in the sports context.<sup>171</sup> Thus, sports may be seen as influencing to some degree the development of general legal doctrine. A broad range of legal scholars will not find it difficult to identify a leading case in their respective areas of interest that involves sports; whether this is anything other than an entirely predictable consequence of the prevalence of sports in society could be a matter for scholarly inquiry. Perhaps sports are well represented because they often generate issues located at the fringes of legal principle requiring clarification or even development of new law by appellate courts (i.e., sports can make for hard cases).<sup>172</sup>

The commercialization of sports has given rise to numerous disputes requiring courts to apply several areas of general law (e.g., contract, intellectual property, labor and antitrust laws) and to reassess their views about external regulation of the sports industry,<sup>173</sup> which has led to the development of important legal precedent with much broader application. For example, in *NCAA v Bd. of Regents*,<sup>174</sup> the Supreme Court established a widely used rule of reason framework for analyzing the legality of concerted restraints of trade under the U.S. antitrust laws. One scholar has aptly observed that *NCAA* "makes it clear that the Sherman Act applies to nonprofit entities"<sup>175</sup> and "signaled an increasing reluctance by the Court to reflexively rely on per se antitrust principles and a willingness to at least hear purported justifications for trade restraints even where competitor collaboration was involved."<sup>176</sup>

Similarly, the Australian High Court's 1979 landmark decision construing a provision of the Australian Constitution conferring power on the federal legislature to make laws with respect to "trading corporations,"<sup>177</sup> which arose out of a sports-related dispute, has had significant implications regarding the development of Australian corporate law. By a narrow majority, the High Court ruled that a corporation's current activities, rather than the purpose

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for its formation, determined whether it is a “trading corporation.” Two football leagues and one football club were formed as not-for-profit, community controlled corporations for the purpose of organizing or participating in sporting competitions. Because all three entities were sufficiently engaged in business activities in support of their sporting purposes (including the sale of tickets, media rights, advertising and catering), the High Court held they constituted “trading corporations” within the terms of the Constitution.<sup>178</sup>

Whatever may be the degree to which sports cases are represented in leading judicial rulings, this feature of sports law is likely to retain an ad hoc or random character because the uncertainties of litigation are important determinants of which disputes and issues ultimately are resolved by appellate courts. Of greater significance for present purposes is the emerging capacity of sports to act as a catalyst for law reform and to provide a venue for public policy debate. We previously noted that sports have enormous power to convey educational messages to diverse global audiences because of its extensive media coverage and the public’s strong interest in sports.<sup>179</sup> Consequently, debates over social issues that occur in the context of sports may have a profound effect on public and governmental attitudes on issues with wider application beyond sports. Thus, it is important that legal scholars closely monitor sports law developments and participate in sports-related policy debates and legal initiatives; otherwise, broader legal reform and/or public policy issues in their respective fields may become shaped or resolved without their timely input.<sup>180</sup> Conversely, proponents of issues having wide social relevance may use sports as a venue for raising and advancing their views because of sports’ capacity to draw attention to particular issues or grievances.

In 1994, David Halberstam, a respected sportswriter, observed:<sup>181</sup>

*[S]ports has been an excellent window through which to monitor changes in the rest of the society as we become more and more of an entertainment society. I do not know of any other venue that showcases the changes in American life and its values and the coming of the norms of entertainment more dramatically than sports. We can learn so much about race from sports as almost any subject and we can learn what the coming of big money does to players and lines of authority more from sports than anything else.*

Halberstam stated that the St. Louis Cardinals’ victory in the decisive seventh game of the 1964 World Series with four black players in the club’s lineup “represented not just a larger slice of America, but a more just America.”<sup>182</sup> One of those players was Curt Flood who later achieved legal fame as the unsuccessful plaintiff in *Flood v Kuhn*,<sup>183</sup> in which the Supreme Court affirmed Major League Baseball’s common law antitrust exemption.<sup>184</sup> Flood’s efforts to free himself and other baseball players of Major League Baseball’s “reserve system” (which provided a club with perpetual rights to a player’s services even after his contract expired) had parallels with the civil rights movement, and each drew support from and inspired the other.<sup>185</sup>

Many nations outlaw racial abuse or vilification as an adjunct to anti-discrimination laws. However, Australia’s racial vilification laws are of relatively recent origin.<sup>186</sup> Before these laws were enacted, racial vilification by players and spectators was more or less tolerated as a tactic to distract an opponent. On April 17, 1993, during a match between the St Kilda and Collingwood Football Clubs in the Australian Football League (AFL), an indigenous Australian who played for St Kilda, Nicky Winmar, was racially taunted by the crowd of Collingwood supporters. St Kilda was unexpectedly victorious and Winmar was instrumental in that success. Towards the end of the game when the result was certain, Winmar stood before the crowd, pulled up his shirt and pointed defiantly to his black skin. Images of this incident were carried by national news media and were probably instrumental in the passage of Australia’s racial vilification laws. Another highly publicized incident of racial abuse of another indigenous AFL player together, with impending federal legislation, prompted the AFL to introduce rules and policies against racial and religious vilification, which included educational programs and a procedure for making confidential complaints and conciliation. Although not entirely free of criticism, the AFL’s approach has been so successful that it is regarded as a model, and the AFL’s strong stance has served to pave the way for wider public acceptance of the anti-vilification laws and the social policies they reflect.<sup>187</sup>

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## B. International Sports Law’s Influence on the Development of Global Legal Norms and Policies

In this section we observe that the rules and commercial arrangements of international and Olympic sports possess a unique capacity to spread legal norms worldwide because of the growing importance of international sports competition. International sports law, which includes the developing body of *lex sportiva*, illustrates that there are important areas of law in which globalization may create a need for worldwide uniformity (rather than balkanization by national law) and may be a harbinger of tomorrow—perhaps international harmonization of more laws (and the corresponding twilight of domestic law in those areas) as the world becomes more globalized. The potential of sports to drive international legal reform has only recently become evident, so our discussion will necessarily involve a degree of crystal ball gazing. To demonstrate our thesis, we will briefly consider two areas: intellectual property and anti-ambush marketing laws and human rights laws.<sup>188</sup>

Before we do so, a general observation can be made about how international sports law may influence the evolution of national laws. It is possible that the developing body of *lex sportiva* created by CAS will influence judicial resolution of purely domestic sports industry disputes and the development of national sports law by having a transjudicial effect. It is a technique well known to the common law for courts to consider the opinions of foreign courts resolving similar issues as well as international conventions and practice in the search for solutions to difficult problems.<sup>189</sup> We suggest that it may be appropriate for national courts to consider, compare, and/or adopt CAS jurisprudence in resolving purely domestic sports law disputes. For example, perhaps a U.S. court will consider the Pistorius v. IAAF CAS award<sup>190</sup> as well as the Supreme Court’s Martin v. PGA ruling<sup>191</sup> in a future Americans With Disabilities Act case by a disabled U.S. athlete claiming an American sports governing body must modify its rules to enable him or her to participate in an athletic event.

### 1. Intellectual Property and Anti-Ambush Marketing Laws

Intellectual property and anti-ambush marketing<sup>192</sup> laws are the backbone of the broadcasting, merchandising, and sponsorship agreements that finance international sports competitions and generate several billion dollars.<sup>193</sup> Not

surprisingly, the IOC and IFs are increasingly careful to ensure that countries in which international sports competitions are held will accord a sufficient degree of legal protection to their intellectual property as well as the contract and licensing rights of broadcasters, sponsors, or merchandisers. This may involve anti-ambush laws that confer a greater level of legal protection than traditional national trademark and unfair competition laws that provide legal remedies only from infringement that creates a likelihood of consumer confusion regarding affiliation, sponsorship, or endorsement.<sup>194</sup> The intense competition among potential host countries and cities for major events such as the Olympic Games and the FIFA World Cup ensures a seller’s market, and the bid documents for major events invariably require high levels of legal protection for the sports organization’s rights. As major international sporting events move around the globe they often leave a legacy of intellectual property reform and related legal developments, which may be specific to the event or sports organization or perhaps have wider relevance.<sup>195</sup>

The prospect of being awarded the right to host a major international sports event may prompt countries that do not have advanced intellectual property law regimes to revise their laws and policies.<sup>196</sup> For example, the enactment of China’s *Regulations on the Protection of Olympic Symbols 2002 (PRC)*<sup>197</sup> in connection with the 2008 Beijing Olympic Games coincided with its national government’s shift away from its previous reluctance to protect intellectual property rights.<sup>198</sup> It has been suggested that India’s hosting of the World Cup of Cricket in 2011 will necessitate a change in its government’s attitudes regarding anti-ambush legislation.<sup>199</sup> This process can also apply to developed countries, especially in regard to modernizing their copyright laws to protect the

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digital media that are so important to sports broadcasting. In addition, legal agreements concerning sports event digital media rights are likely to have significant broader implications. For instance, scholars interested in differences between European and U.S. intellectual property laws<sup>200</sup> should monitor legal developments concerning sports event intellectual property rights, which are strongly influenced by both European trained lawyers who represent European-based sports governing bodies such as the IOC as well as U.S. lawyers representing U.S. broadcasters and media companies.

In some countries such as Australia<sup>201</sup> and the U.S.,<sup>202</sup> which have recently hosted Olympic Games, the level of protection accorded the Olympic marks exceeds that generally provided by trademark laws in those countries. Given the success of international and Olympic sports in having host nations introduce anti-ambush laws,<sup>203</sup> some have suggested that it is now time for a standardized international approach, perhaps through a UNESCO sponsored convention.<sup>204</sup> Even reforms that are specific to the event or sports organization may have significant wider impacts because major global corporate sponsors have the right to use the intellectual property associated with the sporting event and sports organization, thereby also benefitting from any enhanced legal protections. Given the perceived importance of stronger intellectual property laws for the growth of world trade,<sup>205</sup> sports is a player that drives legal reform and economic growth.

### 2. Human Rights Laws

The awarding of the rights to host a major sports event such as the Olympic Games or the World Cup of Football has come to be linked to some degree directly or indirectly to the human rights records of the bidders. For disadvantaged groups, the attention on their country by the world's news media can be occasion for them to bring their circumstances to the notice of a much wider audience and perhaps embarrass their government into desirable action. Realistically, the capacity of international and Olympic sports to effect real change in this way is probably quite limited. The 1936 Olympic Games in Berlin represents a notable failure. Despite protests from the IOC and even the threat of a possible boycott, the Third Reich made only token concessions in its campaign of discrimination against Jewish people generally and in its policy of excluding them the German Olympic team.<sup>206</sup> In the lead-up to and during the Beijing Olympic Games, China was the object of criticism in the world's news media over its policies of internet and local news media

censorship and other human rights issues.<sup>207</sup> Whether the legacy of the Games and the attendant international spotlight will include meaningful long-term change in China in response to these criticisms is hard to assess.

Rather than explore the links between hosting events and human rights which are often examined in the numerous histories and evaluations of the Olympic Movement,<sup>208</sup> we will briefly make some other observations that may be of interest to scholars. The evolving body of international sports law, particularly agreements among private parties, may create and protect individual rights that currently are not recognized in some countries, thereby advancing the legal protection of human rights worldwide. For example, the fifth Fundamental Principle of Olympism embodied in the Olympic Charter states that “[a]ny form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement.”<sup>209</sup> In accordance with their contractual obligation to comply with the Olympic Charter's anti-discrimination provisions, each of the 205 NOCs has a legal duty to ensure no Olympic sport athlete in their respective countries is excluded from sports participation or discriminated against for “racial, religious or political reasons or by reason of other forms of discrimination.”<sup>210</sup> The rules of IFs also may incorporate similar protections of human rights, which NGBs are required to respect and include in their respective rules. In accordance with their contractual or membership rights, individual athletes may be able to legally require their respective NGBs to accord them a level of human rights protection not otherwise available in their home countries. For instance, an athlete or official from a country which offers little or no human rights guarantees who is denied selection to a national team on discriminatory grounds might successfully challenge that decision in a CAS proceeding as a breach of the NGB's rules and *lex sportiva*, notwithstanding that domestic law is not infringed. An IF could take punitive measures against an NGB that fails to honor a CAS award, which might include suspension of its membership rights and authorization to enter athletes in international sports competitions, which provides a formidable enforcement mechanism that is perhaps more powerful than judicial compulsion.

An illustration of the effectiveness of international enforcement action based on private agreement can be found in the area of sports employment rights. FIFA's *Regulations for*

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*the Status and Transfer of Players*, regulate a number of aspects of the employment of soccer players worldwide. In the event of dispute between club and player, the Regulations empower an internal FIFA body, the Dispute Resolution Chamber, to rule upon it and, if either party is dissatisfied, the CAS may arbitrate. If a club refuses to comply with the ruling of the Chamber or the CAS, it may be practically difficult or inconvenient for a player to enforce a favorable ruling in a court having jurisdiction over the club. As an alternative, a complaint may be made by the player against the club to the FIFA Disciplinary Committee which is empowered to impose a range of penalties including loss of premiership points (possibly leading to relegation of the club to a lower division of competition) for the club's failure to comply with the ruling of the Chamber or the CAS.<sup>211</sup> While these penalties do not directly enforce those rulings, the avoidance of such penalties serves as a powerful incentive to comply that, as a practical matter in the world of competitive sports, is far more likely to be more compelling, efficient, and faster than judicial enforcement.

Given the significant cultural and economic importance of sports globally, sports law may sow seeds that germinate into the increased national legal protection of human rights, a topic of interest to scholars who study international human rights law as well as the globalization of law.

## Conclusion

The evolving law of sports has potentially broad implications for the development of international, comparative, and national law as well as global dispute resolution, which often are not recognized or carefully considered. It offers fertile ground for academic study by legal scholars as well as those who teach sports law courses or focus their scholarship on sports law issues. In addition, attorneys and judges need to be aware that judicial resolution of sports-related cases may provide the seed that germinates into jurisprudence with broader application and more widespread effects. It is our hope that this article contributes to greater awareness of the importance of sports, not only as a worldwide cultural phenomenon and a significant part of our 21st century global economy, but as a rich source of both international and national public and private laws as well as lessons for establishing, implementing, and enforcing global legal norms. ■ **BASL**

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- 1 *Such a purpose may be achieved for Australian and United States law respectively by consideration of Deborah Healey, Sport and the Law (University of New South Wales Press, 3rd edition, 2005) and W T Champion, Sports Law in a Nutshell (West Publishing Co, 4th ed, 2009).*
- 2 *See generally MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: Cases, Materials, and Problems (2d. ed.) 1-21 (2009).*
- 3 *According to the 2009-2010 AALS Directory of Law Teachers, there are only 120 professors who teach sports law, while there are approximately 340 antitrust law, 1,800 constitutional law, and 360 labor law professors. Antitrust, constitutional, and labor law are three of the most significant areas of public law that regulate sports in the U.S.*
- 4 *See generally Daniel E. Lazaroff, The Influence of Sports Law on American Jurisprudence, 1 Va. J. Sports & Ent. L. J. 1 (2001); Charles Yablon, On the Contribution of Baseball to American Legal Theory 104 Yale L. J. 227 (1994). A number of the landmark rulings of the High Court of Australia have occurred in the context of sporting activity, e.g., R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League Inc (1979) 143 CLR 190 (meaning of federal corporations power conferred by The Constitution (63 & 64 Vict, c 12), s 51 (xx) - professional football clubs held to be trading corporations); Victoria Park Racing and Recreation Grounds Company Limited v Taylor (1937) 58 CLR 479 (nature of property, no rights to an event - horse racing track unable to prevent radio calls of races originating from a structure overlooking the track); Wyong Shire Council v Shirt (1980) 146 CLR 40 (standard of care in the tort of negligence - signage incorrectly identifying “deep water” caused water-skiing accident on lake). The late Edward Grayson, widely recognized as “the father” of English sports law, wrote in 1993 about the peculiar ability of sports to raise novel legal issues on which high appellate courts could differ. He illustrated this proposition by reference to seven decisions of the Court of Appeal on sports which had been overruled on further appeal to the House of Lords. Edward Grayson, Getting the Result Right (1993) 143 New L. J. 61.*
- 5 *The first treatises on U.S. sports law (e.g., Lionel S Sobel, Professional Sports and the Law (Law-Arts Publishers Inc, New York, 1977); Weistart & Lowell, The Law of Sports (Michie 1979); Shubert, Smith & Trentadue, Sports Law (West 1986)) and Australian sports law (e.g., G M Kelly, Sport and the Law; An Australian Perspective (1987) were not published until late 1970s and 1980s. The first U.S. sports law casebook (Yasser, McCurdy & Goplerud, Sports Law: Cases and Materials (Anderson 1990) was not published until 20 years ago. The first Canadian treatise (John Barnes, Sports and the Law in Canada (Butterworths, Toronto, 1983) was published in 1983. Neither author of this article took a sports law course during study for his first law degree. Similarly, the academic study of sports law in leading European countries such as Switzerland, Great Britain, Germany, France and Italy did not gain real momentum until the early 1990s although there are earlier treatises (e.g., Alberto M Toro and Piergiovanni Canepelo, Codice Dello Sport Vols 1 and 2 (Dott A Giuffrè Editore, Milan, 1980), Martin Klose, Die Rolle des Sports bei der Europäischen Einigung (Duncker & Humblot, Berlin, 1989) and Edward Grayson, Sport and the Law (Butterworths, London, 1988).*
- 6 *For an overview of this debate about the nature of sports law and whether the area displays the unique and coherent characteristics of a discreet body of law or is one where principles from more settled legal disciplines are found to have particular applications, see generally Timothy Davis, What Is Sports Law?, 11 Marq. Sports L. Rev. 211 (2001) and Simon Gardiner et al, Sports Law 37-93 (3d ed, 2006). See also Lars Halgreen, European Sports Law; A Comparative Analysis of the European and American Models of Sport 23-32 (2004) for a suggested framework for determining the content of sports law.*
- 7 *Some U.S. (e.g., Marquette, Florida Coastal, and Tulane) and Australian (e.g., Melbourne), law schools now offer very popular specialized programs of study in sports law as part of their J.D. and/or LL.M. curriculums.*
- 8 *Sports provide many illustrations and examples that can be used to facilitate classroom teaching and learning, including usage by law professors to enhance student understanding of other legal doctrines. For example, cricket and goal-tending can be used to teach cause-in-fact doctrine in tort and criminal law. See David Fraser, Cricket and the Law: The Man in White is Always Right (Routledge, London, 2005) 125-132. Sports also may be used to enliven a drowsy class by mentioning a judicial opinion or fact scenario involving a sports-related incident or a celebrity athlete. Sport is a setting in which judges can be carried away (or least depart from their aura of stateliness) much to the entertainment of students and observers. In Zhu v Treasurer of New South Wales (2004) 218 CLR 530 at 535 (a case concerning the tort of inducing breach of contract) the High Court of Australia in a joint judgment observed in the opening sentence, ‘It is a truth almost universally acknowledged - a truth unpatriotic to question - that the period from 15 September 2000 to 1 October 2000, when the Olympic Games were held in Sydney, was one of the happiest in the history of that city. The evidence in this case, however, reveals that the preparations for that event had a darker side.’ Regarding American jurisprudence, “There was something about baseball that turned cerebral judges into pennant-waving schoolboys; that caused them to lose their judicial bearings, to twist precedents, and to jeopardize the dignity of the federal courts; and that made it nearly impossible for any litigant to defeat the baseball establishment. This case was about more than Federal Baseball and Toolson or Justice Holmes and stare decisis; it was about the grip of the national pastime on the minds of the men in black robes. This was what Flood was up against as his lawsuit made its way to the Supreme Court.” Brad Snyder, A Well-Paid Slave; Curt Flood’s Fight for Free Agency in Professional Sports (2006) 223. To use Barry Bonds as another example, several legal issues have arisen: 1) whether his career home run total should be recognized as MLB’s all-time record in light of allegations he used and lied about banned performance-enhancing substances; 2) ownership of the baseball Bonds hit that broke Hank Aaron’s career home run record; and 3) the application of federal Constitutional law to governmental seizure of confidential electronic records evidencing his positive test for banned performance-enhancing substances.*
- 9 [http://portal.unesco.org/en/ev.php-URL\\_ID=31037&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31037&URL_DO=DO_TOPIC&URL_SECTION=201.html).
- 10 *Australia and the United States of America ratified the Convention on January 17, 2006 and August 25, 2008 respectively. State Parties are listed at: <<http://portal.unesco.org/la/convention.asp?KO=31037&language=E>> accessed December 31, 2009.*
- 11 *International Convention against Doping in Sport 2005, art 5. However, under the laws of both Australia and the United States, the Convention is not “self-executing” in the sense of automatically becoming enforceable domestic law. As a general proposition, federal domestic legislation is required. See generally Medillin v. Texas, 552 U.S. 491, (2008); Richardson v Forestry Commission (1988) 164 CLR 261. Following ratification and in order to comply with the Convention, Australia replaced its anti-doping legislation with the Australian Sports Anti-Doping Authority Act 2006 (Cth). Rather than compelling domestic sports leagues and governing bodies to comply with the WADA Code, the Australian government’s policy has been to (successfully) exert pressure by means of adverse publicity and threatened withdrawal of financial support. Thus far, the United States Congress has not enacted enabling legislation. Even if it were to do so, the flexible terms of article 5 of the Convention would not require Congress to compel U.S. professional sports leagues and governing bodies to comply with the WADA Code.*
- 12 *The modern Olympic Movement consists of those “organisations, athletes and other persons who agree to be guided by the Olympic Charter.” “Olympic Movement,” at*

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- [http://www.olympic.org/uk/organisation/movement/index\\_uk.asp](http://www.olympic.org/uk/organisation/movement/index_uk.asp). There are numerous organizations and persons that are part of the Olympic Movement, including the IOC, International Sports Federations (IFs) (the international governing bodies for each Olympic sport), National Olympic Committees (NOCs), National Governing Bodies (NGBs) for each Olympic sport, the World Anti-Doping Agency, the Court of Arbitration for Sport, and the Olympic Museum as well as millions of individual athletes, judges, and coaches.
- 13 See Willy Voet, *Breaking the Chain: Drugs and Cycling: The True Story* (2nd ed, 2002). On July 8, 1998, Voet was stopped by customs officials on the Franco-Belgian border. He was the 'soigneur' (trainer) for the Festina cycling team competing in the Tour de France. A search of his car produced various sophisticated performance-enhancing drugs and doping equipment. Voet was arrested, briefly imprisoned and eventually convicted of various offences against French law relating to supplying and inciting the use of drugs. Along with other team management and support staff, he received a suspended jail sentence and was fined.
  - 14 There are 193 national governments that are signatories to the Declaration: <http://www.wada-ama.org/en/World-Anti-Doping-Program/Governments/Copenhagen-Declaration-on-Anti-Doping-in-Sport/List-of-signatories/> accessed January 22, 2010.
  - 15 The current edition of the WADA Code (effective January 1, 2009) is available at [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-The-Code/WADA\\_Anti-Doping\\_CODE\\_2009\\_EN.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf) (accessed January 1, 2010).
  - 16 For a brief account from an insider, see Richard W Pound, *Inside Dope* (Wiley, Mississauga ON, 2006) 91-104.
  - 17 See eg, Tom Donohoe and Neil Johnson, *Foul Play; Drug Abuse in Sports* (Basil Blackwell, Oxford UK, 1986) 2-4; Barrie Houlihan, *Dying to Win; Doping in Sport and the Development of Anti-Doping Policy* (Council of Europe Publishing, Strasbourg, 1999) 33-4; Michelle Verroken, 'Drug Use and Abuse in Sport' in David Mottram (ed), *Drugs in Sport* (E & F N Spon, London, 2nd ed 1996) 18-19.
  - 18 However, it has been claimed controversially that these arguments are of relatively recent origin and that doping was largely tolerated if not accepted for significant periods of time. See Paul Dimeo, *A History of Drug Use in Sport 1876-1976: Beyond Good and Evil* (Routledge, London, 2007). But see Albert Dirix and Xavier Sturbois, *The First Thirty Years of the International Olympic Committee Medical Commission, 1967-1997* (International Olympic Committee, Lausanne, 1999) 13, 16 and Ken Fitch, 'Book Review: A History of Drug Use in Sport 1876-1976: Beyond Good and Evil' (2007) 42 *British Journal of Sports Medicine* 76.
  - 19 Dirix and Sturbois, *supra* note 18 at 14. It should be noted that while the IOC had power to act in respect of the Olympic Games, it could not make rules of direct application in relation to the activities of other bodies. Also, chemical testing was not introduced for around another 30 years.
  - 20 Reports were received of 'obvious signs of the reckless use of medicinal substances' at the Helsinki (1952) and Melbourne (1956) Olympic Games: *Id.* at 13. There is an earlier report of post World War II drug use from the London Olympic Games in 1948. Dimeo, *supra* note 18 at 54.
  - 21 The death of a cyclist at the Rome Olympic Games was allegedly the result of the use of amphetamines: Dirix and Sturbois, *supra* note 18 at 13. However, this cause of death has been vigorously contested: V Møller, Knud Enemark Jensen's Death During the 1960 Rome Olympics: A Search for Truth?, 25 *Sport in History* 452 (2005). Shortly afterwards in 1961, the IOC established a Medical Commission and at the 1964 Olympic Games in Tokyo attempts were made to test cyclists for doping, but this led to a boycott. The death of the British cyclist Tommy Smith in 1967 prompted the reconstitution of the Medical Commission into its modern-day form: Dirix and Sturbois, *supra* note 18 at 13-14.
  - 22 This was conducted by way of analysis of a sample of an athlete's urine and this remains the principal method today.
  - 23 See eg, Michelle Verroken and David Mottram, 'Doping Control in Sport' in David Mottram (ed), *Drugs in Sport* (E & F N Spon, London, 2nd ed 1996) at 234.
  - 24 Prohibitions were extended to include methods of doping such as 'blood doping' and attempts to foil reliable testing ranging from refusing to provide urine samples for testing to the substitution of 'clean' urine.
  - 25 Verroken and Mottram, *supra* note 23 at 239-41; Dirix and Sturbois, *supra* note 18 at 33-34.
  - 26 Out-of-competition testing was introduced as a response initially to anabolic steroids which could deliver lasting performance-enhancing effects but be cleared from an athlete's body well before competition day: Verroken and Mottram, *supra* note 23 at 238.
  - 27 Perhaps the most notorious incident was the disqualification of Canadian runner, Ben Johnson, from the men's 100 meter sprint at the Seoul Olympic Games in 1988. Charles L Dubin, *Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance* (Canadian Government Publishing Centre, Ottawa, 1990) at 234-309. For other views of this incident, see Charlie Francis, *Speed Trap: Inside the Biggest Scandal in Olympic History* (Grafton Book, London, 1990) and Andrew Jennings and Vyv Simson, *The Lords of the Rings* (Simon & Schuster, London, 1992) at 243-245.
  - 28 See generally Dubin, *supra* note 27.
  - 29 See, e.g, Senate Standing Committee on Environment, Recreation and the Arts, *Parliament of Australia, Drugs in Sport Interim Report* (1989) and Senate Standing Committee on Environment, Recreation and the Arts, *Parliament of Australia, Drugs in Sport Second Report* (1990).
  - 30 For example, Portugal: *Anti-Doping Regulation, Decreto-Lei 374/79*, 8 September 1979; France: Act number 89-432, 28 June 1989 'for the prevention and punishment of the use of doping agents at sporting competitions and events'.
  - 31 Among the first, if not the first, was the Australian Sports Drug Agency established by the Australian Sports Drug Agency Act 1990 (Cth).
  - 32 See, e.g., Council of Europe Anti-Doping Convention, opened for signature November 16, 1989, CETS 135 (entered into force March 1, 1990).
  - 33 See, e.g., International Anti-Doping Arrangement 1997 (IADA) which was a multi-lateral agreement between Australia, Canada, Denmark, Finland, the Netherlands, New Zealand, Norway, Sweden, and the United Kingdom. The member countries in IADA worked to establish international standards of anti-doping practice.
  - 34 The astonishingly evil practices of the former German Democratic Republic (East Germany) in regard to doping its athletes in the pursuit of political agendas was coming to light. Werner Franke and Brigitte Berendonk, *Hormonal Doping and Androgenization of Athletes: A Secret Program of the German Democratic Republic Government 43 Clinical Chemistry* 1262(1997); Steven Ungerleider, *Faust's Gold: Inside the East German Doping Machine* (2001). It was feared that this practice had spread to female Chinese swimmers in particular but whether doping in Chinese sport was state-sponsored has been hotly debated. For commentary on doping and doping scandals in China, see Dong Jinxia, *Women, Sport and Society in Modern China* (2003); Bruce Kidd, Robert Edelman and Susan Brownell, *Comparative Analysis of Doping Scandals: Canada, Russia and China* in Wayne Wilson and Edward Dorse (eds), *Doping in Elite Sport: The Politics of Drugs in the Olympic Movement* (2001) and David Galluzzi, *The Doping Crisis in International Athletic Competition: Lessons from the Chinese Doping Scandal in Women's*

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- Swimming 10 Seton Hall J. Sport Law 65 (2001).
- USA Track and Field (USATF) received strong international criticism for not reporting alleged breaches of doping rules to the governing international federation. At least 13 elite athletes who were ultimately “cleared” were involved. See, e.g. Pound, *supra* note 14 at 96. The USATF cited due process and privacy reasons for refusing to make disclosure unless and until guilt was found. However, critics accused the USATF of favoring its own athletes because by adopting a “secretive” approach it circumvented the international rules which provided for immediate interim suspension pending the outcome of disciplinary proceedings. Ultimately, the USATF was cleared of any wrongdoing by the CAS, which concluded that the USATF had not acted contrary to the rules of the governing international federation. *International Association of Athletics Federations v USA Track & Field*, CAS 2002/O/401, award of Jan. 10, 2003, in *DIGEST OF CAS AWARDS III 2001-2003* 37 (Matthieu Reeb ed., 2004). See also Travis T Tygart, *Winners Never Dope and Finally, Dopers Never Win: USADA Takes Over Drug Testing of United States Olympic Athletes*, 1 DePaul J. Sports L. Contemp. Probs. 124, 126 (2003).
- 35 See, e.g., Lauri Tarasti, *Legal Solutions in International Doping Cases: Awards by the IAAF Arbitration Panel 1985-1999* (SEP Editrice, Milan, 2000).
- 36 See, e.g., *Edwards v British Athletic Federation* [1997] Eu LR 721 (four year ban for a first offence held to be reasonable and proportional by English High Court); *Johnson v Athletics Canada* (1998) 114 OAC 388 (life ban for a second offence held not to be an unreasonable restraint on trade by the Ontario Court of Appeal); *Krabbe v International Amateur Athletic Federation*, decision of the Munich Region Court of 17 March 1995, SpuRt 1995, 161, 166 (in Germany, a two-year suspension is maximum permissible under fundamental rights and democratic principles), affirmed by decision of the Munich Region Court of Appeal of 28 March 1996, SpuRt 1996, 133, 138 (three year ban excessive and disproportionate for a first doping offence). See generally Gabrielle Kaufman-Kohler, Antonio Rigozzi and Giorgio Malinverni, *Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law* 26 February 2003, paras 160-1, available at <http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf>, accessed December 29, 2009.
- 37 Rule 44 of the Olympic Charter stipulates that the “World Anti-Doping Code is mandatory for the whole Olympic Movement,” and Rule 26 stipulates that recognition of an IF by the IOC is dependent upon the IF adopting and implementing the WADA Code. *International Olympic Committee, Olympic Charter* available at [http://www.olympic.org/Documents/olympic\\_charter\\_en.pdf](http://www.olympic.org/Documents/olympic_charter_en.pdf) (last visited March 17, 2010).
- 38 See *infra* note 60 and accompanying text.
- 39 Thus far, U.S. professional sports leagues such as the National Football League, National Basketball League, National Hockey League, and Major League Baseball (whose respective drug testing programs are collectively bargained because their players have unionized) and the National Collegiate Athletic Association (which has unilaterally promulgated a separate drug testing policy for its more than 400,000 student-athletes) are notable exceptions.
- 40 World Anti-doping Agency, *World Anti-doping Code*, art. 1-4 available at [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-The-Code/WADA\\_Anti-Doping\\_CODE\\_2009\\_EN.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf). (last visited March 17, 2010) (hereinafter “WADA Code”).
- 41 WADA Code art. 5-6.
- 42 WADA Code art. 7-8.
- 43 WADA Code art. 9-12.
- 44 WADA Code art. 13.
- 45 WADA Code art. 20-22.
- 46 WADA Code art. 18-19.
- 47 World Anti-Doping Agency, *2010 Prohibited List* (World Anti-Doping Agency, Montreal, 2009) available at [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-Prohibit-ed-list/WADA\\_Prohibited\\_List\\_2010\\_EN.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-Prohibit-ed-list/WADA_Prohibited_List_2010_EN.pdf) (accessed March 14, 2010).
- 48 World Anti-Doping Agency, *International Standard for Testing* 2009 (World Anti-Doping Agency, Montreal, 2008) available at [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-IS-Testing/WADA\\_Int.Standard\\_Testing\\_2009\\_EN.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-Testing/WADA_Int.Standard_Testing_2009_EN.pdf) (accessed December 31, 2009).
- 49 World Anti-Doping Agency, *International Standard for Laboratories* 2009 (World Anti-Doping Agency, Montreal, 2008) available at [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-IS-Laboratories/WADA\\_Int.Standard\\_Laboratories\\_2009\\_EN.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-Laboratories/WADA_Int.Standard_Laboratories_2009_EN.pdf) (accessed December 31, 2009).
- 50 World Anti-Doping Agency, *International Standard for Therapeutic Use Exemptions* 2010 (World Anti-Doping Agency, Montreal, 2009) available at [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-IS-TUE/WADA\\_ISTUE\\_2010\\_EN.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-TUE/WADA_ISTUE_2010_EN.pdf) (accessed December 31, 2009).
- 51 World Anti-Doping Agency, *International Standard for the Protection of Privacy and Personal Information* 2009 (World Anti-Doping Agency, Montreal, 2009) available at [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-IS-PPPI/WADA\\_IS\\_PPPI\\_2009\\_EN.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-PPPI/WADA_IS_PPPI_2009_EN.pdf) (accessed December 31, 2009).
- 52 See *infra* notes 98-101 and accompanying text.
- 53 See *supra* notes 32 and 33 and accompanying text.
- 54 See, e.g., *China’s 2004 anti-doping regulations enacted pursuant to the Law of the People’s Republic of China on Physical Culture and Sports* available at [www.chinadn.cn/english/sanji/sj01.php?id=146](http://www.chinadn.cn/english/sanji/sj01.php?id=146) (accessed January 4, 2010). See also note 28 and accompanying text.
- 55 Some national anti-doping agencies such as Drug Free Sport New Zealand ([www.drugfreesport.org.nz](http://www.drugfreesport.org.nz)) and the South African Institute for Drug-Free Sport ([www.drugfreesport.org.za](http://www.drugfreesport.org.za)) are public entities established by legislation (respectively the Sports Anti-Doping Act 2006 (NZ) and South African Institute for Drug-Free Sport Act 14 of 1997 (RSA)). See also note 29 and accompanying text. However, not all national anti-doping agencies are state bodies; notable examples of private non-profit bodies are the Canadian Centre for Ethics in Sport ([www.cces.ca](http://www.cces.ca)) and the United States Anti-Doping Agency ([www.usada.org](http://www.usada.org)), although each is officially recognised by their respective governments as the national anti-doping agency.
- 56 Houlihan, *supra* note 17 at 174.
- 57 WADA Code art 13.
- 58 See *infra* notes 162-169 and accompanying text.
- 59 The tightly knit pyramid structure of the Olympic Movement combined with its authority to exclude particular sports from the Olympic Games have given the IOC the necessary leverage to exert considerable pressure on international sports governing bodies to adopt the WADA Code. In addition, the IOC is able to condition a country’s hosting of the Olympic Games on its government’s adoption, compliance, and enforcement of the WADA Code.
- 60 See generally MATTHEW J. MITTEN ET AL., *supra* note 2 at 278-28.
- 61 23 F.3d 1110 (6th Cir. 1994).

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- 62 In addition, it is questionable whether national courts have the requisite expertise to resolve international sports disputes. Judge Richard Posner, a prominent federal appellate court judge, has observed: "there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to compete in the Olympic games." *Michels v USOC*, 741 F.2d 155, 159 (7th Cir. 1984).
- 63 Distinctive U.S. features: separate regulatory authority based on level of competition; "amateur" intercollegiate and interscholastic competition; closed professional leagues; no national sports ministry or direct federal government regulation; Olympic sports privately funded rather than state-sponsored training schools that financially support athletes. European features: central government funding, regulation, and encouragement of sports participation; club sport model rather than tie to educational institutions; open leagues and promotion and relegation; hierarchical vertical pyramid. See generally James A. R. Nafziger, *A Comparison of the European and North American Models of Sports Organization in EU, Sport, Law and Policy* (S. Gardiner, R. Parrish & R. Siekmann, eds.) (T.M.C. Asser Instituut 2009). Australian features: influenced by large geographic size and a smaller market with widely separated population centers; until relatively recently entire semi-professional leagues located in each major center; national professional leagues now established; closed professional leagues; private ownership of professional teams either non-existent or new; club sports model rather than university-based sports; strong government sports development policy; many professional leagues include a New Zealand based team. See Bob Stewart, *Australian Sport: Better by Design?* (Routledge, 2004).
- 64 See generally Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards*, 10 *Pepperdine Dispute Resolution L. J.* 51 (2009).
- 65 Daniel H. Yi, *Turning Medals into Metal: Evaluating the Court of Arbitration for Sport as an International Tribunal*, 6 *Asper Rev. Int'l Bus. & Trade L.* 289, 290 n. 7 (2006).
- 66 The CAS is recognized under the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations. Ian S. Blackshaw, *Introductory Remarks, The Court of Arbitration for Sport 1984-2004* at 4 (Ian S. Blackshaw et al. eds. 2006) (As a result, "CAS rulings are legally effective and can be enforced internationally.")
- 67 Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, in *The Court of Arbitration for Sport 1984-2004* at 31, 32 (Ian S. Blackshaw et al. eds. 2006)
- 68 CODE OF SPORTS-RELATED ARBITRATION [hereinafter "Code"] available at [http://www.tas-cas.org/d2wfiles/document/3923/5048/0/Code%202010%20\(en\).pdf](http://www.tas-cas.org/d2wfiles/document/3923/5048/0/Code%202010%20(en).pdf) (last visited March 15, 2010).
- 69 ICAS currently has two U.S. members, Michael B. Lenard and Judge Juan R. Torruella, and one Australian member, John D. Coates, who is the ICAS Vice-President.
- 70 Code, S20.
- 71 These include the FIFA World Cup, Commonwealth Games and Union of European Football Associations (UEFA) European Football Championships.
- 72 Code, S16.
- 73 Code, S14
- 74 *Id.*
- 75 CAS website at <http://www.tas-cas.org/d2wfiles/document/452/5048/0/Liste%20nationalit%202009.pdf> (last visited March 17, 2010).
- 76 Code, R28.
- 77 See Gabrielle Kaufmann-Kohler, *Identifying and Applying the Law Governing the Arbitration Procedure - The Role of the Law of the Place of Arbitration*, *Congress Series No 9, International Council for Commercial Arbitration* 336, 348 (1998) (the objective of choosing Lausanne as the seat of CAS arbitrations is to provide the advantage of a uniform procedural regime).
- 78 The Swiss Federal Code on Private International Law (PIL), reprinted in *COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION AND MEDIATION RULES* app. 3, 162 (2004) requires an arbitration tribunal to resolve a dispute pursuant to the rules of law chosen by the parties, or absent any choice, according to the law with the closest connection to the dispute. Article 187. The choice of law rules in the CAS Code are consistent with the Swiss PIL. See *infra* notes \_\_\_ and accompanying text.
- 79 *Arbitration CAS 2004/A/628, IAAF v. USA Track and Field & Jerome Young*, award of 28 June 2004 ¶73 at 18 [hereinafter *Jerome Young*].
- 80 James A. R. Nafziger, *INTERNATIONAL SPORTS LAW* (2d. Ed.) at 48-54 (Transnational Publishers, Inc. 2004) and Michael J. Beloff, Tim Kerr and Marie Demetriou, *SPORTS LAW* (Hart Publishing, Oxford, 1999) at 7-12. But see Allan Erbsen, *The Substance and Illusion of Lex Sportiva*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004* 441 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds. 2006) (concluding that it is inaccurate to describe collective body of CAS awards as *lex sportiva*). See also Ken Foster, *Is There a Global Sports Law? 2 Entertainment Law 1* (2003) and *Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport's Jurisprudence 3 Entertainment and Sports L. J.* available at <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume3/number2>.
- 81 *Jerome Young*, *supra* note 79, at ¶73.
- 82 Code, R59, available at <http://www.tas-cas.org/statutes> (last visited April 4, 2009). See *infra* notes 128-134 and accompanying text for a discussion of the nature and scope of the SFT's judicial review of CAS awards.
- 83 A. \_\_\_ and B. \_\_\_ v IOC and FIS ("Lazutina"), 4P.267-270/2002 (1st Civ. Ct., 27 May 2003) (translation), in *DIGEST OF CAS AWARDS III 2001-2003* (Matthieu Reeb ed., 1998) at 674; G. v. Federation Equestre Internationale, 1st Civ. Ct., 15 March 1993) (translation), in *DIGEST OF CAS AWARDS 1986-1998* (Matthieu Reeb ed., 1998) at 561. Notwithstanding the SFT's ruling, some commentators question whether the CAS is sufficiently independent from the IOC and some members of the Olympic Movement. See, e.g., Andrea Pinna, *The Trials and Tribulations of the Court of Arbitration for Sport: Contribution to the Study of the Arbitration of Disputes Concerning Disciplinary Sanctions*, 1/2 *International Sports Law Journal* 8, 13-14 (2005); Antonio Rigozzi, *L'Arbitrage International en Matière de Sport* (2005); Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 *Loyola U. Chicago L. J.* 1203, 1231-1232 (2005).
- 84 See *Project on International Courts and Tribunals, The International Judiciary in Context (Chart)*, available at [http://www.pict-pcti.org/publications/synoptic\\_chart.html](http://www.pict-pcti.org/publications/synoptic_chart.html) (last visited on July 15, 2009) (Chart lists several permanent arbitral tribunals).
- 85 Yi, *supra* note 65 at 290. See also Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 *Law & Contemp. Probs.* 221, 245 (2004) (observing that the CAS "has earned a reputation for independence and fairness, although it, too, is a mandatory arbitration program" and "is viewed as establishing a consistent body of arbitral authority, a kind of *lex sportiva*, because of its combination of expertise and transparency.").
- 86 Yi, *supra* note 65 at 291.

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- 87 *Id.* at 291.
- 88 See *infra* notes 137-138 and accompanying text.
- 89 “[The] globalization of law creates a multitude of decentred law-making processes in various sectors of civil society, independently of nation-states. . . . They claim worldwide validity independently of the law of nation-states and in relative distance to the rules of international public law. They have come into existence not by formal acts of nation-states but by strange paradoxical acts of self-validation.” Gunther Teubner, *Global Law Without a State* (1997) at xiii.
- 90 Arbitration CAS 98/200, *AEK Athens v UEFA*, award of 20 August 1999, at 103 (“Sports law has developed and consolidated along the years, particularly through the arbitral settlement of disputes, a set of unwritten legal principles—a sort of *lex mercatoria* for sports or, so to speak, a *lex ludica* to which national and international sports federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law, provided that they do not conflict with any national ‘public policy’ (‘ordre public’) provision applicable in a given case.”). But see Nafziger, *supra* note 80 at 48-49 (observing “the association of the two terms may be somewhat strained” because “the status and general scope of the emerging *lex sportiva* are . . . much less substantial than the *lex mercatoria* within their respective spheres of application”).
- 91 See, e.g., Bryan Caplan & Edward P. Stringham, *Privatizing the Adjudication of Disputes*, 9 *Theoretical Inquiries in Law* 503 (July 2008) (asserting that “[p]ublic courts should, as a matter of policy, respect contracts that specify final and binding arbitration,” but failing to cite the CAS and its arbitration awards as an example, which would have strengthened their argument).
- 92 Recently, the CAS Secretary General began posting the full text of current CAS awards on the CAS website and is developing a searchable archive of past awards. Pursuant to an agreement with the United States Olympic Committee (USOC), the National Sports Law Institute (NSLI) of Marquette University Law School is developing an electronic summary and index of issues resolved by CAS awards that will be posted on both the USOC and NSLI websites.
- 93 See, e.g., Erbsen, *supra* note 80 at 452 (finding a “strong textualist theme in CAS doping opinions”).
- 94 In *Canas v ATP Tour*, 4P.172/2006 (2007) (Switz.), ATF 133 III 235, translated in *Swiss 1 Swiss Int’l Arb. L. Rep* 65, 84-85, the SFT recently observed that: “Sports competition is characterized by a highly hierarchical structure, as much on the international as on the national level. Vertically integrated, the relationships between athletes and organisations in charge of the various sports disciplines are distinct from the horizontal relationship represented by a contractual relationship between two parties. . . . This structural difference between the two types of relationships is not without influence on the volitional process driving the formation of every agreement. . . . [E]xperience has shown that, by and large, athletes will often not have the bargaining power required and would therefore have to submit to the federation’s requirements, whether they like it or not. Accordingly, any athlete wishing to participate in organised competition under the control of a sports federation whose rules provide for recourse to arbitration will not have any choice but to accept the arbitral clause, in particular by subscribing to the articles of the sports federation in question in which the arbitration clause was inserted. . . .” It ruled that mandatory arbitration provisions are enforceable because the CAS provides a swift, independent, and impartial means of resolving international sports disputes by a specialized tribunal. However, as a “counterbalance,” an athlete must have a right to have an adverse CAS award judicially reviewed by the SFT to remedy “breaches of fundamental principles and essential procedural guarantees that which may be committed by the arbitrators called upon to decide in his case.” *Id.* at 86.
- 95 A CAS panel will not rewrite an international sports governing body’s rules or second guess its decisions or policies. Arbitration CAS 2006/A/1165, *Ohuruogu v UK Athletics Ltd*, award of 3 April 2007 at 11-12. On the other hand, one CAS panel has recognized the need for “general principles of law” to govern international sports federations in addition to their own rules or applicable national law. For example, procedural fairness should be required, and “arbitrary or unreasonable rules and measures” should be prohibited. Arbitration CAS 98/200, *AEK Athens v UEFA*, award of 20 August 1999) at 102-03.
- 96 One scholar has suggested: “Consideration should also be given to an organizational structure whereby CAS can address the development of law in arbitral sporting decisions. CAS decisions are increasingly cited by parties and arbitral panels as authority for rules upon which to decide cases, yet the persuasive effect of these citations to arbitral cases is unclear. For CAS to be a true ‘Supreme Court for Sport,’ it should institute a formal appellate body akin to a U.S. Supreme Court with discretionary review, to rule on conflicting interpretations of *lex sportiva* rendered by CAS panels.” Maureen Weston, *Simply a Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport*, 38 *Ga. J. Int’l & Comp. L.* 97, 128 (2009).
- 97 For example, considering that Olympic sports organizations currently provide substantial funding for the CAS and appoint 60% of the members of the ICAS, which has the exclusive authority to appoint CAS arbitrators (many of whom have ties to Olympic sports governing bodies), is it appropriate to have a closed list of CAS arbitrators? In addition, scholarly analysis of the current CAS arbitrator conflict of interest rules and SFT rulings regarding the grounds for challenging a CAS arbitrator’s independence is needed.
- 98 There are, however, some significant areas of law in which displacement is very unlikely to occur. For example, criminal laws generally apply to sports-related conduct within a country. The Italian government refused to honor the Turin Olympic Games organizing committee’s promise that Italy’s criminal sports doping laws would not be enforced during the 2006 Turin Olympics against foreign Olympic athletes. Phil Sheridan, *Italy’s Drug Laws Put IOC to the Test*, PHILA. INQUIRER, Feb. 9, 2006, at H2; Rosie DiManno, *A Gold in the Scandal Event*, TORONTO SUN, Feb. 22, 2006, at A6. Visiting foreign athletes have been prosecuted for violating domestic criminal laws despite the assertion of a private sports league that player discipline for on-ice violence should be exclusively an internal governance matter. For example, in 2000, the Boston Bruins’ Marty McSorley was convicted of assaulting Donald Brashear, Vancouver Canucks’ player, with a weapon (a hockey stick) during an NHL game. Mitten, *supra* note 58 at 926-931 (discussing *Regina v. McSorley*, 2000 British Columbia Provincial Ct. 0116 (Criminal Div. 2000)). National tax laws also apply to income earned by foreign athletes within a county’s borders, although it is important to avoid double taxation by multiple countries. See Rijkele Betten, *The Avoidance of the Double Taxation of Sports Persons*, 2004/1-2 *Int’l Sports L. J.* 78; Rijkele Betten (ed), *The International Guide to the Taxation of Sportsmen and Sportswomen* (looseleaf).
- 99 Some other examples are cited in Alexandre M. Mestre, *The Law of the Olympic Games* (TMC Asser Press, Le Hague, 2009) 16-18.
- 100 See generally Matthew J. Mitten, *Forward, Sports Law as a Reflection of Society’s Laws and Values*, 38 *SO. TEX. L. REV.* 999 (1997).
- 101 Almost 20 years ago, Professor James Nafziger, a leading international law and international sports law scholar, observed that “[t]he much-neglected field of international sports law is changing significantly. . . . The evolving legal framework has important implications for participants and spectators in both sports and the international legal process. Among students and practitioners of international law, the role of nongovernmental sports organizations in gaining governmental and intergovernmental support, in shaping a still immature body of law, in acquiring a measure of legal personality, and in responding to new issues is of general

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- professional interest. Athletic competition is a fundamental human activity whose history has been replete with international problems. Understanding the peculiar blending of governmental, intergovernmental and nongovernmental authority over political and other consequences of sports activity is therefore significant.” James A. R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends*, 86 *Am. J. Int'l L.* 489, 489 (1992). See also James A. R. Nafziger, *International Sports Law as a Process for Resolving Disputes*, 45 *Int'l & Comp. L. Quarterly* 130 (1996) (“Normative trends thus confirm a growing commitment of national legal systems to the special processes of international sports law. The [CAS], in particular, is assuming a central position for avoiding, managing and resolving international disputes. What remains is for the legal profession throughout the world to take international sports law seriously.”).
- 102 Nils Jansen & Ralf Michaels, *Beyond the State? Rethinking Private Law: Introduction to the Issue*, 56 *Amer. J. Comp. L.* 527, 527 (2008).
- 103 Christiane C. Wendehorst, *The State as a Foundation of Private Law Reasoning*, 56 *Amer. J. Comp. L.* 567, 593-95 (2008).
- 104 Jurgen Basedow, *The State's Private Law and the Economy-Commercial Law as an Amalgam of Public and Private Rule-Making*, 56 *Amer. J. Comp. L.* 703, 709-10 (2008).
- 105 Legal pluralism is based on “the premise that people belong to (or feel affiliated with) multiple groups and understand themselves to be bound by the norms of these multiple groups.” Paul S. Berman, *Global Legal Pluralism*, 80 *S. Cal. L. Rev.* 1155, 1169 (2007). “[M]any community affiliations . . . may at times exert tremendous power over our actions even though they are not part of an ‘official’ state-based system.” *Id.* at 1170. Thus, “situations [arise] in which two or more state and non-state normative systems occupy the same social field and must negotiate the resulting hybrid legal space. *Id.* at 1170. Conflicts arising out of overlapping legal rules created by Olympic and international sports private agreements and national laws must be resolved either by “reimposing the primacy of territorially-based (and often nation-state-based) authority or by seeking universal harmonization.” *Id.* at 1162-1163 and n.31.
- 106 The tide, however, is changing. In his concluding remarks during the 60th Congress of the International Association of Legal Science, which was hosted by the Istanbul University Law Faculty Centre for Comparative Law, in Istanbul, Turkey on May 13-14, 2010, Mauro Bussani, Professor of Comparative Law at the University of Trieste, Italy, observed that comparative sports law is a “very attractive scientific discipline.” He stated that “conceiving sports law as just a legal specialization, in which national and international legal doctrines are subject to special deviations, exceptions, exclusions, would be inconsistent with reality. As my learned colleagues showed us during these two days, sports law can indeed be viewed as a legal system in itself. . . . As any legal system, sports law has its own institutions, procedures, and rules. As most legal systems, it is made up of different layers, which present themselves as stratified one upon the other. Some of these layers are regionally fragmented, while others have been internationally harmonized by homogenous practices. Legal solutions often circulate from one region to the other ones, and frequently this circulation gives rise to legal transplants and legal borrowing.” Mauro Bussani, *Sports Law As A Comparative Discipline* [need citation]
- 107 (1988) 81 ALR 51.
- 108 [1995] ECR I-4921.
- 109 The case and its consequences have generated a voluminous literature in books and articles. See, e.g., Roger Blanpain and Rita Inston, *The Bosman Case: The End of the Transfer System?* (1996); Braham Dabscheck, *The Globe at Their Feet: FIFA's New Employment Rules - I 7(1) Sport in Society* 69 (2004); Braham Dabscheck, *The Globe at Their Feet: FIFA's New Employment Rules - II, 9(1) Sport in Society* 1(2006); David McArdle, *From Boot Money to Bosman; Football, Society and the Law* (2001); P E Morris, S Morrow and P M Spink, *EC Law and Professional Football: Bosman and Its Implications*, 59 *Modern Law Review* 893 (1996); Stefaan Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman* (2005); Jens Pelle Van den Brink, *EC Competition Law and the Regulation of Football: Part I* 21 *European Competition Law Review* 359 (2000); Jens Pelle Van den Brink, *EC Competition Law and the Regulation of Football: Part II*, 21 *European Competition Law Review* 420 (2000).
- 110 *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413 at 438.
- 111 *The ECJ considered it unnecessary to adjudicate plaintiff's claim that the rules contravened Articles 85 and 86 (now Articles 101 and 102) relating to freedom of economic competition.*
- 112 Morris, Morrow and Spink, *supra* note 109 at 902.
- 113 Courts in other countries had long recognised the contrariness of such transfer systems to laws protecting freedom of economic competition and employment. See, e.g., Buckley v Tutty (1971) 125 CLR 353 (Australia); *Blackler v New Zealand Rugby Football League, Inc.* [1968] NZLR 547 (New Zealand); *Mackey v National Football League*, 543 F.2d 606 (8th Cir. 1976) (USA). In Europe, serious doubt existed as well. See, e.g., *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413 and Janssen Van Raay, Report of the Committee on Legal Affairs and Citizens' Rights on the Freedom of Movement of Professional Footballers in the Community (European Parliament, Session Documents Series A, March 1, 1989).
- 114 Bosman demonstrates that court rulings which apply national laws to international sports rules and agreements can prove to be problematic because they do not accommodate the special circumstances and needs of international sports. FIFA responded to the ruling by amending its transfer regulations, which caused some Belgian trade unions to file a complaint with the European Commission alleging contravention of competition law (Articles 85 and 86 of the EC Treaty - now Articles 101 and 102 of the EU Treaty). Following protracted negotiation and political lobbying, during which FIFA and UEFA were able to convince the Commission of the special economics and social status of soccer, an agreement was reached on new Regulations for the Status and Transfer of Players to apply worldwide. See Braham Dabscheck, *The Globe at Their Feet: FIFA's New Employment Rules - I, 7(1) Sport in Society* 69 (2004). The development of the new rules was strongly influenced by European perspectives and it is an issue worthy of scholarly investigation as to whether the socio-economic and legal perspectives of Asia and the Americas have been sufficiently considered in adopting these worldwide rules.
- 115 740 F.2d 670 (9th Cir. 1984). American courts also have rejected state discrimination law claims by foreign athletes seeking to march in opening ceremonies in Olympic Games held in the United States under flags of countries not recognized by the IOC. See *Spindulys v. Los Angeles Olympic Organizing Comm.*, 175 Cal. App. 3d 206, 220 Cal. Rptr. 565 (Cal. App. 1985); *Ren-Guey v. Lake Placid 1980 Olympic Games*, 72 A.D.2d 439, 424 N.Y.S.2d 533, *aff'd*, 49 N.Y.2d 771, 429 N.Y.S.2d 473 (1980).
- 116 *Id.* at 673.
- 117 *Id.* at 677. The dissenting judge argued: “The IOC made concessions to the widespread popularity of women's track and field by adding two distance races this year. The IOC refused, however, to grant women athletes equal status by including all events in which women compete internationally. In so doing, the IOC postpones indefinitely the equality of athletic opportunity that it could easily achieve this year in Los Angeles. When the Olympics move to other countries, some without America's commitment to human rights, the opportunity to tip the scales of justice in favor of equality may slip away. Meanwhile, the Olympic flame - which should be a symbol of harmony, equality, and justice - will burn less brightly over the Los Angeles Olympic Games.” *Id.* at 684.
- 118 2009 BCCA 522 (2009), 98 B.C.L.R. (4th) 141, 2009 B.C. LEXIS

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2465. On December 22, 2009, the Supreme Court of Canada refused appellants' leave to appeal. *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games 2009 CanLII 72220* (S.C.C.) available at: [www.canlii.org/en/ca/scc/doc/2009/2009canlii72220/2009canlii72220.pdf](http://www.canlii.org/en/ca/scc/doc/2009/2009canlii72220/2009canlii72220.pdf).
- 119 *Id.* at \_\_\_ ¶ 21
- 120 *Id.* at \_\_\_ ¶ 9
- 121 *Id.* at \_\_\_ ¶ 56
- 122 See also *USOC v Intelicence Corp.*, 737 F.2d 263, 268 (2d Cir.), cert. denied, 469 U.S. 982 (1984) (the Amateur Sports Act, a federal statute, “cannot be overborn” by the terms of IOC Charter which “is not a treaty ratified in accordance with constitutional requirements”).
- 123 A current high profile controversy, of particular interest to scholars studying the application of national and transnational civil liberties and personal privacy laws in an era of increasing globalization, provides an illustrative example of the on-going dispute concerning the primacy of national laws versus the need for uniform international sports rules and agreements. In Section IA, we observed that the international anti-doping regime has several features invasive of athletes' privacy interests. On January 1, 2009, WADA adopted a “whereabouts rule” requiring all elite athletes to provide three months' advance notice of their location one hour each day, seven days a week from 6am-11pm so they can be tested out-of-competition by WADA without any warning. European Union Sports Commissioner Jan Figel has demanded that the WADA revise this rule to comply with European privacy laws because “WADA rules do not supersede [the] laws of countries.” Raf Casert, *WADA Code Must Change*, EU Sports Chief Says, AP, April 27, 2009. In response, WADA president John Fahey claimed that doing so “could potentially undermine the fight against doping in sport.” *Id.* In January 2010, a Spanish court rejected a Spanish professional cyclist's claim that the Union Cycliste Internationale (UCI) (the IF for cycling)'s whereabouts rule, which was based on WADA's rule, breached his individual rights guaranteed by the Spanish Constitution. See January 27, 2010 UCI Press Release, “The Appeal by Carlos Roman Golbano is Rejected” available at [www.uci.ch/Modules/ENews/ENewsDetails.asp?id=NjcxOA&MenuId=MTYxNw&LangId=1&BackLink=%2FTemplates%2FUCI%2FUCI5%2FLayout%2Easp%3FMenuId%3DMTYxNw%26LangId%3D1](http://www.uci.ch/Modules/ENews/ENewsDetails.asp?id=NjcxOA&MenuId=MTYxNw&LangId=1&BackLink=%2FTemplates%2FUCI%2FUCI5%2FLayout%2Easp%3FMenuId%3DMTYxNw%26LangId%3D1).
- 124 Court of Arbitration for Sport, *Arbitration Rules for the Olympic Games*, Art. 17 available at <http://www.tas-cas.org/adhoc-rules> (last visited March 17, 2010).
- 125 Code, R58, *supra* note 68.
- 126 On the other hand, CAS arbitrators have expressed a willingness to rely on (or to at least survey) national laws when developing a rule of law to govern a dispute that cannot be resolved solely by applying a sports governing body's internal rules. See, e.g., *Arbitration CAS 2004/A/704*, *Yang Tae Young v International Gymnastics Federation*, award of 21 October 2004 (considering the extent to which courts have been willing to judicially review and interfere with a referee's application of the rules of the game or field of play decision).
- 127 See, e.g., *Arbitration CAS 2007/A/1312*, *Adams v CCES*, award of 16 May 2008 (finding no violation of Ontario Human Rights Code); *Arbitration CAS 2005/A/951*; *Arbitration CAS 2006/A/1149* and *2007/A/1211*, *WADA v FMF & Alvarez*, award of 16 May 2007 at 5-12 (CAS 2007) (rejecting athlete's claimed violation of Mexican law); *Arbitration CAS 2006/A/1002*, *Eder v Ski Austria*, award of 13 November 2006 (refusing to use Austrian law to invalidate challenged World Anti-Doping Code rules or their application to Austrian athlete by Austrian national governing body); *Arbitration CAS 2005/A/951*, *Canas v ATP Tour*, award of 23 May 2007 (no violation of Delaware, U.S. antitrust, or European Union law found).
- 128 *Arbitration CAS 2006/A/1110*, *PAOK FC v UEFS*, award of 25 August 2006 (rejecting Greek football club's request to apply Greek law to club licensing dispute with UEFA).
- 129 Switzerland's Federal Code on Private International Law (PIL), reprinted in *COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION AND MEDIATION RULES* app. 3, 162 (2004).
- 130 *In Canas v. ATP Tour*, 4P.172/2006 (2007) (Switz.), ATF 133 III 235, translated in *Swiss Int'l Arb. L. Rep* 65, the SFT vacated and remanded a CAS award because it violated an athlete's right to a fair hearing by not providing reasons for rejecting arguments that his doping sanction violated Delaware, United States, and European Union laws. The SFT ruled that CAS arbitrators must discuss all of the parties' arguments in their legal analysis of the relevant issues in dispute, including claims that applicable national or transnational laws have been violated. The panel must explain “if only briefly” their reasons “so that the petitioner could be satisfied upon a perusal of the award that the arbitrators had considered all of his arguments which had objective relevance, even if it was to dismiss them ultimately.” *Id.* at 98.
- 131 PIL, *supra* note 129, art. 190. See generally Antonio Rigozzi, *Available Remedies Against CAS Awards*, in *Sport Governance, Football Disputes, Doping and CAS Arbitration* (M. Bernasconi & A. Rigozzi, eds.) (Editions Weblaw, Berne 2009).
- 132 Rigozzi, *supra* note 131at 134-141.
- 133 N., J., Y., W. v. FINA, 5P.83/1999 (2d Civil Court, Mar. 31, 1999) at 779.
- 134 *Id.*
- 135 G. v. Int'l Equestrian Fed'n (FEI), CAS 92/63, award of Sept. 10, 1992 (translation), in *DIGEST OF CAS AWARDS 1986-1998 115* (Matthieu Reeb ed., 1998).
- 136 9 U.S.C. §§201-08.
- 137 Abbas Ravjani, *The Court of Arbitration for Sport: A Subtle Form of International Delegation*, 2 *J. Int'l Media & Ent. L. J.* 241, 251 (2009) (Ironically, as one commentator observes, “CAS has had success in having its judgments that arise from contractual disputes enforced, while [International Court of Justice] judgments arising out of treaties often have trouble being enforced.”).
- 138 In Appendix to 9 U.S.C. §§201-08-Tulane Law Review editors, we're not sure how to cite.
- 139 *Slaney v. IAAF*, 244 F.3d 580 (7th Cir.), cert. denied, 534 U.S. 828 (2001); *Gatlin v. U.S. Anti-doping Agency, Inc.*, 2008 WL 2567657 (N.D. Fla. 2008). These cases are consistent with non-sports cases rejecting claims that a foreign arbitral award should not be enforced because it violates public policy. *Industrial Risk Insurers v. M.A.N. Gutehofnungshutte GmbH*, 141 F.3d 1434, 1445 (11th Cir. 1998) (finding no “violation of public policy of the sort required to sustain a defense under . . . Convention”); *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie Du Papier (Rakta)*, 508 F.2d 969, 974 (2d. 1974) (“Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions on morality and justice.”). But see *Dynamo v. Ovechkin*, 412 F. Supp.2d 24 (D.D.C. 2006) (refusing to enforce Russian arbitration award finding that Alexander Ovechkin is contractually obligated to play for Moscow Dynamo during the 2005-06 hockey season and banning him from playing for any other club because Dynamo did not prove Ovechkin agreed in writing to arbitrate the parties' dispute).
- 140 Convention on the Recognition and Enforcement of Foreign Arbitral Awards available at <http://treaties.un.org/pages/participationstatus.aspx> (select “CHAPTER XXII”; then select “Convention on the Recognition and Enforcement of Foreign Arbitral Awards”) (listing countries ratifying the Convention) (last visited July 27, 2009).

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- 141 The CAS does provide two important procedural rights to athletes, namely the right to be heard before an independent and impartial panel of arbitrators and de novo review of international sports governing body decisions, which is not constrained by national laws that would preclude a domestic court from providing the same scope of judicial review. See, e.g., Arbitration CAS 2008/A/11574, *D'Arcy v Australian Olympic Committee*, award of 11 June 2008.
- 142 2008 WL 2567657 (N.D. Fla. 2008).
- 143 However, U.S. domestic sports law generally does not provide athletes with greater legal rights than the developing body of *lex sportiva*. Strict liability for Olympic sports doping violations is permissible. See, e.g., *Walton-Floyd v. United States Olympic Committee*, 965 S.W.2d 35 (Tex. App. 1998). Monolithic private sports governing bodies may establish “take it or leave it” terms applicable to their members and athletes as a condition of eligibility to participate in competitive sports. *National Collegiate Athletic Ass'n. v. Tarkanian*, 522 U.S. 1028 (1997). U.S. courts refuse to allow state law to directly regulate the internal affairs of national sports governing bodies. *Flood v. Kuhn*, 407 U.S. 258 (1972); *National Collegiate Athletic Ass'n v. Miller* 10 F.3d 633 (1993); *Partee v. San Diego Chargers Football Co.*, 668 P.2d (Cal. 1983). Moreover, the CAS’s de novo review of international sports governing body rules and conduct exercised is more exacting than the very deferential arbitrary and capricious standard of review that U.S. courts generally exercise in reviewing domestic sports governing body rules and conduct. See generally *Matthew J. Mitten & Timothy Davis, Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 Va. Sports & Ent. L. J. 71 (2009).
- 144 Arbitration CAS 2008/A/1461, *Gatlin v. USADA*, award of 10 September 2008. In rejecting *Gatlin’s* ADA claim, the CAS panel stated: “The Panel agrees with the IAAF’s argument that there was no discrimination on the basis of a disability in this instance. The Panel is of the view that in order to constitute a violation, Mr. *Gatlin* must have been prevented from competing by virtue of disability. . . . The Panel notes from Mr. *Gatlin’s* own submissions that “[h]is ADD affected his ability to focus in the classroom. . . . While Mr. *Gatlin’s* disability admittedly put him at a disadvantage in the classroom, it in no way put him at a disadvantage on the track. Indeed until recently, he was the reigning 100m Olympic champion.” *Id.* at 11.
- 145 2008 WL 2567657 at \*1.
- 146 *Id.*
- 147 The *Gatlin* court cited and relied upon *Slaney v. IAAF*, 244 F.3d 580 (7th Cir.), cert. denied, 534 U.S. 828 (2001), which the Seventh Circuit held that a U.S. athlete’s state law claims seeking to re-litigate the same doping dispute issues decided by a valid foreign arbitration award are barred by the New York Convention. It concluded that “[t]he judicial system is not meant to provide a second bite at the apple for those who have sought adjudication of their disputes in other forums and are not content with the resolution they have received.” *Id.* at 591. See *Weston*, supra note \_\_\_ at 104 (observing that “United States has implicitly assigned the protection of the rights of its [athletes] to a private international tribunal seated in a foreign nation.”).
- 148 2008 WL 2567657 at 2.
- 149 In April 2009 *Gatlin* settled his claims against all defendants (USOC, USA Track and Field, the United States Anti-doping Agency, and the International Association of Athletics Federations) on terms that were not publicly disclosed.
- 150 *Thomas Carboneau, The Revolution in Law through Arbitration*, 56 *Cleveland State Law Review* 233, 239-41(2008).
- 151 See *Mitten*, supra note 64 at 64-67.
- 152 [2006] 5 C.M.L.R. 18 (ECJ 3rd Chamber 2006).
- 153 Arbitration CAS 99/A/234 and 99/A/235, *Meca-Medina and Majcen v. FINA*, award of 29 February 2000 at ¶¶ 4.4-4.10. See also *Arbitration CAS 2005/A/951, Canas v ATP Tour*, award of 23 May 2007 (concluding that WADA anti-doping rules and sanctions do not violate European law). See generally *Massimo Coccia, Applicable Law in CAS Proceedings: What to do with EU Law? in Sport Governance, Football Disputes, Doping and CAS Arbitration* (M. Bernasconi & A. Rigozzi, eds.) (Editions Weblaw, Berne 2009).
- 154 Arbitration CAS 2000/A/270, *Meca-Medina and Majcen v. FINA*, award of 23 May 2001.
- 155 (2000) 50 NSWLR 236. See also *Damian Sturzaker and Kate Godhard, The Olympic Legal Legacy*, 2 *Melbourne Journal of International Law* 241(2001).
- 156 *International Arbitration Act 1974* (Cth).
- 157 *Commercial Arbitration Act 1984* (Cth) s 40.
- 158 *Raguz*, 50 NSWLR at 257.
- 159 See, e.g., Arbitration CAS 2007/A/1298, *Wigan Athletic FC v Heart of Midlothian*, award of 30 January 2008 at 36 (“it is in the interests of football that solutions to compensation be based on uniform criteria rather than on provisions of national law that may vary considerably from country to country”).
- 160 *Yi*, supra note 65 at 301-02 (Olympic institutions, as a practical matter, simply cannot defend its myriad of decisions in the courts of every single member nation.”).
- In 2005, a Swiss court in the canton of Vaud granted a preliminary injunction that suspended a CAS award upholding a two-year disciplinary suspension imposed by the International Cycling Union (UCI) on *Danilo Hondo*, a German cyclist, for his usage of a banned stimulant. *Hondo* owned a home in the canton of Vaud, and his lawsuit was based on an obscure Swiss law that permitted a Swiss resident to judicially challenge a Swiss arbitration award (e.g., a CAS award) in the canton in which he resided. He asserted that the UCI’s strict liability doping rules, which provided for an automatic two-year suspension for a first offense, violated Swiss law. *Yi*, supra note \_\_\_ at 31-33. The Appeals Chamber of the Court for the Canton of Vaud as well as the SFT ultimately upheld the CAS award, which required *Hondo* to serve a two-year suspension for his doping violation. *Decision 4P.148/2006* of 10 January 2007 (X [*Danilo Hondo*] v. AMA et consorts & TAS), *ASA Bull.* 2007, p. 569 (English translation available at [http://translate.google.com/translate?hl=en&sl=fr&tl=en&u=http%3A%2F%2Fwww.polyreg.ch%2Fdf%2Finformationen%2Fgeunpubliziert%2FJahr\\_2006%2FEntscheide\\_4P\\_2006%2F4P.148\\_2006.html](http://translate.google.com/translate?hl=en&sl=fr&tl=en&u=http%3A%2F%2Fwww.polyreg.ch%2Fdf%2Finformationen%2Fgeunpubliziert%2FJahr_2006%2FEntscheide_4P_2006%2F4P.148_2006.html)) (last visited July 28, 2009). Nevertheless, it is problematic to give a Swiss local court judicial authority to nullify a CAS award affecting Swiss residents based on its application of Swiss law; whereas, non-Swiss residents are required to seek vacation of a CAS award by the SFT on much narrower grounds.
- 161 See generally *Mitten*, supra note 64 at 64-67. In his book, *How Soccer Explains The World* (Harper Perennial 2004), *Franklin Foer* hypothesizes that Americans’ like or dislike of soccer, Europe’s most popular sport, reflects their differing views regarding globalization. Those who like soccer believe “in the essential tenants of the globalization religion as preached by European politicians, that national governments should defer to institutions like the UN and WTO.” *Id.* at 245. Those who do not believe “that America’s history and singular form of government has given the nation a unique role to play in the world; that the U.S. should be above submitting to international laws and bodies.” *Id.* Ironically, U.S. courts have taken a global view that facilitates a uniform body of *lex sportiva*; whereas, the ECJ’s *Meca-Medina* decision threatens its worldwide uniformity and application. Although U.S. courts have recognized and enforced international arbitration awards that conflict with national law (albeit reluctantly) it raises the possibility that, in the future, U.S. judges may apply the NY Convention’s “public policy” defense more broadly in an effort to protect U.S. athletes’ rights under domestic law if other courts use national or transnational law to engage in de facto review of the merits of a CAS award.

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- 162 A Greek law professor suggests that “public international law could lay down a regulatory framework for international sports governing bodies.” Dimitrios P. Panagiotopoulos, *The Application of Lex Sportiva in the Context of National Sports Law*, 9 *The Journal of Comparative Law* 121 (2008). He proposes that “the institutional autonomy of international sports federations and consequently the *Lex Sportiva*, and the corresponding jurisdictional order, should be placed under international scrutiny as to its legitimacy by what one might call a sports united nations. States must adopt an international sports charter to establish a truly international *Lex Sportiva*, a framework supporting the institutional autonomy and operation of international sporting bodies.” *Id.* at 139-40.
- 163 See generally Allen Guttmann, *Sports: The First Five Millennia* 1 (Univ. of Mass. Press 2004) (tracing the history and development of sports from preliterate to modern times and observing that “[s]ports are a human universal, appearing in every culture, past and present.”).
- 164 For example, people throughout the U.S. experienced the following emotions upon learning that Central Washington University intercollegiate softball players Mallory Holtman and Liz Wallace, in an unprecedented act of sportsmanship, carried Western Oregon player Sara Tucholsky around the bases during a game in which she hit her first home run, but was unable to run the bases after seriously injuring her knee: “It gave gooseflesh to a phys-ed teacher in Pennsylvania, made a market researcher in Texas weak in the knees, put a lump in the throat of a crusty old man in Minnesota. It convinced a cynic in Connecticut that all was not lost.” Thomas Lake, *The Way It Should Be*, *Sports Illus.*, (June 29, 2009) at 56. In Australia, an act of extraordinary sportsmanship has been immortalized in a large bronze statue in the sports district of Melbourne and named as the nation’s finest sporting moment of the 20th century. In 1956, John Landy, former 1500 metre world record holder and rival of Roger Bannister to be the first man to break the 4 minute mark for the mile, was competing in the Australian mile championship in the lead-up to the 1956 Olympic Games in Melbourne. Ron Clarke, who would go on to hold every world record for distances from two miles to 20 kilometres, fell after clipping the heel of another runner. Landy who was following tried to jump clear but with only partial success and in the process trod on Clarke’s arm with his spikes. As other runners passed by, Landy returned down the track to inquire as to Clarke’s well-being and apologise. By then Clarke had regained his feet and Landy was satisfied the injury was not serious. Landy returned to the race, chased down the distant field and won! The delay had perhaps cost Landy a world record. Harry Gordon, John Landy <[http://www.athletics.com.au/fanzone/hall\\_of\\_fame/john\\_landy](http://www.athletics.com.au/fanzone/hall_of_fame/john_landy)> accessed January 22, 2010.
- 165 John J. MacAloon, “Double Visions: Olympic Games and American Culture” in W. Lindsay Adams and Larry R. Gerlach (eds.), *The Olympic Games, Ancient and Modern* (Pearson Custom Publishing, Boston, 2002) 181, 183.
- 166 Roger I. Abrams, *Cricket and the Cohesive Role of Sports in Society*, 15 *Seton Hall J. of Sport & Ent. Law* 39, 40 (2005) (“Countries cannot be at play with one another and remain vigilant enemies, because at the very least there must be an agreement upon the rules for the sport’s encounter. They compete in what may be termed a ‘friendly spirit.’”).
- 167 As of June 2009, there are 205 National Olympic Committees, Nat’l Olympic Comm., [http://www.olympic.org/uk/organisation/noc/index\\_uk.asp](http://www.olympic.org/uk/organisation/noc/index_uk.asp) (last visited June 25, 2009), while there are 192 members of the United Nations, Member States, <http://www.un.org/en/members/growth.shtml> (last visited June 25, 2009). Notably, Australian government policy has sought to foster cooperation in sport between Australia and other countries through the provision of resources such as facilities and the contribution of expert personnel. For example, the Australia Africa 2006 Sport Development Programme’s “Active Community Clubs Initiative is funded by the Australian Agency for International Development - AusAID [-] and is delivered by the Australian Sports Commission (ASC). The ASC is the federal agency that governs sport and sport
- development in Australia and through its International Relations division aims to assist, create and sustain opportunities for all people in the community to participate in, and benefit from, physical activity offered by multi-sport community-based clubs”. Rand Afrikaans University Department of Sport and Movement Studies, *An Impact Study on the Active Community Clubs Initiative*, Final Report (2006) page v.
- 168 James M. Citrin, *Sports Lessons for the Business World*, *BUS. WK.*, Oct. 2 2007, available at <http://www.msnbc.msn.com/id/21016087/> (quoting Nelson Mandela’s award speech at the 2000 Laureus World Sports Awards) (last visited June 25, 2009). Danny Jordaan, the chief executive of the organizing committee for the 2010 FIFA World Cup, which will be held in South Africa, stated: “Nelson Mandela struggled for, went to jail for and was released pursuing a vision of a country that would recognize every human being as equal. We want to move to a united future. What you need are projects that bind a nation, that carry a common and shared vision. I think that is what the World Cup will do.” Jere Longman, *South Africa Under Microscope One Year Before World Cup*, *NY Times Sports*, June 28, 2009 at 1. Similarly, former Pope John Paul II observed that “sport is spread in every corner of the world, overcoming diversity of culture and nation.” Steve Rushin, *Heaven Helps Them*, *Sports Illus.*, May 2, 2005. For example, Willye White, an African-American woman who was a member of four U.S. Olympic teams who competed in international track and field competitions in more than 150 countries, said: “Before my first Olympics, I thought the whole world consisted of cross burnings and lynchings. The Olympic Movement taught me not to judge a person by the color of their skin but by the contents of their hearts. Athletics was my flight to freedom . . . my acceptance in the world. I am who I am because of my participation in sports.” Fred Mitchell, *Olympian’s finest work came long after Games*, *Chicago Trib.*, Feb. 10, 2007, at 1.
- 169 The International Olympic Committee works closely with UNESCO to educate young people about “Olympic values” including the advancement of peaceful relations through sport. See, e.g., 6th World Forum on Sport, Education and Culture, “Educating the Now Generation,” *Busan, Korea*, September 25-27, 2008. On June 16, 2009 President Barack Obama announced the formation of a permanent White House Office of Olympic, Paralympic, and Youth Sport to promote the values of the Olympic Movement and to encourage increased youth participation in athletics. He stated that “[s]ports are an important way to instill values, judgment and teamwork in our nation’s kids, and this new office reflects our commitment to giving all our children a chance to thrive.” Lynn Sweet, *Obama White House Putting Muscle Behind Chicago 2016 Olympic Bid*, June 16, 2009 *CHI. SUN-TIMES*, available at [http://blogs.suntimes.com/sweet/2009/06/obama\\_white\\_house\\_putting\\_muscle.html](http://blogs.suntimes.com/sweet/2009/06/obama_white_house_putting_muscle.html) (quoting President Barack Obama’s taped message to the general assembly of European Olympic Committees on Nov. 21, 2008. Taped speech is available at <http://www.chicago2016.org/obama2016.aspx>).
- 170 For example, developing science and technology creates an external means of enhancing individual athletic performance, which raise not only significant legal and ethical issues regarding sports competition, but also broader issues regarding the use of science to enhance human intellectual, physical, and psychological capabilities for other purposes. See, e.g., Gregor Wolbring, *Oscar Pistorius and the Future Nature of Olympic, Paralympic and Other Sports*, 5 *SCRIPT-ed* 139 (2008).
- 171 See *supra* note 4 for a listing of Australian cases. Regarding U.S. law, one commentator has observed: “In federal law, antitrust and labor doctrine have been significantly shaped by cases originating in the sports industries. In addition, constitutional principles involving drug testing and search and seizure have been influenced by sports law cases. On the state level, important tort doctrine has been and will continue to be affected by disputes arising in the context of sports. Undoubtedly, other areas of the law will be similarly influenced by sports litigation.” See Lazaroff, *supra* note 4 at 2-3. For example, several cases involving athletes have played a significant role in developing the scope of state law protection of publicity rights and

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- First Amendment limits thereon. See, e.g., *C.B.C. Distribution and Marketing, Inc. v. MLBAM*, 505 F.3d 818 (8th Cir. 2007), cert. denied, 128 S.Ct. 2872 (2008); *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915 (6th Cir. 2003). See also Keith Sharfman, *Valuation Averaging: A New Procedure for Resolving Valuation Disputes*, 88 *Minn. L. Rev.* 357, 365-66 (2003) (noting adoption and use of baseball final offer salary arbitration system to resolve joint venture valuation disputes).
- 172 Edward Grayson, *International Reports 1992 - England*, 3(1) *ANZSLA Newsletter* 7 (1993); Hayden Opie, *From the Sideline - A Message from the President*, 3(2) *ANZSLA Newsletter* 2 (1993).
- 173 Hayden Opie & Graham Smith, *The Withering of Individualism: Professional Team Sports and Employment Law*, 15 *University of New South Wales Law Journal* 313, 313-17(1992).
- 174 468 U.S. 85 (1984)
- 175 See Lazaroff, *supra* note 4 at 15.
- 176 *Id.* at 7-8.
- 177 *The Constitution* (63 & 64 *Vict.*, c 12), s 51 (xx).
- 178 *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League Inc* (1979) 143 CLR 190, 210-11(Barwick C.J.), 233-7 (Mason J with whom Jacobs J agreed), 239-40 (Murphy J). Implicit in this reasoning is a judicial conclusion that an organization's simultaneous pursuit of both sporting and business interests is not incompatible - a conclusion that courts may have been reluctant to reach at the height of the ethos of amateurism.
- 179 See *supra* note 169 and accompanying text.
- 180 In Australia, it is generally accepted that employers may test employees for their use of illicit drugs such as cocaine, amphetamines and marijuana and take pre-emptive disciplinary action for purposes of workplace safety. Beyond that, the usefulness of testing has been considered as less important than protection of employees' privacy interests. In 2005, that position was significantly affected when the Australian Football League with the agreement of the Players' Association introduced testing for illicit drug use at any time of the year outside of competition including the players' private time. AFL Illicit Drugs Policy, February 2005; copy on file with authors. (The WADA Code prohibits illicit drugs but only during competition.) The action of the AFL received widespread attention in the news media and was greeted with approval by political leaders and the public but little scholarly attention from academics working in the fields of labor law and civil liberties. This lack of scholarly (and perhaps critical) evaluation and the willingness of such a high profile group of employees to accept testing for illicit drugs by their employers during private time has established an arguably unchallenged and powerful precedent for employees in other industries.
- 181 David Halberstam, *Sports as a Window of Social Change*, *The Sporting News*, May 23, 1994 republished in Glenn Stout (ed.), *Everything They Had: Sports Writing from David Halberstam* (Hyperion, New York, 2008) at 22, 27.
- 182 *Id.* at 28.
- 183 407 U.S. 258 (1972).
- 184 For a detailed account of this litigation and its background, see Brad Snyder, *A Well-Paid Slave: Curt Flood's Fight for Free Agency in Professional Sports* (Viking, New York, 2006). Major League Baseball's common law antitrust exemption was limited by the Curt Flood Act of 1998, which provides MLB players with the same antitrust law remedies as other major league players. 15 U.S.C. §27b(c).
- 185 Halberstam, *supra* note 181 at 60-62, 115-116. However, some African-
- American civil rights groups "failed to make the connection between Flood's lawsuit and the freedom struggle." *Id.* at 115.
- 186 In 1995, amendments to the federal Racial Discrimination Act 1975 (Cth) specifically outlawed racial vilification (see s 18C).
- 187 See generally Ian Warren & Spiros Tsaousis, *Racism and Law in Australian Rules Football: A Critical Analysis*, 14(1) *Sporting Traditions* 27 (1997); Lawrence McNamara, *Tackling Racial Hatred: Conciliation, Reconciliation and Football*, 6 *Australian Journal of Human Rights* 5(2000).
- 188 Other possible areas for exploration include: extraterritorial enforcement of player contract rights and remedies, *Boston Celtics v Shaw*, 908 F.2d 1041 (1st Cir. 1990); internationalization of labor markets, Heather Morrow, *The Wide World of Sports is Getting Wider: A Look at Drafting Foreign Players into US Professional Sports*, 26 *Houston Journal of International Law* 649 (2004); and the application of antitrust and competition laws to player restraints, Stephen Ross, *Player Restraints and Competition Law Throughout the World*, 15 *Marquette Sports L. Rev.* 49 (2004) (despite different national competition laws, uniform legal standard developing regarding legality of player restraints) or internal league governance, *AEK Athens v UEFA*, CAS 98/200, award of 20 August 1999 (applying Swiss and European Union competition law in rejecting challenge to UEFA rule prohibiting clubs with common ownership from both participating in same Pan European championship soccer competition; although U.S. antitrust law "has limited precedential value" because of different structure of U.S. sports leagues, the CAS observes that it is similar to Swiss and European Union legal standard and result likely would be same under U.S. law).
- 189 For example, some U.S. Supreme Court justices recently have relied upon foreign and international laws to support their interpretations of the U.S. Constitution. See, e.g., *Grutter v. Bollinger*, 539 U. S. 306, 344 (2003) (Ginsburg, J., concurring) (referencing the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women); *Lawrence v. Texas*, 539 U. S. 558, 573 (Kennedy, J.) (2003) (citing European Court of Human Rights opinion finding laws prohibiting homosexual conduct invalid under the European Convention on Human Rights).
- 190 CAS 2008/A/1480, award of 16 May 2008. A CAS panel ruled that Oscar Pistorius, a South African athlete who is a double amputee, is eligible to run in IAAF-sanctioned track events with "Cheetah" model prosthetic legs. An IAAF rule prohibited the use of "any technical device that incorporates springs, wheels or any other element that provides the user with an advantage over another athlete not using such a device." The panel concluded that, because scientific evidence did not prove that Pistorius obtained a metabolic or biomechanical advantage from using the "Cheetah" prosthetic legs, his exclusion would not further the rule's purpose of ensuring fair competition among athletes.
- 191 530 U.S. 661 (2001).
- 192 "The term 'ambush,' 'parasitic' or 'piratical' marketing is used to describe a completely legitimate group of methods (if planned and implemented carefully) that a company may use in order to associate itself with major events of public interest, like the Olympic Games." George Avlonitis & Sofoklis Ladias, *Ambush Marketing and the Olympic Games "Athens 2004"* in Dimitrios Panagiotopoulos (ed.), *Sports Law: Implementation and the Olympic Games* 380, 380 (2005). Ambushers have been very successful in circumventing traditional intellectual property rights conferred by copyright and trademark laws so as to associate their products and services with major sports events at very little cost and in the process deprive official sponsors and suppliers of the full return on their financial support of those events. Because this activity threatens the long-term viability of major events, legislatures have enacted special anti-ambush laws.
- 193 For example, the IOC maintains an immense marketing program.

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- The two key elements are broadcast and sponsorship revenues, the latter undertaken through the Olympic Partner Programme (TOP). See: [http://www.olympic.org/Documents/fact\\_file\\_2010.pdf](http://www.olympic.org/Documents/fact_file_2010.pdf) (last visited March 3, 2010).
- 194 See, e.g., *NHL v Pepsi-Cola Canada Ltd.*, 70 B.C.L.R.2d 27, 92 D.L.R. 4th 349 (British Columbia Supreme Ct. 1992).
- 195 See generally Robin Jacob, *Trade Marks and the Olympic Games Throughout the Years*, [2001] *European Intellectual Property Review* 1; Christian Michalos, *Five Golden Rings: The Development of the Protection of the Olympic Insignia*, 3 *International Sports Law Review* 64 (2006). For a discussion regarding specific Olympic Games, see: Atlanta—Robert Davis, *Ambushing the Olympic Games*, 3 *Villanova Sports and Entertainment Law Journal* 423 (1996); Stephen McKelvey, *Atlanta '96: Olympic Countdown to Ambush Armageddon*, 4 *Seton Hall Journal of Sports Law* 397 (1994); Sydney—Christopher Kendall & Jeremy Curthoys, *Running Rings Around the Sponsors: The Sydney Olympics and “Ambush Marketing,”* 11 *Australian Intellectual Property Journal* 5 (2000); Salt Lake City—Anne Wall, *The Game behind the Games*, 12 *Marquette Sports Law Review* 557 (2002); Noalle K Nish, *How Far Have We Come? A Look at the Olympic and Amateur Sports Act of 1998*, the *United States Olympic Committee and the Winter Olympic Games of 2002*, 13 *Seton Hall Journal of Sports Law* 53 (2003); Athens—Steve McKelvey & John Grady, *An Analysis of the Ongoing Global Efforts to Combat Ambush Marketing: Will Corporate Marketers Take the “Gold” in Greece?*, 14 *Journal of the Legal Aspects of Sport* 191(2004); Beijing—Anne Wall, *Intellectual Property Protection in China: Enforcing Trademark Rights*, 17 *Marquette Sports Law Review* 341 (2006); Stacey Wang, *Great Olympics, New China: Intellectual Property Enforcement Steps up to the Mark*, 27 *Loyola of Los Angeles International and Comparative Law Review* 291(2005); Vancouver—Laura Misener, *Safeguarding the Olympic Insignia: Protecting the Commercial Integrity of the Canadian Olympic Association* 13 *Journal of the Legal Aspects of Sport* 79 (2003); Juda Strawczynski, *Is Canada Ready for the Vancouver Winter Games? An Examination of Canada’s Olympic Intellectual Property Protection*, 62 *University of Toronto Faculty Law Review* 213 (2004); London 2012—Anna Blakeley, *London Olympic Games and Paralympic Games Act 2006: Less Presumptive than the London Olympics Bill 17 Entertainment Law Review* 183 (2006); Rachel Montagnon & Joel Smith, *Intellectual Property: The London Olympics Bill*, 28(1) *European Intellectual Property Review* N11(2006).
- 196 The award of a major sporting event to a developing nation (e.g., Seoul, Korea (1988 Olympic Games), Beijing, China (2008 Olympic Games), South Africa (2010 FIFA World Cup), Rio de Janeiro, Brazil (2016 Olympic Games)) indicates that it has a threshold level of sophistication in its legal system sufficient to manage such an event and hosting the event may stimulate further general development of its laws.
- 197 Available at: *Regulations on the Protection of Olympic Symbols 2002 (PRC)*, <http://en.beijing2008.cn/bocog/ipr/n214071828.shtml>.
- 198 Arul George Scaria, *Ambush Marketing: Game within a Game* (Oxford University Press, New Delhi 2008) at 96; Wang, *supra* note 195 at 291.
- 199 Scaria, *supra* note 198 at 100.
- 200 Nicola Lucchi, *Intellectual Property Rights in Digital Media: EU v USA*, 53 *Buffalo L. Rev.* 1111 (2005).
- 201 *Olympic Insignia Protection Act 1987 (Cth)* (among other things, prohibiting the unauthorized use of “Olympic expressions” for commercial purposes so as to suggest sponsorship of certain Olympic interests: section 36).
- 202 *Ted Stevens Olympic and Amateur Sports Act*, 36 U.S.C. §220506(c) (prohibiting unauthorized use of Olympic marks “for purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition”).
- 203 For example, in the lead-up to the Sydney Olympic Games in 2000 and pursuant to obligations under the host city contract, Australia passed specific legislation to extend the protection afforded Olympic marks and to guard against ambush activity: *Sydney 2000 Games (Indicia and Images) Protection Act 1996 (Cth)*. See also Christopher Kendall and Jeremy Curthoys, *Ambush Marketing and the Sydney 2000 Games (Indicia and Images) Protection Act: A Retrospective*, 8.2 *Murdoch University Electronic Journal of Law* (2001) available at: [www.murdoch.edu.au/elaw/issues/v8n2/kendall82.html](http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82.html).
- 204 James A.R. Nafziger, *The Future of International Sports Law*, 42 *WILLAMETTE L. REV.* 861, 871-73 (2006).
- 205 Carsten Fink & Carlos A Primo Baga, *How Stronger Protection of Intellectual Property Rights Affects International Trade Flows in Carsten Fink and Keith A Maskus (eds), Intellectual Property and Development* (World Bank and Oxford University Press, Washington DC 2005) at19-40.
- 206 Barbara J. Keys, *Globalizing Sport: National Rivalry and International Community in the 1930s* (Harvard University Press, Cambridge MA, 2006) pp 136-141. See also Duff Hart-Davis, *Hitler’s Games: The 1936 Olympics* (Century Hutchinson, London, 1986).
- 207 See, e.g., Jacquelin Magnay, *Propaganda Bureau Muzzles Chinese Press: Guide for Editors Tells which Issues Must be Avoided*, *The Age* (Melbourne) August 14, 2008; Mary-Anne Toy, *Games Undesirables Expelled with Ruthless Efficiency*, *The Age* (Melbourne), July12, 2008.
- 208 See, e.g., Allen Guttmann, *The Olympics: A History of the Modern Games* (University of Illinois Press, Urbana, 1994).
- 209 *Fundamental Principles of Olympism, Olympic Charter, Paragraph 5*, page 11, available at [http://www.olympic.org/Documents/Olympic%20Charter/Charter\\_en\\_2010.pdf](http://www.olympic.org/Documents/Olympic%20Charter/Charter_en_2010.pdf) (last visited March 4, 2010).
- 210 OLYMPIC CHARTER, Rul. 45(3), page 83 available at [http://www.olympic.org/Documents/Olympic%20Charter/Charter\\_en\\_2010.pdf](http://www.olympic.org/Documents/Olympic%20Charter/Charter_en_2010.pdf) (last visited March 4, 2010). Another example is WADA’s International Standard for Protection of Privacy and Personal Information which establishes a minimum global standard that may provide more privacy protection to athletes than some countries’ existing domestic laws. Available at: [www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-IS-PPPI/WADA\\_IS\\_PPPI\\_2009\\_EN.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-PPPI/WADA_IS_PPPI_2009_EN.pdf).
- 211 *FIFA Statutes*, August 2009, articles 57 and 59; available at: [www.fifa.com/mm/document/affederation/federation/01/24/fifastatuten2009\\_e.pdf](http://www.fifa.com/mm/document/affederation/federation/01/24/fifastatuten2009_e.pdf). See also, Frans de Weger, *The Jurisprudence of the FIFA Dispute Resolution Chamber* (2008) p 39.

# Global Administrative Law: The next step for Global Sports Law?

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## 1. Global sports law

Global sports law has developed rapidly in the last two decades, alongside many other examples of transnational private regulation. The desire for autonomy, harmonization and private control of international sport have been strong factors in promoting this expansion. This paper argues that recent developments in legal theory can further improve our understanding of the nature of global sports law.

There is a wide acceptance that the work of CAS as an arbitration system covering most Olympic sports and the governance of anti-doping in sport by the WADC has created a distinct and unusual regulatory regime. This has been variously termed *lex sportiva*, transnational sports law or global sports law. Whatever the precise differences between these terms<sup>1</sup>, which have now been widely debated, it is clear that there is now a system of transnational regulatory governance in international sport. This is most comprehensive in relation to doping but it is also evident in many other areas of international sport.

The growth of global sports governance, and in particular the expansion of *lex sportiva* through the jurisprudence of CAS, is of special interest to legal theorists who see it as a regulatory regime juridifying into a form of transnational law outside the review of national courts. In other words what appears to be happening is that a system of regulation that calls itself legal is emerging but without all the characteristics of hard law as defined by traditional formalist lawyers. This raises many questions and problems for such a system can appear to be an autonomous closed system that claims to be self-regulating and outside the legal review of national courts. This paper suggests the outline of a solution to some of these issues by arguing that *lex sportiva* as a transnational legal order has begun to internalize sufficient principles of substantive and procedural justice, through a process of juridification, to be able to argue for a limited immunity from intervention by national states and their judicial

process. However unless this process of internalizing general legal principles is ongoing, the growth of a global administrative law will become a challenge.

How this system of regulation can be theorized as binding, effective and legitimate is a problem that scholars have approached from various directions. One is to describe the norms and regulation as 'soft law' as opposed to hard law.<sup>2</sup> Another is to see it as a variety of legal pluralism, rejecting the Austinian notion that law is state norms and accepting any apparently binding rule-based regime as a legal order.<sup>3</sup> Others, often described as the Dijon school, emphasize binding arbitration as central and argue that a transnational legal order is created through this process.<sup>4</sup> Closely associated to this view is Teubner's idea that globalization creates 'neospontaneous legal regimes' removed from national jurisdictions and international treaties that can be termed global law.<sup>5</sup> Another approach, especially associated with the London School of Economics, is to see this as an issue of transnational private regulation.<sup>6</sup> This is viewed as a process

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whereby rules are adopted and then crystallized in norms, which are embedded in institutions, which are independent and autonomous. A final idea approaches from the standpoint of global administrative law, and argues that global regulators are exercising public powers outside the jurisdiction of national courts and thus can only be controlled by the adoption of administrative law principles.<sup>7</sup>

In this short paper I do not propose to address fully all these theories but rather to ask narrower questions, informed by some of these ideas, about how the global governance of sport and the growth of global sports law can be explained with particular reference to its relative autonomy.

The global regime of sports governance has these characteristics:

- it is rule based and considered binding, by contractual acceptance of the participants, with characteristics that can be equated with law
- it has a mechanism for alternative dispute resolution through arbitration that is binding
- it has a non-state regulatory system of governance, described by some writers as transnational private regulation, through its pyramid structure consisting of the IOC, international federations and national federations
- with its anti-doping rules administered by WADA, it is an interesting example of governance by a hybrid institution in which public elements, such as governments, and private interests are mixed
- it claims to be immune from challenge by national courts and that it is therefore a system of private transnational law beyond state control

Without external restraints can such a regime address issues of substantive justice, accountability and abuse of private power in a globalised world of sport?

I propose to try and answer this question by addressing three crucial questions in the global governance of sport.

- a. How and why is arbitration of sporting disputes, rather than legal enforcement through the courts, accepted as legitimate?
- b. Has WADA become an example of transnational private regulation?
- c. Can the development of global administrative law be used to improve and control the transnational private regulation of global sport?

### 2. Why is arbitration legitimate?

Much of the claim for the effectiveness of *lex sportiva* rests on the assumption that the primary forum for its creation and its development has been CAS. This presents itself as a legal order of arbitration, which has become dislocated from national legal systems to be part of an autonomous legal regime. This regime of arbitration however poses a theoretical problem, which is – from where does this legal order of arbitration derive its legal authority? The paradox is that a system of sports arbitration claiming to be immune from review by national courts can only justify such a claim by relying upon the authority of prior state approval or international agreements. Even if it is argued that arbitration is a contractual order based on the consent of the parties to the arbitration, this argument itself assumes that there is a nexus with a specific legal order that allows such a contract to be valid and binding on the parties.

Legal scholars have debated this question at length in the last decade as global systems of arbitration have become much more widespread, especially in the commercial field.<sup>8</sup> The traditional view has rested on ‘territoriality.’ This implies that each arbitration belongs to a specific legal system and that the parties to the arbitration have agreed, expressly or impliedly, to be governed by it. Normally the law governing the arbitration will be the geographical location of the tribunal but in accordance with contractual supremacy the parties can decide otherwise. The consequence of a strict application of this territorial principle is that the arbitrator has no freedom to depart from the relevant national law, either by applying equitable principles or by applying supranational norms.

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The territorial principle is now outdated in a globalized world where transnational arbitration is increasing and there are multiple international economic exchanges across national borders. Most national courts will enforce foreign arbitral awards but only if they are binding and enforceable according to their own domestic criteria. This leads to a situation in which many legal orders are potentially involved in assessing the effect of an arbitration. This plurality can be regulated by international treaties but this does not alter the fact that the legitimacy of the arbitration has been relocated outside the original *lex arbitri*.

A radical alternative view advanced by scholars such as Gaillard<sup>9</sup> is that arbitral legal orders are *per se* outside any national legal order and therefore are examples of genuinely transnational law. Shultz for example has defined them as 'transnational legal orders that cannot be reduced to any one public national legal system.'<sup>10</sup> One implication of this view is that arbitrators must be applying substantive transnational norms whose legitimacy and effect is not directly justified by reference to any national legal order. The autonomy of the system is closed and its legitimacy is self-reflexive in the sense that it must come from within the autonomous arbitral order itself.

This nevertheless still raises the potential for conflict between two legal orders - that of autonomous transnational law and of a domestic legal system. How is such a conflict resolved and theorised? One unsatisfactory answer is to argue that there is a broad agreement among states that arbitrations are valid subject to some widely acknowledged minimum standards.<sup>11</sup>

A more sophisticated response is to assert that transnational arbitration is legitimized by its own autonomous legal order. It is a private contractual rule based system which does not intersect with any national legal system. This view has been termed a 'pre-emptive strike' by Shultz and is designed to legitimize a private system of arbitration and dispute settlement within a rule based organization.<sup>12</sup>

This, it is argued, produces a parallel transnational order with its own norms. Its legitimacy, albeit internal, is nevertheless the result of a process of juridification. As a private regime it has norms created and defined by its own constitutional group. The system and its dispute settlement mechanisms operate 'against the background of expectations of what

would happen if the disputants went to law.'<sup>13</sup> Paulsson argues that law is reflective of the social order of the group and that the constitutive force of international sport stems from the wish to avoid state interpretation of their norms or legal intervention in their autonomous system of governance. The process of juridification is hallmarked by the private norms being described as law, as in *lex sportiva*, to access the cultural force of law in most societies and by the private arbitration tribunal being described as a court, as in CAS. Unfortunately this can lead to the regime being seen as private governance, by and for the group, superseding public accountability.

This deficit of accountability and democracy can only be legitimized if the system produces both substantive and procedural justice. Shultz<sup>14</sup>, relying on Fuller's 'inner morality of law' suggests the following as a minimum requirement to legitimize the private order:

- Governance by general and impersonal norms
- Public promulgation of these norms
- Non retroactivity of norms
- Clear rules and obligations
- Coherent and non-contradictory rules
- Steadiness of norms over time
- Impartial implementation and administration

To these examples of substantive justice can be added procedural justice, as generally understood to be due process or 'the rule of law'. I have suggested elsewhere<sup>15</sup> that the jurisprudence of CAS is hallmarked by an insistence on procedural fairness in decision making by sporting federations and this contributes greatly to the internalizing of general legal norms in the private system of governance. Nafziger has recently stated that 'A core principle, perhaps the core principle, to inform not only the *lex sportiva*, but also the larger body of international sports law is fairness.'<sup>16</sup>

The conclusion derived from describing *lex sportiva* as a private system of transnational law is that such a pluralistic notion of law allows us to see private arbitration as a non-

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state arrangement not created by governments but existing as a self-reflexive legal order, which is juridified in its own practice. This juridification, with institutionalized forms of rule creation and a forum for dispute settlement that respects substantive and procedural justice, is the ultimate reason why national courts will respect its exclusive jurisdiction.

### 3. Transnational private regulation

There has been a vast increase in the amount of transnational and transgovernmental regulation. This regulation has been implemented by transnational bodies, not created by national legislation or international treaties, and as such appears to be unaccountable to, and outside the control of states and their domestic legal systems. Globalization has relocated regulation of sports bodies, amongst many other systems of transnational governance, at the global rather than the national level. Regulatory regimes have been created in a transnational space by private standard setting bodies such as the IOC and international sporting federations, or by hybrid private-public institutions such as WADA.

The key question for these theorists of regulation is to formulate how globalization has created systems of transnational private regulation. These systems of regulation have governance powers that were once the prerogative of the nation state and which have now become exercised by private actors or hybrid private-public institutions which are distinct

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In a globalized world, states acting collectively through international treaties are weak as global rule makers for consensus is harder to achieve with a greater number of nation states

from national governments. As a process, the authors ask how it develops, what forms it takes, how it is legitimized and why national governments accept its autonomy.

Casey and Scott<sup>17</sup> have sketched some answers to these questions. They propose a framework that begins by asking how norms are originally promulgated. In a case such as sport, these norms stem from associational and contractual relations supplemented by social and sporting norms. These norms are crystallized, typically within an institutional process for making rules, but not necessarily excluding less focused methods. Casey and Scott further ask how these crystallized norms are legitimated. They suggest four questions that need to be addressed and answered within the transnational regime. These are:

- is the process constitutional?
- is it democratic?
- does it promote the values of the institution?
- is it effective?

Cafaggi<sup>18</sup> discusses the question of why transnational private regulation emerges to govern fields such as global sport. He suggests that there is a need for international harmonization of rules and standards, especially in the face of divergent state practices. In a globalized world, states acting collectively through international treaties are weak as global rule makers for consensus is harder to achieve with a greater number of nation states. States are also poor at enforcing violations of transnational regimes. So a space is created for more effective regulation through new and different global organizations. Many of these organizations, of which WADA is an excellent example, blur the distinction beloved of lawyers between public and private law principles. They are also hallmarked by collaborative rule-making in which joint drafting allows both private and public interests to be balanced. In successful examples of private regulation by transnational organizations the actors raise standards above those which could be achieved by international co-operation between states; and in that process public regulation is delegitimized in favour of the privatization of regulation and of law. These hybrid organizations mean that 'administrative law principles are applied to private organizations exercising rule-making power at transnational level.'<sup>19</sup>

GLOBAL ADMINISTRATIVE LAW: THE NEXT  
STEP FOR GLOBAL SPORTS LAW?**4. Global administrative law**

Legal scholars have in the last decade begun to develop and expand the concept of global administrative law. This is a response to the growth of transnational governance brought on by globalization without the using 'law' in its traditional sense. International sport has developed global institutions of governance and regulatory regimes that constitute an autonomous and normative realm within a structured pyramid of sporting federations. The challenge is how to limit, organize and control what is already a pre-existing constitutional regime with quasi-legal instruments such as the Olympic Charter or the World Anti-Doping Code. This transnational regime of governance is a private ordering but with global networks of regulation that control matters of wide importance to society. As such it is argued that the organizations of global sport are by analogy akin to public administrative bodies in domestic law. The IOC has a status which equates to state immunity<sup>20</sup>, whilst WADA is a hybrid organization with states participating. There is no question that these are bodies exercising 'governmental power'.<sup>21</sup> Sports federations, both national and international, have learnt to respect due process in making decisions in order to avoid legal intervention. The next stage, it is argued, is to extend administrative law principles into global rule-making for sport, adjudication proceedings and to strengthen procedural guarantees of a fair hearing.

These developments have created for some writers a 'crisis of accountability'. With no apparent legal oversight such regimes of global governance have appeared accountable to no one but their own internal procedures. They display at best a self-reflexive accountability formulated in accordance with the logic of their own operational field. This absence of, or limited amount of, accountability of transnational organisations controlling important global activities has led to demands for legal control. Such control can either be achieved by an extension of domestic administrative law principles to transnational governance or by developing a new global administrative law. The first option faces several hurdles. First, there are limits on how far some jurisdictions will apply what they see as public law principles of accountability to private rule making bodies. This is especially marked in England where the courts have shown an extreme reluctance to extend judicial review to the decisions of sporting federations. Second, there is the question of jurisdiction over transnational organisations located overseas and therefore outside the scope of the

The next stage, it is argued, is to extend administrative law principles into global rule-making for sport, adjudication proceedings and to strengthen procedural guarantees of a fair hearing.

national courts. This dilemma conceptually mirrors the difficulty with making transnational private arbitration systems accountable as outlined above. Thus it is argued the better alternative is to develop a parallel global administrative law in order to remedy the defects inherent in a global sports law.

To formulate a concept of global administrative law immediately faces the questions of what are its sources and what is its content. As a variety of transnational law it is by definition different from international law, which is a creation of interstate activity, and from domestic law. It seems that the best attempt is the nebulous concept of 'general principles of law'. This is highly problematic unless it can be shown that there is a high degree of agreement and convergence in the principles used by varying domestic courts.

There is another equally difficult question inherent in the concept of global administrative law and that is how it is enforced. Again the answer to this question can only lie at present in domestic courts claiming jurisdiction over the institutions of global governance by using the principles of global administrative law. Kingsbury et al in one of the early formulations of the concept used the example of CAS to argue that it needed 'to convince domestic courts that their decisions ... meet standards of due process in order to have them recognized in domestic law'.<sup>22</sup> Studies of CAS have suggested that to a large degree, if not universally, it has tried to meet standards akin to a global administrative law.<sup>23</sup>

Despite these formidable obstacles there does seem to be a wide degree of acceptance in the literature as to the emerging

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principles that would be considered as a minimum content of global administrative law. These include

- principles of participation in the formulation and articulation of rules and standards initially within the transnational organisation, in particular the consultation and participation of all interest groups in the process of rule-making. This is especially relevant in organisations such as WADA where there are a number of often conflicting interests involved. Without wide participation, either in the constitutional makeup of the organisation or in the ad hoc formulation of rules, the legitimacy of the process is weakened.
- decisions of the organisation should be reasoned, given in writing and transparent; hence publication of all decisions and their reasons is crucial, for without such transparency the assessment of rationality is impossible.
- there should be a system of internal review and an appeals procedure to ensure proper standards of decision making.
- there should be due process in decision making; so that principles of impartiality, opportunities to be heard and represented, and unbiased judging are respected
- substantive standards of justice in decisions must be met. These include proportionality, especially in relation to penalties, that there is a rational relation between means and ends, and that legitimate expectations are not defeated.

These are minimum standards but to date there is little evidence of their acceptance by national courts. Neither is there much evidence that the arbitral and other regulatory orders of transnational private regulation have been prepared to accept global administrative law as a source for overturning decisions. However it is suggested that global administrative law has the potential to allow the internal review of international sports federation rules even where such rules have been constitutionally formulated and accepted.

### 5. Conclusion

Global sports law has been careful to ensure that its private ordering has juridified enough to be considered a transnational legal order. However the challenge of new concepts derived from global administrative law has yet to be addressed fully, although there are encouraging signs. For example, Richard McLaren, himself an experienced CAS arbitrator, has suggested in a recent article that to strengthen the *lex sportiva* represented by CAS arbitrations further reform is necessary.<sup>24</sup> He lists four desirable reforms; wider publication of awards, 'CAS must address nagging doubts about its impartiality', a more interventionist approach to the freedom of sporting federations to determine their own rules, and more extensive procedural protection for parties to arbitration.

Global sports law has matured to the stage where it no longer needs to reject legal and judicial intervention simply by claiming autonomy and a need for self-regulation. It has become a self-reflexive system which is able to acknowledge itself as a transnational legal order. More continued self-reflection on the need to comply with global administrative law would further strengthen the transnational legal order of sport and reduce the risk of judicial or legislative intervention by nation states. ■ **BASE**

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- 1 For a wide ranging discussion of the term 'lex sportiva' see Robert C.R. Siekmann and Janwillem Soek [eds.]: *Lex Sportiva: What is Sports Law?* (ASSER International Sports Law Series, The Hague, 2012.) On global sport law see Ken Foster, 'Is There a Global Sports Law?' (2003) 2 *Entertainment Law* 1-18.
- 2 For a discussion of soft law see Anna Di Robilant, *Genealogies of Soft Law*, (2006) 54 *The American Journal of Comparative Law* 499 and Kenneth W. Abbott and Duncan Snidal, *Hard and Soft Law in International Governance*. (2000) 54 *International Organization*, 421-456.
- 3 See Ralf Michaels, *Global Legal Pluralism* (2009). *Annual Review of Law & Social Science*, Vol. 5, Duke Law School Public Law & Legal Theory Research Paper No. 259. Available at SSRN: <http://ssrn.com/abstract=1430395>.
- 4 See Thomas Schultz, *The Concept of Law in Transnational Arbitral Legal Orders and some of its Consequences* (2011) 2 *Journal of International Dispute Settlement* 59-85.
- 5 See Andreas Fischer-Lescano, and Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, (2004) 25 *Mich. J. Int'l L.* 999.
- 6 See David Vogel, *The Private Regulation of Global Corporate Conduct, Achievements and Limitations* (2010) 49 *Business Society* 68-87.
- 7 See Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, (2009) 20 *European Journal of International Law* 23-57.
- 8 See for example in another area, Charles N. Brower and Stephen W. Schill, *Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law?* (2009) 9 *Chicago Journal of International Law* 471.
- 9 Emmanuel Gaillard, *The Representations of International Arbitration*, (2010) *Journal of International Dispute Settlement*, 1-11.
- 10 Thomas Schultz, *The Concept of Law in Transnational Arbitral Legal Orders and some of its Consequences*, (2011) 2 *Journal of International Dispute Settlement* 59-85.
- 11 This is Gaillard's position. He states that validity 'is found in the body of rules on which a consensus has been reached by the collectivity of states.' *Supra* p.8
- 12 *Supra*, p.64.
- 13 Jan Paulsson, *Arbitration in Three Dimensions* (2010) *LSE Law, Society and Economy Working Papers* 2
- 14 *Supra*, p.71-2.
- 15 See Ken Foster, *Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport's Jurisprudence* in Robert C.R. Siekmann and Janwillem Soek [eds.]: *Lex Sportiva: What is Sports Law?* (ASSER International Sports Law Series, The Hague, (2012) 123-148.
- 16 James Nafziger, *International Sports Law* in James A. R. Nafziger, Stephen F. Ross [eds.] *Handbook on International Sports Law* (Edgar Elgar, 2011) 3-31.
- 17 Donal Casey, and Colin Scott, *The Crystallization of Regulatory Norms*, (2011) 38 *Journal of Law and Society*, 76-95.
- 18 Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, (2011) 38 *Journal of Law and Society*, 20-49.
- 19 *Ibid* p.25
- 20 Marcia B. Nelson, *Stuck Between Interlocking Rings: Efforts to Resolve the Conflicting Demands Placed on Olympic National Governing Bodies*, (1993) 26 *Vanderbilt Journal of Transnational Law* 895.
- 21 Despite English law's quaint insistence that national sports federations are not subject to judicial review. See *R. v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 *All ER* 853.
- 22 Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, *The Emergence of Global Administrative Law* (2005). *New York University Public Law and Legal Theory Working Papers*. Paper 17, p.20.
- 23 See Ken Foster, *Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport's Jurisprudence* in Robert C.R. Siekmann and Janwillem Soek [eds.]: *Lex Sportiva: What is Sports Law?* (ASSER International Sports Law Series, The Hague, (2012) 123-148.
- 24 Richard McLaren, *The Court of Arbitration for Sport* in James A. R. Nafziger, Stephen F. Ross [eds.] *Handbook on International Sports Law* (Edgar Elgar, 2011) 32-64.

# Reviews and Reports



# Corruption Watch

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Corruption Watch is a new feature of this Journal, although in practice it is a continuation of the relevant section in the present author's general sports law surveys compiled over the past 14 years under the "Current Survey" and "Foreign Update" columns. Its specific focus is the various ways in which sport has been influenced by such malpractices as match-fixing, sport-fixing bribing, dubious transfer-inspired deals known as "bungs", and other untoward activities which have undermined the integrity of sporting activity, both professional and amateur.

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## CRICKET

### **Pakistan corruption scandal ends in jail sentences**

The reader of this Journal is not required to have his attention focused exclusively on its contents to be reminded of the origins and development of the saga that rocked the world of cricket to its foundations during the late summer of 2010. That was the period in which the now-defunct *News of the World* purported to reveal that a number of Pakistani players had agreed to fix the outcome of the one-day international against England. The cricketers involved were immediately suspended, and the matter assumed a more serious aspect in the shape of criminal prosecutions a few months later. Salman Butt, Mohammad Asif and Mohammad Amir were accused of participating in an operation which involved cheating and accepting corrupt payments. The legal drama was played out before the Southwark Crown Court, and reached its conclusion just over a month later.

The charges facing Butt and his teammate Mohammad Asif were conspiracy to obtain and accept corrupt and conspiracy to cheat, which carry maximum sentences of seven and two years' imprisonment respectively, for allegedly spot-fixing during the fourth Test against England at Lord's last year.

The 19-year-old fast bowler Amir, for his part, pleaded guilty on September 16th to charges of conspiracy to cheat at and accepting corrupt payments.

Prosecuting counsel Aftab Jafferjee QC claimed that the defendants were deeply involved in "rampant corruption" at the heart of the sport of cricket. He claimed that the men in question betrayed millions of Pakistan supporters in order to benefit from a betting industry worth £33 billion per annum on the Asian subcontinent alone. He claimed that the case in question revealed a "depressing tale of rampant corruption at the heart of international cricket" with the key players being members of the Pakistan national team. The scheme in question involves bets being placed on the stage at which a bowler delivers a no-ball. The conspirators were alleged to have considered that the inside knowledge gained would enable a Far Eastern betting syndicate to benefit by betting large sums on the unlikely turn of events. However, the damning arrangements and cash benefits were captured on hidden cameras used by the reporter, famously known as "fake sheikh" (*Daily Mail* 6/10/2011, p. 21) Inevitably, details of the affair became more tangible in the course of the proceedings. One of the key witnesses involved was Mazher Majeed, an agent for a series of Pakistani cricketers. The court heard lengthy transcripts of

covertly recorded conversations between Mr. Majeed and an undercover journalist from the News of the World during which arrangements were made to fix certain aspects of the Pakistani team's tour of England that year. Mr. Majeed apparently informed the reporter, Masher Mahmood, that the team had already agreed to fix the result of a one-day international against England towards the end of the 2010 summer, and that fixing matches had been a feature of the sport for "centuries".

Mr. Mahmood gave evidence behind a screen in order to protect his identity. He began by detailing how he had designed his "cover story", initially contacting the agent to arrange a Twenty20 tournament in the Middle East. The agent replied that he could use his networks of friends as consultants for the tournament – these allegedly included former Test players Geoffrey Boycott, Phil Tufnell and Mike Gatting. Once the reporter had earned Mr. Majeed's trust, the pair discussed the fixing of matches. Majeed claimed to have seven Pakistan players involved in match-fixing and that they had approached him to organise it. He added that he had been doing this with the Pakistan team for around 2 ½ years, and that in the process they had made "masses of money". The conversations in question took place before the Oval test in August 2010, and Majeed allegedly informed the reporter that, if he agreed to form part of the match-fixing ring, he would be given details of future results. He continued:

*"We are working towards next month. It is going to be big. I will give you an exact script of how it is going to happen. We've got one result already planned and that is coming*

*within the next three and a half weeks. Pakistan will lose. It's your responsibility to put it on (the bet) at the right times because there's going to be times in that game when Pakistan are favourites, times when England are favourites. I will give you the six names of the players on our side, and you will know exactly what each is going to do"* (*The Daily Telegraph of 11/10/2011, p. 19*).

It then appears that Majeed offered to arrange for Butt to play out a maiden over during a Test match at the Oval in order to prove his control over the players. When the reporter expressed some doubt, Majeed merely replied that he could also call the Pakistan wicketkeeper, Kamran Akmal, and "get him to do something" (*Ibid*). As for Mr. Butt, he later admitted that he had failed to report Majeed to the International Cricket Council – as players are required to do under the current Code of Conduct – when the latter first sent him texts raising the prospect of spot-fixing. As early as the Pakistan tour to Australia in 2009-10, Majeed had texted Butt, saying "if there's something going on, give me a tip". Butt suggested that he had dismissed this as a joke in the wake of the disastrous tour by the visiting team, which had raised questions in Pakistan over the direction some of the games had taken. In May 2010, Majeed sent Butt a series of texts ahead of a fixture against South Africa in St Lucia, suggesting that Pakistan might lose a wicket in the seventh and eighth overs of their innings. Butt failed to reply, but later contacted Majeed requesting an explanation, since the latter had never "asked something like that before". Majeed apparently responded by saying that he was "just checking if we are ever

doing something dodgy like this or not". Asked why he did not report this, Butt replied that he "took his (Majeed's) word" (*The Independent of 18/10/2011, p. 56*).

At a later stage of the trial, it was learned that Salman Butt had arranged for \$181,000 (£115,000) to be transferred from his account to one in his mother's name on the day on which he was interviewed by British police over allegations of spot-fixing. This emerged during a gruelling day of cross examination, Mr. Butt's second in the witness box, in which he twice denied accusations of lying to the jury, was accused of "being corrupted by the love of money at the expense of the game" and of a disagreement in a hotel corridor after midnight with Pakistan's security officer regarding the presence of a former agent in one of the players' rooms days before the infamous third Test against England at the Oval.

Butt and Asif had voluntarily attended an interview with detectives who were investigating allegations that had become public following the News of the World story claiming that Butt, Asif and Mohammad Amir, who opened the bowling with Asif, had delivered three no-balls at pre-arranged times at the request of Mazhar Majeed in return for . The aforementioned Mr Jafferjee, for the prosecution, informed the court that on 3/9/2010, the day of the interview, Butt had moved the entirety of a dollar account in Pakistan to his mother's account. Asked why, the former captain said it was because he did not know how long he would be in Britain for and to provide "ease of access" to the money for his mother while he was away. He claimed that it was coincidence that it happened on

the day of the police interview (*The Independent of 19/10/2011, p. 68*).

Later in his cross-examination Mr Jafferjee asked Butt about an incident in a London hotel shortly before the Oval Test against England. Azhar Majeed, a former agent and brother of Mazhar, whom the prosecution alleged had also been involved in seeking to fix games, was discovered by Major Khwaja Najam Javed, the Pakistan security officer, in batsman Wahab Riaz's room after midnight. According to the team's regulations for the tour, players were not allowed to have anyone in their room after 10pm. Butt and Kamran Akmal, the vice-captain and another client of Mazhar's, were also in the room. Butt said Javed, who he had earlier referred to as "Major 007", was putting pressure on Mr. Azhar and asked Javed to come into the corridor to try and resolve the matter.

Earlier, Butt had described how he had "misjudged" Majeed, whom he had thought of as a "good friend". "I thought I knew him well", said Butt. "I misjudged him. I took his word and trusted him. I never thought there would be another side to him". During cross-examination by Alexander Milne QC, Counsel for Asif, Butt was asked whether he had said in Punjabi to Asif before one of the alleged deliberate no-balls in the Lord's Test, "Run faster, f\*\*\*er, you're running too slow." Butt replied that was the first he had heard of it (*Ibid*). Asif had also claimed Butt's decision to position himself at silly mid-off to Andrew Strauss in the 10th over of England's innings, when the no-ball was bowled, was suspicious and intended to "sledge" the bowler. Mr. Milne told the jury that Asif also became frustrated because he had two

appeals turned down early in the 10th over adding to the rush of blood which led to the no-ball. It was also alleged that Strauss stepped away at one stage because of the shouting by Pakistan's fielders. Butt often laughed and shook his head in the dock as Asif gave evidence for more than five hours (*The Daily Telegraph of 21/10/2011, p. S15*).

Ali Bajwa QC, defending Butt, questioned Asif for two hours, describing his story as a "desperate invention" and that it was "the best story you could think of" after viewing his over on video. Bajwa broke down Asif's over ball by ball, pointing out that, in fact, he only had one unsuccessful appeal - the other against Alastair Cook was a replay from a previous over - and that anyway he was a "patient" bowler, happy to wait for wickets. He also asked why Asif told police during the interview that he did not come under pressure from Butt to bowl a no-ball and did not change his run-up. Asif said the police had not "asked me the question" about speeding up his approach to the wicket. Bajwa also described Butt's position at silly mid off as a normal tactical decision when a bowler was swinging the ball into a left-hander such as Strauss. The court heard more cricket terminology on Thursday than at any other stage during the trial, and at one stage Mr. Asif asked for a cricket ball to demonstrate seam bowling.

Asif claimed he met Mazhar Majeed, the agent alleged to have masterminded the spot-fixing ring, only "two or three times" and that he never signed a formal contract with him. The prosecution concentrated on this relationship. "The sad truth was you had been sucked into this web of

corruption," said Mr. Jafferjee. "And there were two people equally responsible for sucking you in - Majeed and Salman Butt". The QC pointed out that during police questioning Asif failed to state that Majeed was his agent and the record of telephone calls between the two was an example of the closeness of their relationship (*Ibid*).

Butt consistently rejected suggestions yesterday that he had "controlled" Mohammad Amir, the "most impressionable player" in his side, and helped ensure he delivered deliberate no-balls in the Lord's Test. As he faced a third day of questioning, he said that Amir, then 18, was neither impressionable nor weak. Butt gave evidence for more than 13 hours during which he repeatedly denied any involvement in or knowledge of a conspiracy to spot-fix during the Lord's Test with Amir, Mohammad Asif and their agent Mazhar Majeed in return for cash.

It was also suggested to Butt by Mr. Jafferjee, after he had outlined a string of phone calls and texts between Majeed, Butt, Asif and Amir in the build up to the Lord's Test, that Amir was "in on the fix". Butt replied: "Yes". Mr Jafferjee then suggested to Butt that he "controlled the youngest and most impressionable player in your side". Butt replied in the negative. Butt had earlier told the court that he "had his suspicions" over Amir's actions at Lord's. During the same session, the court also heard that there would be no criminal proceedings against other Pakistan players, Wahab Riaz, Kamran Akmal, Umar Akmal or Imran Farhat, who had been named in the trial as involved with Majeed (*The Independent of 20/10/2011, p. 73*).

Much had already been made, in the media and elsewhere, of the fact that Amir was a young player and therefore “easily influenced”. This theme was, not unexpectedly, returned to during the trial. As part of their case, the prosecution alleged that Butt used his authority as captain to influence Amir, then aged 18, to deliver two deliberate no-balls. However, this was countered by Ali Bajwa QC, in summing up Butt’s defence, where he said that Amir was not “some naive and wholly innocent 19-year-old”. Mr Bajwa detailed how Mr. Amir sent a text from Majeed’s phone to a number in Pakistan after his hotel room had been searched by police following the aforementioned allegations published in the News of the World. According to Mr. Bajwa, “Amir sent a text saying: ‘Amir here. Don’t call my phone. ICC police have taken my phone. Are you able to delete those calls you made to me? If you can, do it OK. Don’t reply.’” (*The Independent of 26/10/2011, p. 68*).

Mr Bajwa also drew attention to the fact that Amir called Majeed to a meeting in his room before the agent went to see Mazher Mahmood, the News of the World journalist, in another London hotel where he received £140,000 in cash after promising the under-cover journalist Amir and Asif would bowl three no-balls during the following day’s play, the first of the Lord’s Test. Amir had also sent suspicious texts to a number in Pakistan nine days before the Test. Mr Bajwa closed his defence by telling the jury that Butt, who like Asif denies the charges, would never “risk throwing away a lifetime’s work and honour of leading his team on the world stage”. Mr Milne, for his part, questioned the prosecution’s reliance on Majeed,

describing the 36 year-old from Croydon as “greedy”, “selfish” and “self-interested”. The prosecution, he said, relied on the “words and boasts of a proved fraudster”. In relation to his client’s defence he advised the jury to take the example of Watergate and “follow the money” and that there was no money trail to Asif (*Ibid*).

Following the closure of proceedings, the jury failed to reach a unanimous verdict. Clarke J then informed the jury that he was prepared to accept a 10-2 verdict (*The Independent of 1/11/2011, p. 67*). As a result, Amir, Asif and Butt were all found guilty by the court on 1 November. Their sentences followed two days later – Butt received a jail sentence of 30 months, Asif was jailed for 12 months, whereas Amir was to be detained for six months in a youth offender institution. The harshest penalty was administered to Majeed, who was jailed for two years and eight months. The judge sentenced the four on the basis of the match-fixing at Lord’s, but also heard evidence about attempts at fixing play in other matches and dealings with illegal bookmakers throughout the world. In issuing his sentence, Cooke J also took into consideration the five-year ban issued by the ICC, since it effectively spelt the end of Butt’s and Asif’s careers, and made it problematical for Amir to return (*The Times of 4/11/2012, p. 64*). The four appealed against their sentences, but lost, Judge LJ of the Court of Appeal stating that they had “betrayed their team, their country and followers of the game”, singling out particularly Salman Butt as a “malign influence” (*The Daily Telegraph of 24/11/2011, p. S14*).

However, it soon appeared that the agony might not yet be over for the integrity of Pakistan cricket, and that the net could widen to include other Pakistan players, with the game’s international governing body set to review all the evidence collated by Scotland Yard in securing the convictions of the four charged. While the Crown Prosecution Service chose to focus specifically on the three no-balls bowled at specific points during the fourth Test at Lord’s the previous year in order to secure a conviction, other evidence emerged in court that could provide the basis for further investigations by the International Cricket Council (ICC). It was learned that the ICC anti-corruption and security unit was to co-operate with Scotland Yard to review the large file of evidence collected to augment the News of the World’s investigation, which included text messages, phone records and deleted text messages that were later recovered using special software. The ICC were set to investigate Pakistan players Kamran Akmal and Wahab Riaz following the conviction of their former team-mates. Akmal has not played for Pakistan since the World Cup although Riaz was included in the squad playing against Sri Lanka.

The ICC’s anti-corruption and security unit had, earlier in the summer, written to Butt and Akmal to request phone records covering the period of the Asia Cup in Sri Lanka. During the court case, it emerged that fixer Majeed had claimed to the News of the World’s undercover reporter that seven Pakistan players were involved in fixing with him, also naming Riaz and Akmal, as well as batsmen Umar Akmal and Imran Farhat. None of the four has faced criminal charges. Mr. Jafferjee

had earlier said in court that Akmal had led a “charmed life” in avoiding investigation. He also said the roles of the two players raised “deep, deep suspicions” (*The Times of 2/11/2011, p. 53*).

Indeed, as is customary in landmark trials of this nature, the statements made in the course of the proceedings were more noteworthy and revelatory than the actual outcome itself. Thus, according to Mazher Majeed, the agent at the centre of the spot-fixing controversy, averred that the fixing of a test match was commonly estimated at £1 million. The jurors at the trial were informed that up to £32 million per annum were gambled in the Indian sub-continent alone, under an industry orchestrated by “shadowy figures” based in Dubai, Karachi, Mumbai and London. Mr. Jafferjee alleged that, even if that figure were to be reduced by 10 per cent, it “not unsurprisingly” made spot-fixing and match-rigging “irresistible to some”. The agent added that a Twenty20 result would cost £400,000, and that a bracket of 10 overs would be a mere snip at anything between £50,000 and £80,000. Another claim made during the proceedings was that Australian players were “the biggest” in the corruption league and had “10 brackets per game”.

There was naturally no shortage of reactions to the verdicts and sentences from various quarters. One of the first reactions from the ICC Chief Executive, Haroon Lorgat, who stated: *“I am satisfied that we have worked closely with the CPS and Metropolitan Police throughout this entire process, and this case has shown it is possible for criminal authorities and sports bodies to*

*cooperate with each other, in difficult circumstances, in the best interests of the sport and the public at large. I would reiterate the ICC has a zero-tolerance attitude towards corruption and that we will use everything within our power to ensure that any suggestion of corrupt activity within our game is comprehensively investigated and, where appropriate, robustly prosecuted.”* (*The Guardian of 2/11/2011, p. S1*)

Mr Lorgat at the same time confirmed that the ICC bans of five years and up given to Butt, Asif and Amir would stand. The former Pakistan captain Rashid Latif also hailed the decision, stating that anyone guilty of match-fixing deserved to “go behind bars”. He added that he people of Pakistan “want to watch matches without fixing”. Tim May, the chief executive of FICA, the international players union, also proclaimed himself satisfied that a “loud and clear message” had been sent but voiced concerns that fixing still holds a menacing presence within the game. The former Australian Test spinner added:

*“The practice of spot-fixing and other types of fixing still appears to be prevalent in our game despite the millions spent by the ICC on education and the creation of the ACSU. The ICC and its member boards, cricket officials and players all need to take the responsibility of ridding this corruption from cricket”* (*The Independent of 3/11/2011, p. 49*).

Australia is set to introduce new laws to make to make match- and spot-fixing illegal. Britain is one of the few countries that already has such

legislation and Australia is set to follow suit next year. Cricket Australia had pushed for the laws to be introduced in time for the 2015 World Cup and there is cross-party support for the issue at both state and federal level. Haroon Lorgat, the ICC’ chief executive, and Jacques Rogge, president of the International Olympic Committee, have made calls for governments to do more to help sporting bodies combat corruption in sport.

The Pakistan Cricket Board (PCB), for its part, rejected Amir’ claim that players do not receive enough education about fixing. The PCB said that when Amir was awarded a central contract in March 2010 he also signed the ICC code of conduct, available in Urdu and English. Apparently Amir acknowledged that he understood the code and his responsibilities and committed himself to abiding by these rules. He also participated in a number of ICC tournaments where he attended anti-corruption lectures (*Ibid*).

However, some of the reactions came in the shape of sharp criticism of the lack of effectiveness on the part of the game’s authorities in this area. Andrew Strauss, the England captain, was unambiguous in his view that the International Cricket Council should be doing more to combat the threat posed by fixing. Strauss even went so far as to describe the governing body’s Anti-Corruption and Security Unit as a “toothless tiger”. He said it was “hard to be happy or satisfied” when something like this happened, although he welcomed the fact that there had been “repercussions” for what these guys did and there would accordingly be “some sort of deterrent there” (*The Independent of 3/11/2011, p. 55*).

What concerned Mr. Strauss particularly was how the conspiracy was uncovered – by the News of the World rather than the ICC’s security unit – and whether there are enough resources at the disposal of Ronnie Flanagan, the former British policeman who runs the ACSU. He added:

*“There’s (sic) still a lot of questions to be answered because they weren’t exposed by any of the cricketing members, they were exposed by the News of the World. I still think the ICC could be doing a lot more than they are doing. Unfortunately, the anti-corruption unit is a pretty toothless tiger. They can’t get into the real depth of it all because they haven’t got the resources available to them. I don’t hold it against them, they’re doing the best job they possibly can. They can’t do sting operations like the News of the World, they can’t infiltrate these betting networks. They’ve tried their best. I’m very hopeful that only a minor percentage of cricketers are involved in it, hopefully that is the case but the truth is we really don’t know” (Ibid).*

However, the Chair of the ICC Anti-Corruption Unit, Sir Ronnie Flanagan, defended the work of his investigators and denied that criminal activity was commonplace in the game. He described criticism of the Unit as “ill-informed” and its work as “trendsetting” – even going so far as to describe it as a “role model”. He acknowledged the role played in uncovering the corrupt practices by the News of the World, but added that there had still been a “tremendous amount” of further investigation to be done to bring disciplinary charges to an independent tribunal and subsequently for the British police to launch a successful

criminal prosecution. He added:

*“People have no idea about the emphasis we put on prevention and when we have to investigate, how my investigators work so professionally hand in hand with policing colleagues, just as they have done in this case. We don’t have the powers of a police force, but I certainly would not be seeking the powers of a police force. When the ACSU was created by Lord Condon more than ten years ago, it was created to be the friend of cricketers. It wasn’t created to be the enemy of cricketers, although I would certainly consider we would be the enemy of corrupt cricketers. In saying that, corrupt cricketers are a very tiny proportion of the cricketing world” (The Times of 4/11/2011 p. 112).*

Nevertheless, some of the criticism levelled at the ACSU does not seem to have been entirely misplaced, since barely a few days after the court reached its verdict, an International Cricket Council report was understood to recommend that the Unit should give more priority to detection by employing more cricket-informed officers than hitherto, while a new measure was put the ball in the court – so to speak – of the cricketer who has unexplained wealth to explain how he acquired it, otherwise he will not be selected. The ICC had in fact ordered this review of the Unit before the criminal trial had started. The evidence presented in Southwark Crown Court over the last month suggested the review needs to be implemented urgently, particularly in view of the “iceberg beneath the surface” which was glimpsed during the trial. This is the far more discreet world of the

match-fixing mafia in Dubai, Pakistan and India; of texts and phone calls that cannot be traced; of bank accounts in Switzerland and other countries that cannot be accessed by the police. And just how remote the Unit could be from illegal gambling was shown when the former chief investigator, Ravi Sawani, who only gave up his post earlier this year after three years in the job, revealed during the trial that he did not know what a “bracket” was. (A “bracket” is the basic unit of spot-fixing and illegal gambling, a block of 10 overs during a side’s innings – although Cooke J, in his summing up, described it as an eight-over block in Pakistan).

In its 11 years the Unit can claim to have done a good deal of prevention work in discouraging players from getting involved in match- and spot-fixing. Yet one cannot help feeling that nothing would have deterred young cricketers so much as seeing an established player caught, convicted and severely punished by the game’s governing body, although it was only in 2009 that the ICC assumed the responsibility to bring charges rather than leaving it to national boards (*The Sunday Telegraph of 6/11/2011, p. S7*).

It was later learned that the Pakistan left-arm paceman Wahab Riaz, whose name was mentioned in court during the spot-fixing trial, had been recalled to the Test squad for the series against England. The chief selector, Mohammad Ilyas, said Wahab, who has been out of the team for several months, was considered for the Test series that starts next month in neutral United Arab Emirates after the Pakistan board gave clearance. Mr. Wahab had been included in the squad for the Sri Lanka series in October but was sent

home after an undercover reporter informed the jury at Southwark crown court that the agent Mazhar Majeed had told him that he had several cricketers working for him. Recordings played in court of Majeed talking to the reporter mentioned the fast bowler's name as well as that of the batsman Umar Akmal, who has similarly been cleared and was also picked in the squad to face England in the UAE.

Will the prison sentences and bans visited upon the Pakistani players in question secure a sea-change in the battle to eradicate corruption from cricket, or will have only a short-lived impact on attempts to fix matches? One of the bookmakers operating from the country's illegal gambling dens was of the opinion that the latter was the more likely outcome. The high stakes wagered on Test matches, one-day internationals and T20 games meant the rewards for bent cricketers, bookies and crime syndicates remain attractive, said the bookmaker in question, referred to as "PK", who operates a handful of gambling operations in Lahore and asked that his full name not be used.

*"There will be an impact as there will be much more strictness and scrutiny of games involving the cricket team for the time being. Players will be much more careful and bookmakers will be looking over their shoulders because we know the government and the police will be under pressure to curb what is happening. But the money will still be there so they will be back to their old tricks. They have got used to the money on offer so it will be difficult to kick the habit."* (*The Daily Telegraph* of 6/11/2011, p. S9).

The money web of criminal conspiracy, which ended in a London courtroom, stretches all the way to thousands of secret gambling dens like PK's in Lahore. Betting on cricket is a massive industry all across the Indian sub-continent, even though all gambling is banned in Muslim Pakistan, and only bets on horse racing are allowed in India.

The sentencing of the three players on Thursday appears to have had but little impact on PK's business. Although he has switched to new premises – a shabby bedroom with the curtains drawn and a thick fug of cigarette smoke – as a precaution against increased police interest in his operation, he had taken 1.3m rupees (almost £10,000) by lunch on the first day of Pakistan's third test against in Dubai. During last year's, one of his associates estimated that he had taken £80,000 in profit alone. And with as many as 1,000 illegal dens operating in Lahore alone – according to police estimates – that means millions of pounds changes hands each match. Many believe Dawood Ibrahim, the notorious Indian crime lord, sits at the top of this gambling network. As well as racketeering and drug running, he is suspected of having links to al-Qaeda and of having funded terrorist attacks in India. So while PK takes bets on his mobile phone under the shadow of organised crime, the suspicion will linger that cricket is vulnerable.

It was always unlikely that the sentenced players would remain silent for ever once they had served their time, and Mohammad Amir did not disappoint in this respect. His sentence over, he returned to Pakistan where he spoke publicly about the entire affair for the first time since the verdict was

issued. In so doing, he claimed that he was entrapped into deliberately bowling two no-balls and was too scared to contact the authorities over the demands being made of him by his captain, Salman Butt, and Butt's British agent, Mazhar Majeed. More particularly, he claimed that Butt and Majeed tricked him into delivering the no-balls against England at Lord's – whilst accepting that his "stupidity" also played a role, and that he panicked when the police became involved and at first refused to admit his guilt. In an interview with SkySports, he added:

*"You can imagine how any 18-year-old lad was feeling under those circumstances. I'd gone from the height of fame to being disgraced in such a horrendous way. Anyone going through that would panic and fail to understand the situation. Had I fully realised what had happened I would have gone straight to the ICC. I was so stupid. However, I never did it for money. I'm so angry with Salman. He took advantage of my friendship. He used to call me 'innocent one'. Like how an elder brother would speak to a younger one. He should have helped me instead of involving me in all this" (*The Independent* of 20/3/2012, p. 63)*

According to Amir, his entrapment happened on the eve of the fourth Test, when he was asked to meet Mr. Majeed in a car in the underground car park of the team's hotel. Butt joined them and sat in the back seat. Majeed told Amir that the ICC were investigating him over his involvement with a man called Ali, a friend of Butt's. "They told me I was in trouble," said Amir. The latter had apparently met Ali in Dubai some months previously. During the England

tour, Amir had provided Ali with his bank details and exchanged text messages with him that suggested discussions over spot-fixing. When the police became involved, Amir sent Ali a text asking him to delete all messages between them.

Amir claims Majeed told him he, Majeed, could sort the case but in return Amir would have to do him a favour and bowl the no-balls. He added that he was “scared” to approach team management and “confused”. He was, he says, worried that if he failed to do it, this might create a problem for him. He bowled both no-balls as required. Before the second, Butt came over to him from mid-off in order to remind him what was required. Afterwards Waqar Younis, Pakistan’s coach, is said to have confronted Amir. He was untying his shoelaces when he came up to Amir asking him “what on earth I’d done”. At this point, Butt is said to have intervened, explaining that he had instructed Amir to bowl a bouncer. Thereupon Amir “remained quiet” and “said nothing” (*Ibid*).

However, these claims were angrily rebutted by Salman Butt’s father, who accused Amir of falsely placing all the blame on his son. He said:

*“Amir said before the ICC tribunal that Butt did not ask him to bowl no-balls and then before the UK court he said the same, so was he lying then or now? [His] latest interview suggests that he wants to revive his career and that’s why he is accusing my son” (The Daily Telegraph of 21/3/2012, p. S15).*

It is sincerely to be hoped that this whole sordid affair has acted as a “wake-up call” as well as an adequate deterrent to a repetition of such damaging episodes. This certainly was the view of the new Pakistan captain, Misbah-ul-Haq who, on assuming the leadership of the Test series against England earlier this year, declared corruption to be “a thing of the past” (*The Independent of 11/1/2012*). What can be said, however, is that Pakistan remains far from being the sole focus of corrupting manoeuvres and manipulation in the noble game. This is amply demonstrated by one of the sections featured below, which involved a player emanating from the very country which gave birth to the game as we know it. On the other hand, exactly how difficult a task it will be to root out these corrupt practices in the sub-continent can be seen from our next feature below.

.....  
**Match fixing assumes  
Bollywood dimension**  
(India)

In March 2012, Mazher Mahmood, the undercover reporter who, as detailed above, exposed the spot-fixing scandal which marred Pakistan’s tour of England in 2010, revealed in a leading British Sunday newspaper how crooked Indian bookmakers were using an actress to lure players into corruption. All over India, traders are renting out cheap mobile telephones to eager punters who thus buy a stake in one of the world’s biggest rings which extends throughout the Indian subcontinent and beyond. The millions of cricket-mad gamblers in the cities and slums of India are apparently helping to the subversion of the sport by a network of match-fixers. The undercover

investigation by The Sunday Times (*11/3/2012, p. 14*) reveals just how far the corruption extends its reach, and the identities of some of the men behind it.

The story starts among the fans who are prepared to bet on any cricket match anywhere in the world — including English county cricket fixtures. Millions of pounds change hands through a network of undercover bookmakers. The rented mobile phones are central to the operation because they provide punters with a special match “commentary”. More particularly, punters lay with their local bookmakers using the odds announced by the commentator whose voice is broadcast down the telephones. The bookmakers’ activities are banned in India, yet appear to be as much a part of the nation’s culture as chai.

With enormous amounts of cash at stake, bookmakers can earn a fortune by knowing in advance the outcome of games or parts of games, from the number of runs scored in a fixed period, individual scores, the fall of wickets, no-balls and wides to the number of catches that will be dropped — and even the result of the toss. Most of these can easily be fixed and bookmakers profit by luring punters by offering favourable odds. The role of the match fixers is to obtain the co-operation of players — by bribing them. Through a series of secretly filmed meetings the undercover reporters discovered just how well-organise, and lucrative, this practice has become.

At a bar in Gurgaon, they met Vicky Seth, one of Delhi’s most influential bookmakers. While the one-day cricket international between England and

Pakistan in Abu Dhabi was playing in the background on the television screen, Mr. Seth poured himself a large Chivas Regal whisky and chatted to undercover reporters posing as fellow bookies. He said:

*“(Match fixing) will always carry on in cricket. There is just so much money involved and it’s easy to do as long as people don’t talk....”*

*“Obviously the big money is to be made in big matches — Test matches, Twenty20s, the IPL (Indian Premier League) and BPL (Bangladeshi Premier League). But any match that is televised is good for us, which is why English county cricket is a good market. They are low-profile matches and nobody monitors them. That’s why good money can be made there without any hassle if we can get the players to play for us.” (Ibid).*

After the reporters’ meeting with Mr. Seth at the bar in Gurgaon, the smartly dressed bookmaker agreed to meet them at the nearby Country Inn hotel. Here he elaborated on his claims to be able to throw overseas matches, naming several players he said were corrupt. He claimed that, at this time, they had connections with New Zealand. At this point he named two players with whom he alleges to have concluded a spot-fixing deal in 2010, and even claimed that one of these was still working for his organisation. He then claimed that they did similar deals with some Pakistan players.

Seth, who hides his corrupt gambling behind a legitimate property business, alleged that last year’s World Cup semi-final between India and Pakistan, one of the biggest matches of recent years, had been fixed. He claimed not to have any

links with any English players, but that there was a bookmaker in Delhi who did. Sure enough, the reporters rapidly found another Delhi bookmaker who elaborated on claims that English players were being approached and corrupted, sometimes through the use of “honeytraps”, i.e. women who act as go-betweens. He said:

*“Attractive girls are the ideal choice to cosy up to players and to persuade them to work for bookmakers. Players are always surrounded by fans and groupies so nobody suspects a thing when they walk in and out of player’s hotel rooms. Players are always vulnerable to approaches by pretty girls and when they are offered the opportunity to make fortunes for making minor adjustments in their play, it is an irresistible package. Besides, many players are now wary of even being seen with fixers or bookies so if all the deals are done through their supposed girlfriend, then it is the perfect solution.” (Ibid).*

The game’s world governing body, the ICC, is apparently aware of the activities of a Bollywood actress, suspected of attempting to subvert players. Officials were alerted by reports from four players who reported her suspicious approaches to them. Eager to learn more about the amounts at stake, the undercover reporters arranged to meet a man known to his clients and contacts simply as Monubhai. Said to be a wealthy entrepreneur, he owns a string of restaurants in India and China as well as a chemical factory, but for thrills also operates as a bookmaker. Mr. Monubhai agreed to meet the reporters at the Royal Plaza hotel in Delhi to discuss match-fixing opportunities.

Accompanied by two minders, Monubhai, aged in his forties and wearing a white designer sweater, clutched three mobile phones as he arrived at the hotel. He relaxed in a leather sofa chatting on his BlackBerry while his minders vetted the reporters. Once satisfied that they were genuine, the bookmaker claimed to have “boys that handle this business (illicit gambling) for me”. However, whenever there was match-fixing to be done, he does it “quietly”. He says he never discuss anything of this nature with his staff because “if anything ever leaks out, it’s always through your staff.”

Monubhai claimed that fixing remained rife, and claims that the second match in the Bangladesh Premier League (BPL), in February 2012, was fixed. He claimed to have been in Calcutta where he received a phone call to that effect. He asked who had made the arrangements and was told the name of the person in question. He phoned the latter directly and “got in on the deal”. Three or four players were apparently involved in the fix. He also alleges that he had worked with players from almost every main cricketing nation to fix games and that he had recently been offered an opportunity to sign up New Zealanders. He added:

*“I was invited to strike a deal with some New Zealanders but I didn’t go. The IPL starts on April 4 then everyone will be doing it (match-fixing). I will let you have results with scripts (details of ‘fixes’ set up in advance, such as agreed no-balls, or agreed numbers of runs). I’ve got players there. I will tell you, in this team there are five players, by the fifth over two wickets will be down, the third wicket will go in the*

*seventh over, the fourth will go in the eighth, by the tenth five will be out, the total score will be below 110. I will give you the whole lot. Everything we say will happen.” (Ibid).*

Informed by the undercover reporters that they had access to some corrupt players, Monubhai replied that if they would “do something for us, it’s our duty to give them (money)”. In other words, his organisation would pay them for their work. Turning to the terms of his illicit deal and the rewards, he continued:

*“I don’t pay upfront. You send your guy who will sit with me and there will be a bag full of cash and you can check the amount. As soon as the job is done, you take your bag. We can pay in London or anywhere in the world that you want. My cousin is in London so it’s no problem. Test matches are very good. You have good time to bet, to do each and everything. In Twenty20s the rates fluctuate in a couple of minutes and you have to catch them. The money is three crores for a result. If one player will do (fix) a session, if he is a bowler ... it’s 40 lakh to 50 lakh in Indian rupees. If it’s two batsmen, 70 lakh (or) 35 each. No need for them to give (away) their wicket, we’re not telling them to throw their wicket. We’re only saying to them, stop the score. It’s approximately £400,000 (around Rs 3.2 crore) for a result. That’s an international match, not for any domestic. For a single bowler make it around about £50,000-60,000 (per session). It depends on the bowler. If we are happy we give a £5,000 or £10,000 gift. For two batsmen, it’s £100,000. This is for ODIs.” (Ibid)*

Shortly after the meeting, Mr. Monubhai called the reporters and raised his offer for us fixing an international match to £750,000 on condition that any deal would be exclusively with him. It looks as though the authorities, both inside and outside the game, have a mammoth task ahead of them.

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### **Westfield/Kaneria affair ends in jail sentence (UK)**

It is two years ago now since these columns first featured reports that a fixture in the domestic limited-overs NatWest Pro40 series had come in for scrutiny, first from the game’s national authorities, then from the general forces of law and order. More specifically it was claimed that Essex fast bowler Mervyn Westfield had accepted bribes in order to engage in match-fixing during a game against Durham CCC. Also, in April 2010 it had emerged that another Essex player, spinner Danish Kaneria, had been investigated by police over alleged match-fixing offences and that an unnamed English player was also incriminated – who turned out to be Mr. Westfield. Both were questioned under caution by Essex police and released on bail until September that year pending further enquiries.

In the event, once the police had completed all their investigations, Kaneria was eliminated from their enquiries (for the fall-out this decision, see below!). Mr. Westfield, however, was charged with accepting or obtaining corrupt payments, and assisting others to cheat at gambling – offences under the Corruption Act and the 2005 Gambling Act respectively. He was

alleged to have deliberately sent down poor bowling and allowed a certain amount of runs to be scored from his first over. Westfield, the first English cricketer to face corruption charges arising from a fixture, conceded 60 runs from seven overs during that game, including four wides and two no-balls, as Durham scored 276 for six, a target which was eventually overhauled by the visiting side, who won by seven wickets with 19 balls to spare. The trial was fixed for January of this year at the Old Bailey (Central Criminal Court) London (*The Daily Telegraph of 12/1/2012, S13*). The defendant changed his plea from not guilty to guilty at a late stage of the trial.

The court heard how Mervyn Westfield’s downfall started when he showed a fellow Essex cricketer the money he had made from agreeing to a spot-fixing exercise during one of his rare appearances in the first team. Westfield had confided in Tony Palladino, a club-mate from his teenage days at Wanstead in the Essex League. Mr Palladino followed anti-corruption guidelines by reporting the incident to the club’s hierarchy, the coach and captain, Paul Grayson and Mark Pettini. Palladino, who went on to play for Derbyshire, was named in a pre-trial hearing as the prosecution’s star witness. The Crown had applied for Mr. Pettini to be flown from Zimbabwe, where he was playing first-class cricket for Mountaineers, in order to give evidence. Messrs. Grayson and Pettini had approached the club’s chief executive, David East, and the matter was soon passed on to the England and Wales Cricket Board, who called in Essex police. Since his fall, Westfield had played club cricket for Wanstead but had several offers on the table from

counties willing to employ him during the following season were he to be found not guilty at the Old Bailey.

It also emerged that Westfield was the kind of vulnerable young player about whom the authorities feared that he would be open to a match-fixing approach. As a Second XI player his salary was around £10,000, as well as money. To be offered £6,000 for one over appears to have represented an irresistible temptation. Detectives were able to follow the money trail; mobile telephone records also provided strong evidence. Initially it is thought attempts were made by close friends within cricket to convince Westfield to confess, but he feared repercussions from the gangster underworld. Slowly over the past 18 months details had emerged of a young, impressionable fast bowler led astray by a senior team-mate who, in the words of Judge Anthony Morris would be named in court at the relevant sentencing hearing.

The fact that Mr. Westfield was happy to tell his team-mates about his crime suggests that he may have succumbed to the pater of an experienced fixer who would have convinced him that, because the match between Durham and Essex in September 2009 was of no particular consequence, bowling a few wides would cause little harm. In reality, however, millions of dollars are bet in Asia on “brackets” of overs during which punters on a set amount of runs being scored in seven over spells (*The Daily Telegraph of 13/1/2012, p. S2*).

The Essex bowler was eventually found guilty. The defendant’s legal team had tried to argue that the fact that Westfield had only conceded 10 runs, including a wide, from the over in

question, rather than the 12 which he had been said to have agreed, showed that he had not in fact gone through with the fix. However, the judge’s response was that he found it hard to accept that he would have been paid had he failed to deliver on his side of the bargain. The game had been broadcast live on Sky Sports and would have been shown across the Indian subcontinent, where most illegal betting takes place. Neither the Essex police nor the prosecution succeeded in establishing who was responsible for paying Westfield, but they did identify an alleged corrupter and held out the prospect of his being named at the sentencing hearing. The latter took place a month later, and Mr. Westfield was jailed for four months.

The judge revealed that the entire affair had been orchestrated by none other than Danish Kaneria, who had been released without charge at an early stage of the investigation. It was revealed that Kaneria’s approaches to players, offering “bungs” from bookmakers, were an open secret at Essex CCC. Mark Milliken-Smith QC, defending Westfield, said that it was “startling” that no-one had reported Kaneria and suggested that players had “turned a blind eye” because the Pakistani player was a match-winner. This development plunged Pakistani cricket and the ICC into a fresh fixing controversy, since it emerged they knew that Kaneria had “highly inappropriate links” to a corrupt Indian bookmaker called Arun Bhatia since 2008. The leg-spinner had been officially warned by the ICC but continued to play for club and country. Kaneria now faces the prospect of a corruption inquiry by the England and Wales Cricket Board (EWCBC) which could result in a worldwide lifetime ban

for the player (*The Daily Telegraph of 18/2/2012, p. B20*).

This naturally raises the legitimate question, raised earlier, as to why Kaneria did not join Westfield in the dock. It emerged that the Essex police had initially treated the case as a “conspiracy” between Westfield and Kaneria, and passed a file to that effect to the Crown Prosecution Service. However, senior lawyers had decided that there was insufficient evidence for a “realistic prospect of a conviction” against Kaneria, which is why he was released without charge. Both the police and the CPS confirmed immediately after the trial that they would not be pursuing a fresh case. However, they intended to pass their files to the EWCBC, where the case will be adjudicated in accordance with the penalties applicable at the time of the offences (2009), under which he could incur a lifetime worldwide ban (*Ibid*). Mr. Kaneria immediately claimed that he had been cleared not only by the police and the CPS, but also by the ICC and the ECB. Both, however, deny having cleared him (*Daily Mail of 21/2/2012*). In fact, it soon emerged that Kaneria would also be summoned to appear before the Pakistan Cricket Board’s Integrity Committee in order to explain his involvement in the Westfield case (*The Guardian of 21/2/2012, p. 46*). It was also learned that Westfield had agreed to talk to the ECB’s anti-corruption investigators, with his evidence set to form a major part of any potential action against the leg-spinner. The ECB’s Access Unit, led by Chris Watts, a former Metropolitan Police officer, will then interview Essex players before the start of the 2012 season (*The Daily Telegraph of 21/2/2012, p. S14*).

If anything, the trial and its outcome showed that corruption in cricket spreads its tentacles very widely. That much was accepted by the ECB and its chairman, Giles Clarke, who said that the notion that this was just being done “by some nasty people abroad” was “a load of rubbish”. He emphasised just how important it was for governing bodies across the world to fight in order to preserve the game’s integrity. At the same time, the ECB announced an amnesty had been put into effect until 30/4/2012 in order to encourage players and officials to report “approaches or information relating to corrupt activities”. As is mentioned above, under ECB rules it is an offence not to report such approaches, but the Board intends to provide an opportunity for players and officials “who may not have previously reported such activity to be offered the opportunity to furnish information without the threat of sanction”. Accordingly during the coming months both the ECB and the general public may be given a clearer idea of exactly how widespread spot-fixing is in English county cricket (*The Guardian of 13/11/2012, p. S1*).

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**Chris Cairns (no relation)  
clears name after High  
Court £90,000 libel award**

Allegations surrounding the former New Zealand and all-rounder Chris Cairns denied have already surfaced in the columns of this Journal. They have culminated in a seminal court case in which the 41-year-old international succeeded in obtaining a substantial sum by way of damages from the High Court. More particularly he had been accused of involvement in match-fixing

in the rebel Indian Cricket League in 2008 by the former Indian Premier League chairman, Lalit Modi, on a well-known social networking site. It was claimed that this fact was the explanation for his exclusion from the list for the Indian Premier league (IPL).

The case has been described as a “clear-cut” example of libel tourism, with Mr. Modi’s lawyers claiming that the tweet was read by only 35 people in England and Wales, whereas Mr. Cairns’s team claimed a figure of up to 95. The all-rounder claimed that, having lived in England when his father Lance, also a New Zealand international, played here, and then again when he was employed by Nottinghamshire, he values his reputation in this country highly. Earlier, he had already secured undisclosed damages from Cricinfo, the cricket website which communicated the tweet. Mr. Modi, for his part, had declined to apologise and pleaded justification, maintaining the allegation was true. Cairns claimed that the defendant’s allegations had a profound effect on his personal and private life and put a strain on his marriage. He felt hurt that his wife might think that he was not the man she thought he was. He was also perturbed that friends, many of whom were former cricketing opponents, would question his integrity “as a man and a sportsman”, and that all he had achieved in the great game of cricket was “dust” (*The Guardian of 6/3/2012, p. 48*).

Cairns was then pressed by Modi’s counsel, Ronald Thwaites QC, in four hours of cross-examination, and pronounced himself “offended” by suggestions that an ankle had been fabricated to cover up his abrupt departure as the captain of the ICL

franchise Chandigarh Lions. Mr. Thwaites also questioned the former player over payments of 900,000 dirhams (about £155,000) he had received from Rough Diamond Traders, a company based in Dubai. Cairns said he had a verbal agreement to perform PR work for it, having learned about the diamond trade in Antwerp. Mr. Modi, who was suspended from his role as commissioner of the IPL in April 2010 over separate claims, promised evidence from six Indian players who claimed Cairns was involved in match-fixing, as well as from Andrew Hall, the former South Africa all-rounder and Northamptonshire captain who also played for Chandigarh Lions in the ICL.

The court heard accusations via witness statements from members of the Chandigarh Lions, a team Cairns captained in the now-defunct ICL. It was alleged he was involved in fixing along with Dinesh Mongia, a left-arm spinner who played for India, Lancashire and Leicestershire, and who was his unofficial vice-captain.

Love Amlish, a Chandigarh bowler, alleged Cairns told him to bowl a no-ball and a leg-stump yorker in one match while batsman Gaurav Gupta claimed Cairns told him to not score more than five runs in an innings. Another player, Rajesh Sharma, alleged he was told he would be forced to leave the team if he “kept expressing his view on fixing.” There was no suggestion Cairns himself under-performed at any stage. The court was told that Rodney Marsh, the former Australia wicketkeeper, refused to sign a bat autographed by Cairns because he did not want to be associated with him. Cairns accepted this and said he “had it

out” with Marsh over a drink at his abode.

Cairns was again asked if Howard Beer, the ICL’s anti-corruption officer, was present at the meeting when his contract was terminated by the ICL. Mr. Thwaites ended his cross examination by alleging Cairns said “help me Howard” when rumours of fixing were put to him by the ICL. The official explanation for his departure was failure to disclose an and Cairns denied Beer was present at the meeting (*The Daily Telegraph* of 7/3/2012, p. S15).

The proceedings took a dramatic turn when Mr. Cairns lost his temper when Mr. Modi remained silent on day five of libel trial. The New Zealander had to be ushered away from confronting Indian administrator at the end of an eventful fifth day of the libel trial. He became visibly annoyed when it was announced in court that Modi would not be giving evidence in the case. One source close to the former New Zealand captain told *Telegraph Sport* that the decision not to put Modi in the witness box was “spineless”. Mr. Modi had followed the advice of his lawyers to stay silent in court (*The Daily Telegraph* of 10/3/2012, p. S19).

Earlier, the aforementioned Andrew Hall, the former South Africa all-rounder and current captain of Northamptonshire, told the court how he suspected he was being framed for fixing by the same team-mates who accused Cairns. Hall, who took over the captaincy of the side after Cairns was sent home, said his instinctive reaction was that Cairns had been “set up” by the Indian players in the team. However, he had changed his mind

after the League’s anti-corruption officer, Howard Beer, assured him a proper investigation had been conducted. Mr. Beer told him he had “no doubt” Cairns was implicated. Senior ICL executives then apparently informed a meeting of all the team captains that Cairns had been suspended for fixing. Hall said in his witness statement that he thought the meeting had been called because of the press reports “indicating that Chris Cairns had been suspended on grounds” (*Ibid*). He continued:

*“The ICL executives made clear to everyone present that this was not the case. In fact they told us that Chris Cairns had wanted the ICL to release a statement confirming that the reason for his suspension was medical, but the ICL had refused to do this. The impression I got from that meeting was that nothing further was going to be done in relation to the match-fixing allegations and that the ICL wanted to keep things quiet in order to protect itself at that time.”* (*Ibid*)

Three Indian players, former team-mates from the Chandigarh Lions, gave testimony via video link from Delhi. Gaurav Gupta, a batsman who played first-class cricket for Punjab, said Cairns told him before a match against Mumbai to score “no more than five runs”. When Cairns arrived at the crease Gupta was four not out and he alleged his captain said “you should get out now”. He was dismissed soon after without adding to his score. Karanveer Singh, a leg-spinner, told the court about a meeting with Dinesh Mongia, the senior India player in the side implicated during this case as a match fixer.

Singh said Mongia told him everyone in the ICL from “top to bottom” was involved in fixing. He then described a conversation with Cairns a few days later in which he asked him if he had spoken to Mongia. Singh was convinced the subject of his conversation with Cairns “was about fixing”, and he was reluctant to report it to the authorities because he had been told even ICL executives were corrupt. Rajesh Sharma, an off-spinner who also played first-class cricket for Punjab, testified via a translator that he was told to stop talking about fixing by Cairns. He took this as evidence that Cairns was involved. He was asked by the Bean J why there were discrepancies in two witness statements he signed over the past three years and he replied: “I thought if I had given them everything [in 2008] I would have ended up in prison.” (*The Daily Telegraph* of 13/3/2012, p. S18).

In the event, the former New Zealand captain was awarded £90,000 in damages. Modi was also ordered to pay £400,000 in costs to Cairns’s solicitors within 28 days. Mr. Cairns was not at the High Court for the ruling by Bean J, who heard the case without a jury. The judge said that Modi had “singularly failed” to provide any reliable evidence that Cairns was involved in match-fixing or spot-fixing, or even that there were strong grounds for suspicion that he was. He added:

*It is obvious that an allegation that a professional cricketer is a match-fixer goes to the core attributes of his personality and, if true, entirely destroys his reputation for integrity. The allegation is not as serious as one of involvement in terrorism or sexual offences [to take two examples from recent cases]. But it is*

*otherwise as serious an allegation as anyone could make against a professional sportsman” (The Guardian of 27/3/2012, p. 46).*

Cairns later said in a statement:

*“Today’s verdict lifts a dark cloud that has been over me for the past two years. I feel mixed emotions. Firstly, sadness that I should ever have had to put myself, my friends and my family through this because of one man’s misdirected allegations. But I also feel great joy because my past career has come through unscathed and remains intact and because I had the courage to stand up in the highest court to defend my name. Lastly, I feel great relief that I am able to walk into any cricket ground in the world with my head held high.” (Ibid)*

The judge granted Modi permission to appeal over the amount of damages but refused permission on the question of liability, although Modi’s lawyers, at the time of writing, intended to pursue that with the Court of Appeal direct. In his ruling, the judge said a claim by Modi’s lawyers that the case was an example of “libel tourism” was misguided, as Cairns went to school in England, as did his children, and he played county cricket for seven seasons. Also, Modi – who, as is mentioned earlier, was not called to give evidence during the eight-day trial – had been resident in England since mid-2010.

He rejected a claim by Mr. Thwaites that Cairns had given “incredible evidence” on a number of points, saying that Despite prolonged, searching and occasionally intrusive questioning about his sporting, financial and personal life, he emerged

“essentially unscathed”. He added that evidence given by cricketers Gaurav Gupta, Rajesh Sharma and Tejinder Pal Singh was not to be believed and hearsay evidence from Amit Uniyal and Love Amlish was inconsistent and unreliable, while that of Karanveer Singh fell well short of sustaining Modi’s case. He also said Mr. Modi’s lawyers had launched a “sustained and aggressive” attack on Mr. Cairns, which must be taken to have been made on his instructions. In Mr Thwaites’s closing speech to the court, the words “liar”, “lied” and “lies” were used 24 times. To reflect that, said the judge, he had increased the damages by about 20 per cent, from a starting point of £75,000 to £90,000.

## FOOTBALL

Fifa corruption scandal  
– an update

### Caribbean “cash for votes” scandal lingers on

It will be recalled from a previous issue of this Journal that a protracted and bitter investigation into this affair by the world governing body FIFA’s Ethics Committee had claimed the careers of several prominent football officials. One of them, former Qatari executive committee member Mohamed Bin Hammam, incurred a lifetime ban for allegedly offering bribes to Caribbean football officials during his campaign for the FIFA presidency. The other, Jack Warner, had also been accused of involvement in the affair, but resigned before any action could be taken against him. The former firmly denied the allegations and applied for a review of the decision before the FIFA Appeals

Committee, claiming that his prosecution was politically motivated and orchestrated by the organisation’s controversial President, Sepp Blatter, and General Secretary Jérôme Valcke (*The Daily Telegraph of 15/9/2011, p. S7*). However, Mr. Bin Hammam’s challenge failed in mid-September. Undeterred, the former Qatari official announced his intention to appeal to the Court of Arbitration for Sport (*The Guardian of 16/9/2011, p. S4*). The outcome of this appeal was not yet known at the time of writing.

Mr. Warner, for his part, gave every sign that, although no longer part of FIFA officialdom, he was not about to fade away unobtrusively. In mid-October 2011, he accused FIFA of conspiracy and entrapment after the leaking of a video which appeared to show him advising Caribbean officials to accept money from Bin Hammam. He also claimed the video was illegal as amounting to contempt of court. The video was made available in the wake of the news that 15 Caribbean Football Union (CFU) members were also set to face the FIFA Ethics Committee. He said:

*“It is clear that those who recorded the meeting and subsequently made certain that the video went global are engaged in entrapment. The release of this video is tantamount to contempt because it seeks to influence international opinion against what is clearly a conspiracy against the delegates of the CFU. The Caribbean delegates are in Zürich and are actively involved in disciplinary proceedings established by FIFA, so this leak is clearly subjudicious and contrary to the very principles of law and justice. This is what defines FIFA: a*

*perceived right to do all in its power, right or wrong, to defend its own”*  
(*The Times of 13/10/2012, p. 61*).

As a result of the disciplinary proceedings referred to by Mr. Warner, ten more officials from the Caribbean were charged with involvement in the bribery scandal (*The Daily Telegraph of 27/10/2011, p. S17*). No further details are available at the time of writing.

Mr. Warner returned to the fray just before the dawning of the new year 2012 when he alleged that he obtained the television broadcasting rights for the World Cup for \$1 after assisting Sepp Blatter in his successful election bid for the FIFA presidency. More particularly he claimed that he acquired the rights in question from the world governing body in 1998 through a Mexican company, as well as obtaining them for the 2002, 2006, 2010 and 2014 tournaments. He allegedly used the revenue from selling on these rights to develop football in the Caribbean. FIFA responded by stating that it would “look into Warner’s concerns” (*The Daily Telegraph of 30/12/2010*). No further details are available at the time of writing.

Barely a few weeks later, the ex-Trinidadian official was back in the news for the wrong reasons when it was announced that FIFA had suspended its £30,000 pension payable to him pending the outcome of an investigation into £440,000 of missing money intended to assist the victims of the Haiti earthquake in 2010. The world governing body said that it had yet to receive a satisfactory explanation from the Trinidad and Tobago Football Federation (TTFF) as to the whereabouts of this cash. The

Federation immediately laid the blame for the alleged financial irregularity on Mr. Warner, claiming that it had “surrendered authority” to him for the special account into which the money was paid. As expected, Mr. Warner was not only dismissive of the accusation, but also hinted at the existence of a conspiracy by saying “Why now? And after you get why now, just join the dots and see” (*The Times of 17/2/2012, p. 56*). The matter remained unresolved at the time of writing.

As a postscript, in late September 2011 FIFA’s ethics committee suspended leading Caribbean official Colin Klass for 26 months. Mr. Klass, a member of the Caribbean Football Union (CFU) Executive Committee, and head of the Guyana FA for 22 years, was also fined SF 5,000. He had been found guilty of orchestrating a campaign of support for Mr. Warner (*The Daily Telegraph of 24/9/2011, p. S5*).

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**The Teixeira/ISL affair**

As if the world governing body was not sufficiently embroiled in scandal and accusation, a new potential cloud of corruption threatened to envelop it when, in mid-August 2011, it was learned that Ricardo Teixeira, the president of the Brazilian Football association and the man in charge of the 2014 World Cup, had been accused of involvement in the embezzlement of funds from a friendly international between Brazil and Portugal in 2008. A police investigation had been commenced into the use of £2.5 million paid to a company in order to market the fixture, amid allegations that Teixeira received some of the funds. The Brazilian was a member of

the FIFA Executive Committee and a key ally of Sepp Blatter, as well as being regarded as one of the leading contenders to succeed the Swiss administrator when the latter eventually steps down. Nor was this the first occasion on which he had been accused of impropriety, having been the subject of protests in Rio de Janeiro during the World Cup draw held earlier that month. He was also one of the four FIFA figures (who included – inevitably – a certain Jack Warner) whom, as was reported in these columns at the time, Lord Triesman had accused of acting improperly during England’s bid for the 2018 World Cup (*The Independent of 17/8/2011, p. 49*).

It later turned out that the Brazilian police had also commenced an investigation into possible corruption arising from an affair which has dragged on for many years and which was extensively covered at the time in these columns, i.e. the controversy surrounding the now-defunct ISL, being a sports marketing agency operating on behalf of FIFA. The company had gone bankrupt in May 2001, but the fallout had continued until June 2010, when a Swiss court ruled that unnamed FIFA officials had received bribes from ISL in relation to contracts concluded with the agency. Their names were withheld and the prosecution ended after they had paid £3.9 million by way of “reparation”. This fact had gone relatively unnoticed until over a year later, after FIFA had been urged from all quarters to subject itself to substantial reform and innovation in order to prevent a recurrence of the cancer of corruption which had undermined its position in recent years. As a result, President

Blatter had produced a set of proposals which call for greater transparency within the organisation – including the publication of the relevant ISL court documents (*The Daily Telegraph of 19/10/2011, p. S7*).

FIFA has in the past repeatedly blocked attempts to secure the release of these documents – most recently on the eve of Mr. Blatter’s re-election as President. As a party to the case, FIFA could release the information into the public domain immediately, and an application to the court to that effect was submitted shortly afterwards. Added pressure to release the documents had come in the form of the controversial BBC Panorama broadcast in 2010, shortly before the vote was taken on the location of the 2018 World Cup (extensively dealt with in a previous issue of this Journal). This had alleged that £63 million had been paid between 1991 and 2001 by ISL in kickbacks to officials, in return for television and marketing rights contracts. It had alleged that not only Mr. Teixeira, but also officials Nicolas Leoz and Issa Hayatou, President of the Confederation of African Football, were among the recipients. Teixeira was alleged to have received no fewer than £6 million in bribes via a Liechtenstein-registered company called Samud, although he has consistently denied the allegations. Those named in the court proceedings did not incur any criminal charges because, at the time, corporate bribery was not a crime in Switzerland (*The Guardian of 19/10/2011, p. S1*).

A further turn of the screw came a few weeks after Mr. Blatter had made this announcement, when it was learned that investigators from the International Olympic Committee

(IOC) were among those seeking to compel FIFA to publish the relevant papers. This was learned from the Public Prosecutor in Zug, Switzerland, within whose jurisdiction this matter lay. He confirmed that a third application for disclosure had been received from the IOC. After the Panorama broadcast referred to above, the IOC had opened an inquiry into the conduct of Mr. Hayatou and two other named IOC members, Joao Havelange of Brazil and Lamine Diack, the President of the International Association of Athletics Federations (IAAF) (*The Times of 3/11/2011, p. 81*). Even before the court made its decision on the disclosure applied for, Messrs. Hayatou and Diack received formal reprimands from the IOC (*The Daily Telegraph of 9/12/2011, p. S13*). As to the disclosure application itself, this ran into several difficulties from the moment the applications were lodged. Initially it was thought that the court would experience no difficulty in granting the application. However, there was a challenge to the application by “a third party” (thought to have been Teixeira himself) which caused considerable delay in the proceedings. Nevertheless, just before the New Year 2012 the court overruled these objections and decreed that the 41-page document could be published (*The Independent of 28/12/2011, p. 51*). However, this decision was appealed, which is why the final outcome was not yet known at the time of writing.

Before this judicial saga could draw to a close, however, Mr. Teixeira resigned as head of the Brazilian football confederation (CBF), on the grounds of “ill health”. He had been facing mounting pressure, not only because of the corruption allegations, but also

because of construction delays and doubts over the ability of Brazil to host the 2014 World Cup. Earlier, his fellow-countryman (and ex-father-in-law) Joao Havelange had already stepped down from the IOC – just days before, according to insiders, he was about to be suspended as a result of the IOC investigation into the ISL affair (*The Guardian of 5/12/2011, p. S6*).

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### **FBI investigate World Cup bids (US)**

In early December 2012, it was learned that investigators from the US FBI had interviewed members of England’s failed 2018 World Cup bid as part of an investigation by the law enforcement agency into alleged corruption. These interviews were related not only to the World Cup bidding process, but also to the FIFA presidential election and the allegations of bribery dealt with above and in previous issues of this Journal. It is understood that the FBI has “substantial evidence” of outside organisations attempting to hack the email accounts of the US bid for the 2022 tournament, and believes that the English bid may have been similarly affected (*The Daily Telegraph of 7/12/2011, p. S4*).

The interest of the FBI into the World Cup election was thought to be linked with an investigation into payments made to Chuck Blazer (sic), the FIFA Executive Committee member who first revealed the bribery allegations against Bin Hammam and Jack Warner. In his role as General Secretary to the Concacaf organisation, Mr. Blazer received commission payments of over \$500,000, some of which was linked to television contracts. Some of the cash

had been paid into an account in the Cayman Islands, the most recent payment, of \$250,000, having been made in March 2011 and paid into a Bahamas account. These payments were detailed in accounts and letters sent to the FBI by British journalist Andrew Jennings. In August 2011, the press agency Reuter had reported that the payments were being reviewed by a New York-based FBI squad assigned to investigate “Eurasian organised crime”. Mr. Blazer has not denied receiving the payments, but maintained at the time that all his transactions had been legally and properly performed and in compliance “with the various laws of the applicable jurisdictions based on the nature of the transaction (*Ibid*).

It was not yet known at the time of writing whether or not this FBI investigation had been concluded. However, the FBI is not the only party to entertain doubts over the probity of the decision which awarded the 2022 World Cup to Qatar. One of the FIFA members appointed to head the organisation clean-up drive, Theo Zwanziger, has expressed his continued disquiet over an alleged leaked email from FIFA Secretary-General Jérôme Valcke in which he said that the disgraced Bin Hammam “thought you can buy FIFA as they (Qatar) bought the World Cup”. Mr. Zwanziger added that he had “not forgotten this sentence” and that this matter had to be “cleared up” (*The Daily Telegraph of 24/10/2012, p. S12*).

### **“Third party Ownership” warning**

In mid-March 2012, Chris Eaton, FIFA’s head of security, warned that the world governing body must address the issue of third-party ownership of footballers. If it does not, claims Mr. Eaton, the game will risk an uncontrollable corruption epidemic. He warned of sophisticated criminal networks which are subverting players and clubs in order to earn millions of pounds in corrupt profits (*The Daily Telegraph of 10/3/2012, p. S11*).

### **Officials and players charged in Turkish corruption scandal**

In early December 2011, it was learned that a Turkish court had accepted an indictment charging 93 officials and players with match-fixing. The first hearing was due to take place in February the following year. Thirty-one players and officials have been jailed pending trial since the scandal emerged in July 2011. The indictment names eight clubs, including leading side Fenerbahce, who were removed from this season’s Champions League over the allegations. Besiktas and Trabzonspor are also involved, Fourteen players are among the defendants, and investigators have alleged manipulation in 19 matches (*The Independent of 10/12/2011, p. 55*). No further details are available at the time of writing.

### **Top agent lifts the lid on football’s murky secrets (UK)**

Earlier in these columns, we mentioned that cricket corruption is far from the exclusive preserve of dubious South Asian bookmakers. Similarly, it could be said that football corruption is far from being monopolised by garrulous circuit-frequenting international football officials – in fact some of it seems to call home too often for comfort. This was clearly demonstrated in the autumn of 2011 when the former agent who represented top Liverpool star Andy Carroll revealed some of the more controversial dealings and bung culture which currently prevail in British football. In fact the agent in question, Peter Harrison has earned millions from the game but has turned “whistleblower” after having abandoned from the sport. Mr. Harrison has revealed the game’s guilty secrets after spending 20 years at the top representing stars such as Carroll, Eidur Gudjohnsen, Jussi Jaaskelainen, Rivaldo and other top Premier League players.

In a remarkable interview with a top British newspaper, he (a) accused two high-profile managers of taking “bungs” in a television expose and (b) reveals that he had been threatened by underworld characters for exposing football’s dirty secrets. One of the major issues which dictates this corruption agenda is the fact that the agent claims to have earned £900,000 for a day’s work, brokering the transfer of a leading Premier League player. He also alleged that players are routinely tapped up by clubs, even offering “sweeteners” to young players by buying them cars. However, it does

appear that the English FA have “turned a blind eye to the dark arts” (*Daily Mail* of 23/9/2011, p. 88).

Mr. Harrison, who played under Brian Clough at Nottingham Forest, claimed: *“I’m doing this in the interests of the game - people take their kids to matches, they buy the shirts, the season tickets and the TV subscription. There are so many dreams, but they should also know there are a few agents getting away with murder. They break the rules time and again. Paul Stretford was fined a substantial amount of money and banned - how can he be the only one?”* (*Ibid*)

Mr. Harrison left the game after an FA arbitration panel found against him in a legal battle over the £35million transfer of Andy Carroll to Liverpool. The FA tribunal ruled in favour of Mr. Carroll’s new agent, Mark Curtis. Harrison was the Liverpool striker’s agent when he burst onto the scene and successfully negotiated his first professional contract and subsequent deals at Newcastle FC. Mr. Harrison remains convinced that he should have been involved in the Liverpool deal after investing so much time in the striker and becoming a family friend. He was even named on the custody document with Northumbria police when Carroll was arrested for alleged assault in 2009. Carroll was fined after admitting assault. He announced his intention to “bring down two big-name managers and they know who they are” by appearing in a television documentary in which he would be “exposing everything that went on”.

Mr. Harrison admits he freely took advantage of the naivety of West Ham chairman Eggert Magnusson to pocket £900,000 in commission in the deal to Lucas Neill.

He added:

*“The best way is to get a “friendly agent” to act on behalf of the club - that way you can split the commission with someone you trust. If, for example, the agent is based in Monaco, the club will pay his commission into an offshore account and he will pay the player’s agent. It’s all untraceable. The commission with the club is whatever you can negotiate. When I took Lucas Neill to West Ham instead of Liverpool I earned £900,000 and they put the player on £72,000 a week. He was going to Liverpool but West Ham wouldn’t take no for an answer. It was incredible. At the time I thought it was just business - I had bills to pay, office, telephone, travel - but when I look back on it now I’m embarrassed.”* (*Ibid*).

The FIFA-licensed agent also admits offering inducements to young players to keep them under his wing. He said that the days of parents being offered fridges were a thing of the past - now it is cars, houses and . Some of them even come out with a straight demand for money. He added, however, that in many ways they deserve it because they have been “watching their son in rain, sleet and snow since he was seven years old”. The rule appears to be that the better the player, the more you look after their parents; therefore it becomes a business decision.

Harrison, who was exposed by a BBC Panorama programme in 2006 for talking to Chelsea about his client Nathan Porritt, then under contract with Middlesbrough, claims there is a circle of trust in football. He added:

*“There is so much money being made and paid that people are frightened to rock the boat, but I’m not. It’s like a magic circle of trust and people don’t want to be on the outside. It’s a cosy little club. There are a few managers who are close to agents, they do the same deals, and let’s be honest it’s not because that agent can spot a player. It’s funny how things get done, let’s put it that way. If you have a relationship with someone and gain their trust, you might have to go through a manager’s favourite agent to get a deal done”.* (*Ibid*).

Harrison has claims that one club is “under the protection of the FA”. He insists the club uses the same agent for all its deals and that there are kickbacks as a reward. The newspaper to which he made these allegations unable to substantiate them; however, he has notified the FA of his concerns. He added that, if one looked at the deals certain clubs did at the top, it was always the same agents arranging them. There have apparently been many complaints about that club; however, FA fails to act. Harrison also claims that some managers are in on deals and bring in trusted “friends” and agents to make sure they go through.

He revealed that, the Panorama documentary referred to earlier soured his relationship with some people. He was even told by other agents and people connected with football that managers have been instructed not to

work with him. He alleges that they even attempted to enlist the underworld in order to “to get heavy” with him:

*“I’m not blowing my own trumpet but I’ve been involved in deals for 20 years and been at the top and I’ve got a right to tell people what goes on on this side of the fence. I keep talking about Andy Carroll, but in my opinion he was poached from me. When Liverpool signed Andy they brought in someone to act on behalf of the club to broker the deal even though Damien Comolli is their sporting director. Why do they need an agent on transfer deadline day? Surely they just pick up the phone to Newcastle and ask, “How much for Andy Carroll?”*  
*Something’s wrong with the game when it comes to that. I complained to the FA but in my opinion they don’t want to rock the boat with Liverpool or Newcastle” (Ibid)*

Managers, chief executives, agents and chief scouts routinely flout the rules by tapping up players, according to Harrison. Apparently agents meet managers, chief executives and scouts every day without the permission of the club holding the registration of the player and it’s a silly regulation. Some clubs pay “well over the odds for players”. FIFA provides guidance but sometimes chairmen and chief executives are under tremendous pressure to obtain deals Harrison claims he has complained to the FA many times about fellow agents, but insists nothing is ever done (Ibid).

**South Korean match fixers jailed for corruption**

In early September 2011, it was learned that a South Korean court had issued jail sentences and “prison labour” to 24 people – the majority of them top footballers – for their role in the match-fixing crisis which engulfed the game there during the summer of 2011. Apparently, however, the “Godfathers” behind these manipulations, who were Chinese, succeeded in fleeing unpenalised – presumably to “pastures new”. Apart from those issued with prison terms, dozens of other players have incurred bans – some for life (The Mail on Sunday of 4/9/2011, p. S9).

**1978 World Cup match “fixed by secret deal between rulers” (Argentina/Peru)**

At the time when it was awarded and organised the 1978 World Cup, Argentina was under the yoke of a most repressive dictatorship under General Jorge Videla. Explosive new evidence given at a South American extradition hearing has fuelled claims that the military rulers of Argentina and Peru fixed the former’s victory in the tournament. The beneficiaries of a corruption ruling would be the Netherlands, who lost 3-1 in the final, and the Dutch media are leading calls for a FIFA inquiry. The match-fixing allegations focus on the last group match, which the hosts needed to win by four goals to reach the final. They thrashed Peru 6-0. At the time, conspiracy theories abounded, fanned by reports that shortly after the tournament a huge shipment of grain had been sent from Argentina to Peru.

However, according to testimony which emerged in mid-February 2012 from Genaro Ledesma, an 80-year-old former Peruvian Senator, the suspiciously easy victory was the result of an even murkier deal struck between the dictator Videla, and Peru’s military ruler, General Francisco Morales Bermudez (The Times of 19/2/2012, p. 62).

At an extradition hearing in Buenos Aires aimed at summoning the 90-year-old Bermudez from Peru to face charges of kidnapping and torture, Mr. Ledesma claimed that the former leader had agreed deliberately to lose the World Cup match as part of “Operation Condor”. This was a clandestine plan engineered between Latin America’s military rulers in assisting each other to “disappear” troublesome activists. At least 50,000 people are thought to have been victims of the purges by the dictatorships of eight countries in the 1970s. A month before the World Cup, General Videla had spirited away 13 Peruvian dissidents, including Ledesma, to a military base in Argentina. It is alleged that payback came on the football pitch. “With what I know now, I cannot say I am proud of our victory,” said Leopoldo Luque, an Argentine striker who scored twice against Peru, as quoted by a Dutch tabloid that month.

FIFA has said that it required more hard evidence or an official request to launch an inquiry (Ibid).

**“English Premier League vulnerable to match-fixing” says top FIFA official**

Shortly after the new Year 2012, players from English lower league clubs, including a Blue Square Conference side, were said to have reported suspicious approaches from suspected match-fixers to world governing body FIFA. The players are understood to have raised concerns over anonymous approaches from individuals offering financial support. There was no suggestion that Conference matches were fixed, but the players’ concerns raise the prospect that English football may be targeted by fixers. As the informed reader is aware, the past two years have witnessed an explosion in alleged cases of fixing, with suspicious matches reported on every continent. The problem is particularly acute in Europe, with reported cases in 25 countries, almost half of governing body UEFA’s members. Announcing a series of measures designed to prevent match-fixing on Tuesday the FIFA head of security, Chris Eaton, warned that English football may not be immune (*The Daily Telegraph* of 11/1/2012, p. S6).

Mr. Eaton said that he had no evidence of corruption at the highest level of the English game, but warned that the huge global interest in the , and the massive volume of money bet on games made it vulnerable. He added:

*“We have no direct evidence that there is criminal behaviour involving the higher level leagues [in England], but that does not mean it is impossible or even happening. The majority of gambling worldwide is on major league football, and we know that a few years ago a single game between two English Premier*

*League clubs generated €1bn in betting [Chelsea v Liverpool in the 2005 Champions League semi-final]. I don’t say it is happening, but I do know criminals will be considering how they can do it.”* (*Ibid*)

Concern in England has largely been restricted to the lower leagues. The largest prosecution saw five players, four from Accrington Stanley and one from Bury, banned in 2009 for betting on a game in which they competed. An FA tribunal issued bans of up to a year and said it had “serious concerns that the match may have been fixed”. The Football Association (FA) and the Premier League say they have no evidence of fixing and take strong precautions to protect the game.

The measures announced by Mr. Eaton include a whistle-blower hotline and an amnesty programme for players who provide evidence of fixing. Fifa is also employing investigators in Colombia, Malaysia and Jordan, as well as an investigator covering Europe and Africa. Eaton is also proposing changes to the way referees are appointed for international games, including making late changes to officials in high-risk matches. He also wants to see referees’ pay increased. Currently a Fifa referee receives just \$350 (£230) for a game compared to around \$5,000 (£3,200) paid by Uefa. He characterised the threat as an organised crime problem rather than a sporting issue.

As evidence for the scale and reach of fixing, world governing body FIFA has recently published a series of documents linked to convicted Singaporean fixer Wilson Raj Perumal, serving a two-year jail term in Finland,

and a former associate of his Anthony Santia Raj. Last year The Daily Telegraph revealed both men’s involvement in a series of suspicious international matches, some of which were co-ordinated from Perumal’s flat 500 yards from Wembley Stadium. The documents include correspondence with national associations relating to a notorious fixed tournament in Turkey last year that led to life bans for six match officials (see above). They remain the only significant bans handed down by Fifa since Mr. Eaton began aggressively pursuing match-fixing a year ago, and the lack of sanctions highlights one of the major barriers to progress (*Ibid*).

Strictly speaking, FIFA merely has jurisdiction over its international tournaments and friendly games, but despite evidence gathered in the last year it is often reluctant to impose its will at a national level. Eaton rejected the suggestion that his announcement was a diversion from the corruption scandals which have hit the world governing body in recent years (see above!). He said he resented the allegation “because no one can buy me, and I can assure you I did not come here to be bought or instructed by FIFA. I have had no constraint on my activity since I joined FIFA.” (*Ibid*).

By way of footnote, there is some disquiet in the English game at the FA’s £1million-a-year deal with William Hill. The bookmaker is currently in dispute with Football DataCo, the company that licenses fixtures on behalf of the professional leagues, with Hill insisting it should not have to pay to use fixture data. The FA insists there is no integrity issue in accepting sponsorship from a bookmaker (*Ibid*).

## RACING

**Bookmaker wins appeal against BHA ban (UK)**

In late August 2011, it was learned that a racecourse bookmaker was due to appear before the , charged with having breached the sport's rules on corruption. Matthew Thompson, who has taken bets on-course for 15 years, was said to have laid horses from the stables of Mick Easterby and Bill Moore at a time when he was riding work for those trainers.

Thompson denied the charges, which relate to 34 races. He represented himself at the hearing, where he also faced a charge of failing to provide complete telephone records on request. If found in breach, he risked being banned from all tracks and licensed premises, depriving him of his livelihood. Representatives of both stables confirmed that Thompson had ridden out for them but had not been paid. Serena Brotherton (an amateur jockey) asked if she could bring him along to teach him how to ride a little better "so that he could take part in a charity race, which was one of the things he wanted to do in life" said David Easterby, assistant trainer to his father, Mick. He added:

*"After he'd stopped riding out for us, the secretary automatically put him on the list [of registered stable employees] for the next year without being asked to do so, to make sure that we would be covered from an insurance point of view. And during that period, he's laid our horses and now he's in front of a disciplinary panel because of it." (The Guardian of 25/8/2011, p. 26).*

According to BHA records, Mr. Thompson was registered at Easterby's yard from 2/10/2007 to June 2008 and at Moore's from 21/2/2008 to December of that year. Mr. Moore did not dispute the period when asked about it. A BHA spokesman said that anyone riding work for a trainer, whether paid or not, was barred from placing lay bets against horses from that stable. As a bookmaker, Thompson might be thought to be in breach whenever he took bets on runners from those yards, but the case relates only to his personal betting transactions through an online exchange. Mr. Moore said he had checked with the BHA before allowing a bookmaker to ride work on his horses and been advised that there was no objection. No wrongdoing was alleged against either trainer (*Ibid*).

As a result of the hearing, Mr Thompson was declared a disqualified person for a period of 18 months with effect 26 August 2011 to 25 February 2013. Mr. Thompson appealed, on the following grounds:

- a) The penalty was wholly excessive and disproportionate
- b) The penalty did not properly reflect the very substantial and, in some respects, unique, mitigation put forward:
- c) The appellant, while being entered on the register of stable employees ("the Register") for the two licensed trainers in question, was not their employee in any meaningful sense (he would certainly not have satisfied the definition of "employee" or "worker" in Section 203 of the Employment Rights Act 1996);

- d) Rather, he rode out on an irregular basis in order to prepare himself to ride in two charity races, and for no other reason
- e) The Panel wrongly considered as aggravating factors its assumptions that as an owner and bookmaker the Appellant should have known the entirety of the Rules on lay betting, and in particular as they impacted upon a person signing the Register in the (unusual) circumstances in which he did.
- f) Rather, it should have enquired into and made specific findings on the appellant's actual knowledge of the effect of his registration on the Register on his ability to lay horses trained in the two yards in question. The appellant's case was that he did not understand that his links with those yards affected his ability to lay horses trained therefrom, which ignorance, while irrelevant to the fact of his breaches, was and should have been considered to be a mitigating factor.
- g) Further, and in particular, the Panel appeared not to have considered that the object of the (old) Rule 247 (and its successor) is to prevent dishonesty and corruption and that disqualification should be reserved for those guilty of dishonest or corrupt practices. This was not and was neither suggested nor found to be such a case.
- h) In this regard, the Panel did not appear to have had the benefit of consideration of the Judgement of the Appeal Board on 15 July 2010 (Sir Roger Buckley) in the case of Harry Findlay.

i) While it was the appellant's case that there should have been no disqualification for the reasons set out above, he also draws to the attention of the Appeal Board that his breaches were of the (old) Rule 247 (i.e. before 7 September 2009). Under the Guide to Procedures and Penalties in force at the time of his offences, the entry point disqualification was 6 months.

The Appeal Board allowed the appeal. It substituted for the said period of 18 months by way of disqualification a period of 9 months. Accordingly, and for the avoidance of doubt, the disqualification applies until 25 May 2012. The Board concluded that Mr Thompson should have known the entirety of the Rules precluding lay betting, that the fact that he did not was not a mitigating factor, but that the Disciplinary Panel was wrong to regard his imputed knowledge as an aggravating factor.

The Appellant's deposit was accordingly returned (see [www.britishhorseracing.com](http://www.britishhorseracing.com) of 25/11/2011)

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**British Horseracing Authority bans 11 individuals in corruption case**

Towards the end of October 2011, in the most significant case of its kind since the collapse of criminal charges against Kieren Fallon in 2007, 13 people faced corruption charges at the British Horseracing Authority's headquarters in Holborn, London. It was alleged that two licensed owners, Maurice Sines and James Crickmore, were at the heart of a systematic conspiracy to corrupt jockeys to

deliberately ride losers to profit on gambling markets. The four jockeys were Paul Doe, Greg Fairley, Jimmy Quinn, and Kirsty Milczarek, who is the girlfriend of former champion jockey, Kieren Fallon. (There was no suggestion Mr. Fallon was involved in any wrongdoing.) Paul Fitzsimons, now a licensed trainer, was also charged for offences allegedly committed when he was a jockey.

Using phone records and betting accounts the BHA prosecution, led by Mark Warby QC, alleged that the jockeys were paid by Messrs. Sines and Crickmore to ensure that particular horses lost, and to pass inside information to gamblers. They claimed that the horses were then "laid" to lose on betting exchanges by associates of the businessmen. The charges related to 10 Flat races run between January and August 2009. Fairley was charged with throwing three races, Doe two, and Quinn, Fitzsimons and Milczarek one each. They were charged with conspiring to commit a corrupt or fraudulent practice; passing information to betting exchange account holders for "material reward, gift, favour or benefit in kind"; and intentionally failing to ensure that horses ran on their merits (*The Daily Telegraph* of 20/10/2011, p. S17).

The investigation was apparently sparked by reports of suspicious bets from a major bookmaking firm. The bookmaker allegedly informed the BHA that a punter had attempted to place a six-figure bet on a horse in one of the races under suspicion, which they believed was a deliberate attempt to lower the odds. A bet of that size would automatically reduce the odds across the market, lessening the risk for

conspirators planning to back the horse to lose. Messrs. Sines and Crickmore have held shares in more than a dozen horses since 2004, and in March 2011 Sines was reported to have spent £130,000 on a colt at the Kempton breeze-up sale, the highest price paid for any lot. The pair are business partners and have extensive interests in static caravan and holiday parks across the south-east and in East Anglia. Sines, who has owned homes in the affluent Berkshire towns of Old Windsor and Virginia Water, had previously been accused of intimidating residents on mobile home parks which he owns – charges which he denied (*Ibid*).

The hearing was closed to the media, and resulted in 11 individuals, including two owners, two current jockeys and two former jockeys, being found guilty of serious breaches of the sport's rules. The 11 in question, identified in what the tribunal found to be a conspiracy that included three cases of horses deliberately being "stopped" by their riders, were banned from the sport for a combined total of 66 years and six months. The case ended with 14-year bans for the racehorse owners Maurice Sines and James Crickmore, who were found to be the organisers of a conspiracy in which horses were laid to lose on betting exchanges. The BHA disciplinary panel also imposed 12-year bans from racing on Paul Doe and Greg Fairley, both former jockeys, who were found to have deliberately failed to obtain the best possible placing for their horses. Mr. Doe was found to have stopped Edith's Boy at Lingfield in March 2009 and Terminate at Bath in July 2009, while Fairley was found to have breached the rules on The Staffy at Wolverhampton

in March 2009 (*The Guardian of 15/12/2011, p. S1*).

Two current jockeys also received bans. Kirsty Milczarek was banned for two years after the BHA found her guilty of conspiring to commit a corrupt or fraudulent practice and a breach of the rules on passing privileged information. She immediately announced her intention to appeal. Jimmy Quinn was banned for six months after the tribunal found him guilty of conspiring to commit a fraudulent practice. Paul Scotney, the BHA security director, said in a statement after the findings had been announced:

*“We take no pleasure in uncovering such serious breaches of the Rules of Racing. However, the findings of the Disciplinary Panel vindicate the hard work of the BHA’s Integrity and Compliance teams. In the BHA’s history, the scale and complexity of this case is unprecedented” (Ibid).*

The outcomes of any appeals lodged against this decision were not yet known at the time of writing.

Betting turnover on racing was expected to drop as a consequence of the latest corruption case. That is the view of one leading firm of bookmakers, even though the sport’s ruling body made an effort to reassure punters that racing’s record on integrity is at least as good as that of any other sport. David Williams, a spokesman for leading firm Ladbrokes, said:

*“Yet again, racing has got out of the racing pages for the wrong reasons. It’s bad news for everyone because mud sticks, regardless of the detail. I hope we can amplify the fact that in rooting out corruption there will be*

*a long-term benefit for racing, because there is no product if there is no integrity. If people do not believe that what they are watching is straight, turnover will plummet” (The Guardian of 16/12/2011, p. 9).*

Kate Miller of William Hill suggested that an immediate decline was unlikely but said that this kind of story could deter a younger audience from taking an interest, causing problems in the longer term.

In the immediate aftermath of the bans, Paul Scotney, the BHA’s director of integrity services, made a point of thanking not just Betfair, which has a history of sharing information with the BHA, but also the traditional bookmakers. William H confirmed that Ladbrokes had helped to further the investigation. “We are very much of the view that we will do whatever we can to expose wrongdoing” he said. BHA spokesman Robin Mounsey hoped that punters would not be deterred by the decision, saying they “should continue to have every confidence in British racing as a betting medium” (*Ibid*).

.....  
**Bizarre leniency shown to Charlotte Kerton in corruption case (UK)**

The British Horseracing Authority (BHA) may have made all manner of brave noises about the “Fixing Five” having been penalised in the manner detailed in the previous section. However, it appears to have done this cause no favours by the strange case of the jockey who went unpunished after being found guilty of stopping two horses. That was the verdict reached in late February by the Authority, whose

disciplinary panel decided that Charlotte Kerton had twice ridden horses to deliberate defeat but thought it best not to issue a penalty. Kerton was one of six defendants in the case. The other five were “warned off”, exiled from the sport, for at least three years in each case. George Prodromou, the trainer at the centre of the inquiry, was excluded for eight years, though he will appeal and the others may follow suit. However, the panel took a much more lenient view of Ms. Kerton’s offence, declaring only that the BHA should refuse to consider any application from her for a jockey’s licence in the next six years. No exclusion order was made, no fine levied. The panel forebore even to direct any harsh language in her direction.

It is generally agreed that Ms. Kerton was never very talented or prolific. Her best year was 2009, when she had two winners from 47 rides. She had not ridden in Britain since October of the following year, and all but three of her rides in 2010 came from Prodromou. The sport, it seems, gave up on her a long time ago and it was, therefore, no punishment at all to refuse her a British licence. She has in the past been able to get rides in Bahrain and Qatar and may continue to do so. The verdict will not prevent her from riding anywhere abroad. It is difficult to see how to explain away this blasé approach to a rider adjudged to have committed an act which, for most followers of the sport, is most heinous and least forgivable. As regards her ride on Timeteam at Lingfield in January 2010, the panel concluded that “the horse’s head was intentionally turned to the right by Ms Kerton to such an extent that the gelding could not start on even

terms with the other runners”. Of her ride on Trip Switch, also at Lingfield that same month, the panel said she allowed the horse to sit “in last place without making any effort to close on the other runners until the two furlong pole. She then made a weak appearance of trying to improve her position” (*Ibid*).

The panel was satisfied that Ms. Kerton agreed to ride the horses in this way at Mr. Prodromou’s insistence, in exchange for further rides from him. It found no evidence that she had been given any purely financial reward. But there is a feeling abroad that the panel should have imposed a harsher penalty in any case. The entry point for just one offence of this kind is an eight-year exclusion order, which would be reciprocated by other ruling bodies around the world. It is bizarre that Kerton has, in effect, been allowed to walk away unscathed after being found to have stopped two horses. If she chose, she could take a job in any racing yard tomorrow, with influence over any number of young entrants to the sport.

## BOXING

### **Inquiry into “gold medals for sale” claims finds no evidence of wrongdoing**

In late September 2011, it was learned that Olympic boxing officials were to investigate allegations that gold medal bouts at next summer’s London Games could be fixed in a £6million corruption operation. Dr Ching Kuo Wu, the president of the International Amateur Boxing Association (AIBA), said he would examine the allegations,

which he denied, following a BBC2 Newsnight investigation. The International Olympic Committee also examined the allegations and announced that it would demand an immediate report from AIBA.

Dr Wu told Newsnight that he would personally examine the claims, adding: *“These allegations, it is the first time I have heard them, and I must add that they are totally untrue and ludicrous because AIBA and WSB [World Series of Boxing] conduct in a very fair, transparent open way. So when I heard about these accusations I must say totally impossible and ridiculous. Thanks for informing us about this information, I will immediately conduct an investigation into this because there is a zero-tolerance policy in AIBA. If something happened we will definitely investigate. If this is a true story, we will immediately fire Ivan [Khodabakhsh, a senior AIBA executive]. There is no way we can accept it.”* (*Ibid*)

Newsnight claimed to reveal secret payments of at least \$9million from an Azerbaijan source to an AIBA subsidiary, World Series Boxing, and aired allegations that WSB’s Chief Executive Officer had claimed that payment of the money was conditional on Azeri fighters winning two gold medals at . The allegations came with the World Championships due to begin in the Azeri capital, Baku, and centred on the alleged deal between an unnamed Azeri national and WSB, a division of AIBA which was created in order to create professional franchises around the world. Business people involved in WSB told Newsnight that

the venture had run into financial trouble following the cancellation of a broadcast deal, but was then bailed out with the offer of a loan from Azerbaijan. AIBA confirmed to the Newsnight journalists that an anonymous Azeri national had contributed \$9 million to the WSB, but denied that there was any deal to fix gold medals for Azeri fighters in return. Newsnight also said that whistleblowers from inside the boxing organisations came to them with allegations relating to Khodabakhsh, the chief operating officer of WSB (*Ibid*).

The whistleblowers in question told Newsnight that Khodabakhsh had informed them of a secret deal that had been done in order to obtain funding from Azerbaijan in return for manipulation of the Olympic boxing tournament, guaranteeing gold medals for Azeri fighters. One told Newsnight: “Ivan boasted to a few of us that there was no need to worry about World Series Boxing having the coin to pay its bills. As long as the Azeris got their medals, WSB would have the cash.” The programme also claimed it had received documents showing communications between Khodabakhsh, WSB boss Ho Kim and an Azeri minister about an investment agreement for a \$10 million loan. When Newsnight interviewed Khodabakhsh earlier this month and asked him the source of the money he told them: “The money came for WSB America, came from an investment company here based in Switzerland.” (*Ibid*)

It was further alleged that lawyers for AIBA and WSB had since confirmed to them that though the money was paid

through a Swiss company, it did come from Azerbaijan. They denied that it was from the government. They said that the Azeri Minister for Emergencies introduced a private Azeri investor to WSB and that the minister and his assistant at the ministry acted as the interface between the investor and WSB because he did not speak good English. Mr. Khodabakhsh told Newsnight that allegations of any deal with Azerbaijan were “an absolute lie”. Lawyers for AIBA told the BBC that any such allegation was “preposterous and utterly untrue” (*Ibid*).

Whilst the investigation was proceeding, the International Olympic Committee was urged to investigate new seeding rules for boxers that appear to favour Azerbaijan, the country at the centre of the cash-for-gold-medal allegations, in their bid to qualify for the 2012 Olympics. AIBA had introduced a new rule only the previous month which stipulated that the host country of their World Championship would automatically have a seed in every weight category. Since Azerbaijan was hosting the World Championships, it stood to benefit from the rule change. British Member of Parliament, Damian Collins (a member of the select committee for Culture, Media and Sport) called for the IOC to ensure that everything remained above board in terms of boxers qualifying for London 2012 (*The Independent of 28/9/2011, p. 55*).

In the event, the investigation concluded with the finding that there was no case to answer. It criticised the BBC for making “groundless” claims concerning the Azerbaijan boxing team. Dr Tom Virgets, chairman of a two-

month investigation by AIBA, said the allegations were “completely without merit”. He added that the BBC had relied heavily on “hearsay” where it claimed that the money was handed out by a single private investor named Mr Hamid Hamidov. This was found by the panel to be a “purely commercial investment, unconnected to the Olympic Games” and that the panel had traced both the source of funds and their disbursement (US TV rights).

The investigation committee added in a statement:

*“The BBC was either not willing or unable to prove the truth of its allegations of possible corruption with any substantive or credible evidence. The committee was disappointed that having volunteered to provide evidence, the BBC merely provided the committee with transcripts of what it had previously broadcast and unsubstantiated statements by sources who made speculative claims but who refused to co-operate with the investigation.”* (*Daily Mail of 13/12/2011, p. 77*).

A BBC spokesman reacted by stating that Newsnight was aware of AIBA’s position, but that it stood by its investigation, adding that whilst it anticipated AIBA making all the evidence they reviewed public, it was “continuing to co-operate with the ongoing independent investigation by the International Olympic Committee Ethics Commission” (*Ibid*). **BAL**

# National Focus

## – France

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“National focus” is a new feature of this Journal in which the author examines the principal tenets of sport and the law in a particular country. Its main focal points will be (a) brief introduction to the legal system, (b) the organisation of sport in general, (c) specific legal issues such as doping, crowd control, tort liability for sporting injury, criminal liability, etc, and (d) the sports law scene – organisations, courses, leading authors on sports law in the country under review.

### France – Its Legal System

#### Codified law

There are two main families of law in the world – the codified law and the common law. France is perhaps the archetypal codified law country. Although it was not the first nation to regulate vast areas of the law in major, systematically ordered bodies of legislation, it undoubtedly possesses the codified law system which has had the most marked world-wide influence. Following the French revolution, the main legal areas were methodically regulated in such bodies as the Criminal Code (*Code pénal*) the Commercial Code (*Code de commerce*) and, most important of all, the Civil Code (*Code civil*), introduced in 1804 under the vigilant guidance and control of Napoleon Bonaparte, who was later to state that the Civil Code was the achievement of which he was the proudest.

The French codified model was exported, first to other European areas such as Spain, Italy and the Benelux countries, but subsequently also to those nations of other continents which had the codified model imposed on them through the process of colonisation. Thus is it that the entire

subcontinent of Latin America consists of nations which apply the French codified system. Even North America is not immune from its influence – those areas of the US such as Louisiana which, centuries ago, were annexed by France retain characteristics of the French codified model.

The fundamental differences with the common law system are:

- The independence of the courts – there is no system of “binding precedents”
- The supremacy of legislation (*la loi*) – the courts are expressly prohibited from creating law. They are the servants rather than the masters of the law
- Formalism – court decisions are much more formally structured than is the case under the common law
- Broad sweep of legislation. The lawmakers content themselves with laying down a broad outline of the rules to be followed, leaving others (the courts with their case law, the Government through its regulations) to fill in the gaps

#### Sources and Institutions

The most basic legal source of all is the Constitution of the Fifth Republic (1958), which is the only source from which all the institutions of governance find their origin. It is a codified constitution which not only organises the French state, but also – albeit by reference – sets out a list of fundamental civil and economic rights. Unlike its predecessor under the Fourth Republic, the current Constitution favours the Executive at the expense of the Legislature.

Legislation is made by the French Parliament, although the Executive has the right to adopt legislative texts under the supervision of Parliament. This consists of two houses: the National Assembly (*Assemblée nationale*) and the Senate

(*Sénat*). The former is directly elected under a “list” system of voting; the latter consists of representatives of the local and regional authorities. Legislation has to be passed by both Houses on a strictly equal footing. The Executive, on the other hand, breaks down into the Government and the President, each with its own specific areas of jurisdiction. The Government’s main task is (a) to propose legislation (*projets de loi*) and to implement the laws, once adopted, by means of decrees (*décrets*), decisions (*arrêtés*) and circulars (*circulaires*), these being the various forms of regulation (*règlements*).

There are three levels of local government: (a) the regions (*les régions*), the départements (equivalent to counties) and the municipalities (*les communes*). It is in fact these bodies which most substantially subsidise sport through the direct provision of sporting facilities, club subsidies, etc. Moreover, these authorities each have an official whose specific remit is sport and physical education (e.g. the *Conseiller territorial des activités physiques et sportives*).

As to the judiciary, this is essentially split into two sets of judicial bodies: (a) the ordinary courts (*les juridictions judiciaires*) and the administrative courts (*les juridictions administratives*). Each has its own structure and hierarchy. The ordinary courts have three levels of instance, with the *Cour de Cassation* acting as their Supreme Court. The administrative courts also have three levels of instance – here it is the *Conseil d’Etat*, which functions as the highest court.

## Sport in France

### Football

Football is the most popular sport in France, with over two million registered players. The national team is one of only eight to have won the World Cup – admittedly at home in 1998 – and reached the final of the tournament in 2006, being beaten only on penalties. It also won the European Championship twice (1984 and 2000). It is also one of only nine teams to have won the UEFA European Championships (1984 and 2000).

Ligue 1 is the top French professional league for association football clubs. It is the nation’s main football competition and serves as the top division of the French football league. It consists of 20 clubs and operates on the basis of promotion and relegation with Ligue 2. The Coupe de France is the premier knock-out cup competition in French football. Only one French club, Olympique Marseille, has won the UEFA Champions League – in 1993.

### Basketball

France’s national basketball team has enjoyed success in international competitions over the years, but has yet to win any major trophies. The team finished second at the 1948 Olympics, the “EuroBasket” competition of 1949, the 2000 Summer Olympics, and the 2011 “EuroBasket”. Men’s national professional competitions are supervised by the *Ligue Nationale de Basketball*. There are two divisions: Pro A (first division) and Pro B (second division). ASVEL Lyon-Villeurbanne is the most successful team in French first division history with 17 titles from 1949 to 2009. Limoges CSP is the only French team to have won the Euroleague Basketball – in 1993. The women’s national team has won the European title twice (2001 and 2009).

### Motor sport

Motor sports are highly popular in France, especially car and motor cycle racing. Formula One racing has a strong connection and long history with the country. Many French circuits have been employed since the foundation of the Formula I Championships: Reims-Gueux (1950-66), Rouen-les-Essarts (1952-58), Circuit Charade (1965-1972), Bugatti Circuit (1967), Circuit Paul Ricard (1971-1990), Dijon-Prenois (1974-1984) and Circuit de Nevers Magny-Cours (1991-2008). France hosts Formula One World’s Constructors’ Champions Matra (1969) and Renault (2005-6), and has a Formula One World Drivers’ Champion in Alain Prost (1985, 1986, 1989 and 1993).

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### Handball

There are almost 400,000 registered handball players in France as of 2009. The France national handball team is the current Olympic and world champion. The team also won the World Championships in 1995, 2001 and 2009, and the European Championships in 2006 and 2010.

### Rugby Union

Rugby Union (*rugby à 15* or *jeu à 15*) was first introduced in the early 1870s by British residents. While football is the No. 1 sport nationally, rugby union is predominant in the southern half of the country, especially in the Toulouse area, the French Basque Country and Catalonia. Elite French clubs participate in the domestic club competition – the Top 14. Clubs also compete in the European knock-out competition called the Heineken Cup. It is the ninth largest French team sport in the terms of licensed players.

The national side is one of the tier 1 national teams. It competes annually in the Six Nations Championship, and has won it outright 16 times. It has participated in every Rugby World Cup since its inception in 1987, and has been a runner-up on three occasions.

### Rugby League

Rugby league (*Jeu à 13*) has an even more restricted geographical remit than Rugby Union, and is confined mainly to the South East/Catalonia area. Once strong, its national side has gone into relative decline recently.

### Tennis

Tennis is the twelfth most popular French sport in terms of the number of licensed players with. France annually holds the tennis Grand Slam tournament at the Roland Garros stadium (Paris). Current French stars include Richard Gasquet, Gael Monfils, Jo-Wilfried Tsonga, Marion Bartoli and Aaravane Rezaï.

### Cycling

France stages the annual cycling race Tour de France, which takes place each July and lasts for three weeks which has been won by 21 different French cyclists in its 97-year history.

### Pétanque

This sport is mostly played in the South of France. Its international federation is recognized by the International Olympic Committee (IOC). Professional players play the very competitive form of Pétanque which is called Pétanque Sport, under precise rules.

## Organisation of Sport in France

### Legislative context

The principal legislation governing sport in France is contained in the Sporting Code (Code du Sport), which was introduced in 2004 and is based largely on the Law of 16/7/1984, which has subsequently been amended on several occasions. The fundamental principals on which it is based are:

- (a) The State is the organ which has primary responsibility for the development of sport, in particular that practised at the top level
- (b) The State is responsible for the teaching of physical education and sport
- (c) The state is responsible for training the staff in charge of sport as a career
- (d) No-one may supervise or teach physical education and sport in a remunerated capacity unless he/she has an appropriate licence and certified qualification
- (e) The law also defines the terms of sports management and the benefits attached to the status of “top level sporting performer” (*sportif de haut niveau*)
- (f) It also lays down rules for the safety of sports equipment and facilities, as well as sporting events

The Sporting Code is a very large instrument. Its latest consolidated version is divided into four books (*livres*):

**Book I** deals with the organisation of physical and sporting activity. This defines the role of the various public bodies (Titre I), the sporting associations and clubs (Titre II), the

sporting federations and leagues (Titre III) and the representation and conciliation bodies (Titre IV).

**Book II** concerns the “sporting actors” (*acteurs du sport*). This sets out the rules governing sports training and education (Titre I), the high-level and professional sporting performers (Titre II), the health of sporting performers and the rules against doping (Titre III) and the rules against animal doping (Titre IV).

**Book III** deals with the practice of sport (*pratique sportive*). This in turn sets out the rules relating to the locations where sport is practised (Titre I), the obligations involved in sporting activity (Titre II), and sporting events (Titre III).

**Book IV** contains miscellaneous provisions, such as the rules which relate to the financing of sport (Titre I) and to France’s overseas territories (Titre II).

### Organisational structure

As is mentioned above, the state is responsible for formulating sporting policy in France. The main body in charge of this is the Ministry of Youth and Sport (*Ministère de la Jeunesse et des Sports*). It supports sporting activity both at the professional and at the amateur level. It delegates to the sporting federations the power to organise and promote the practice of their sports and supports them through policy agreements (*conventions d’objectifs*) and by making available specialist staff. It also takes part in organising physical and sporting education as well as the training of sporting professionals, in co-operation with the Minister of National Education, Youth and Community Life, and the Minister of Higher Education and Research. In co-operation with the Secretary of State for Health, it also intervenes in the field of sporting medicine and the campaign against doping. In co-operation with the Ministry of Foreign Affairs, it intervenes in matters of international sporting cooperation and the organisation of sporting events.

The Ministry is organised at two levels, i.e. the central and the local. At the central level, the Ministry has the following structure:

- The ministerial office
- The High Defence Official

- The General Inspection Service (IG)
- The Sporting Directorate (DS)

The General Secretariat of Ministries for Social affairs gives support in the shape of the Directorate of human resources (DRH), the Directorate for Financial and Legal Affairs (DAFJS) and the Communication Office (COMM).

At the local level, the Ministry has at its disposal a network of services created in 2010 as a result of the reforms of local organisation, which defines the new relationships between the regional level and that of the *département*. This network includes 22 regional Directorates for Youth, Sport and Social Cohesion (DRJSCS), 50 Departmental Directorates for Social Cohesion (DDCS) and 46 departmental social cohesion directorates (DDCSPP).

The institutional structure of sport as such differs sharply from that which applies in Britain. Sporting clubs are divided into two types: sporting associations (*associations sportives*) and sporting “companies” (*sociétés sportives*). The former are essentially amateur clubs and are governed by the more general legislation on friendly societies. They can only receive public subsidies if they are licensed (*agrées*) – which in turn depends on their submitting to certain conditions regarding internal democracy, transparency of management, gender equality as regards its directing organs, etc. (Articles L121-1 to 6 Sporting Code). The latter are essentially professional clubs – i.e. clubs affiliated to a sporting federation which normally takes part in competitions charging spectator fees above a certain level fixed by the *Conseil d’Etat* (Article L122-1 Sporting Code). They may take the form of a limited liability company or a public limited company (Article L122-2 Sporting Code). Sporting federations are also governed by the legislation on friendly societies (Article L131-2 sporting Code).

The principal independent body overseeing sport is the National Olympic and Sporting Committee (*Comité national olympique et sportif français* – CNOSEF). It acts as an organ which represents the sporting federations and their affiliates, seeks to safeguard the integrity of sport, and has a major conciliation role in disputes which arise between all the sporting actors – with the exception of doping issues (Article 141-1 to 5 Sporting Code).

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## Anti-Doping Rules and Procedures

Disciplinary proceedings involving doping substances can be initiated before two types of institution: the disciplinary authorities of the sporting federations and the French Anti-Doping Agency (*Agence française de lutte contre le dopage* – AFLD). The latter is an independent public body having legal personality. It has two distinct departments, one responsible for doping controls, the other responsible for analysis. This serves to guarantee the independence of both processes. The disciplinary powers are exercised by the members of the Agency Board. In order to carry out its tasks, the AFLD, since it has no local branches, may call upon the services of the Sports Ministry, more particularly the regional directorates for youth sport and social cohesion (DRJSCS).

The general rule is that no-one having used prohibited substances is allowed to participate, or train for, an event organised or authorised by one of the sporting federations referred to above (Article L232-9 Sporting Code). If this is proved to be the case, the performer will be subject to disciplinary proceedings before the doping authority attached to the federation in question, or by the AFLD if the sporting figure in question has no licence from any federation. The list of prohibited substances and procedures is fixed annually by the World Anti-Doping Agency (WADA). It is identical for all sporting performers, regardless of the level at which they compete or their nationality. To qualify as such a substance, the product or procedure in question must have at least two of the following three characteristics: (a) enhancing performance, (b) representing a real or potential risk to the performer, and (c) constituting usage contrary to the sporting spirit.

The doping controls operated in order to monitor observance of these rules can take place both in and out of competition. They consist in

- biological samples (urine, blood or dander tests), and
- analysis of these samples by accredited laboratories

Where the performer's health so demands, he/she may hold or use these substances subject to authorisation given by a committee of medical practitioners.

The use of such substances may also have criminal consequences. The Law of 3/7/2008 was introduced in order to bring French legislation into line with the International Anti-doping Convention adopted under the auspices of UNESCO. This made a criminal offence of the possession, production, importation, exportation and transport of certain doping substances. The use of doping substances as such is not an indictable offence in France. These legislative provisions are supplemented by the decisions of the AFLD, which has the task of putting into place a certain number of provisions, such as the manner of licensing doping samplers, models of doping reports (*procès-verbal de contrôles*), a list of the checks required of requests for the authorised use of substances for therapeutic reasons, etc.

In another recent change, the powers possessed by the AFLD have been extended to include the issuing of warnings, being a penalty which hitherto had been the preserve of the sporting federations. Furthermore, the Agency has been given the power to impose financial penalties in addition to any sporting sanctions. The proceeds of these financial penalties are to be surrendered to the State. The Chairman of the Agency may also take provisional measures (*mesures conservatoires*) where this is justified by the circumstances, pending a definitive decision of the Agency. This power had already been awarded to the chairmen of the federated disciplinary authorities. WADA has also been given the powers to challenge decisions made by the AFLD or by a sporting federation before the administrative courts. Disciplinary proceedings in doping matters are time-barred after eight years.

The persons responsible for taking samples are restricted to accredited doctors, nurses and laboratory technicians. The sampler responsible must be in possession of an order issued by the AFLD or the DRDJS, and be accompanied by a federal delegate. The procedure must be carried out in a location which has been especially designed and organised for this purpose. The organisers must provide individual sealed drinks in order to promote the rapid execution of the controls. The sporting performer to be inspected shall be selected by the sampler, who has freedom of selection and may base his choice on the drawing of lots or on the result of the competition. The sporting performer selected must present him/herself at the control room in possession of an identity document; he/she may be alone or accompanied by a member of his team. In the event of refusal or non-

appearance, the performer may be penalised as if he/she has been found guilty of doping.

Doping controls may involve a medical examination of the performer. The use of medicine as well as any decision authorising use must be mentioned in the control report. There are two containers – one holding the A sample, the other the B sample, used where a second opinion is required. The results are sent in confidence to the president of the federation in question, who in turn must inform the sporting performer. If the latter does not hold a licence from a recognised federation, it is the AFLD which informs him/her of the outcome.

The French administrative courts have adjudicated in doping cases. In one famous case, when a French footballer was tested for drugs, he was found positive for nandrolone and penalised by the French Football Federation. The sample provided by the player had been divided into two containers, one measuring 45 centilitres, the other 15 centilitres. However, the relevant rules, laid down in a decree of 1991, stipulated (Article 6) that each urine sample must be equally divided into two sealed containers by the licensed doctor in question, which must carry an identification label bearing a code number.

The player concerned appealed against this decision before the local *Tribunal administratif*, which set aside the Federation's decision because of this irregularity. The Federation appealed to the Paris Administrative Court of Appeal. The latter found that the requirement that the sample be divided into equal parts was a substantive requirement, the absence of which entailed the voidance of the testing procedure. This was regardless of the fact that no such formality was required by corresponding rules of the International Olympic Committee (IOC), or that failure to observe this requirement had no effect on the outcome of the test. The Court therefore confirmed the first ruling (Decision of the Paris Administrative Appeal Court of 21/3/2001).

## Tort Liability for Sporting Injury

French civil law does not operate on the basis of a set of torts as is the case in English law. It has a general basis in Article 1382 of the Code Civil which confines itself to stating that “anyone who, through his/her fault, causes loss to another person shall be obliged to compensate such loss”. Liability will accordingly arise where there is (a) loss, (b) a fault committed and (c) causation between loss and fault. (There is no duty to take care – everyone is deemed to have a duty to be careful towards everyone else.) There is also a provision on vicarious liability (Article 1384). For the rest, the law of torts has evolved on the basis of the case law, especially that of the *Cour de Cassation*, which had been developed on the basis of these brief provisions over time, and specific laws subsequently adopted, such as the Law on Occupier's Liability (*loi sur la responsabilité civile de l'occupant*). Interestingly, the French Parliament is currently debating a special law on civil liability of sporting performers...

The case law on liability for sporting injury has evolved especially in the context of injuries sustained in rugby union (not unlike this country). Two factors stand out in this case law – one, the courts tend to include as much as possible the sporting clubs and associations to which the defendant player belongs within the purview of the aforementioned provision on vicarious liability, i.e. Article 1384(1) Civil Code. Secondly, they tend to apply the risk acceptance theory (*volenti non fit injuria*) much more easily than has been the case with the English courts. As regards the acceptance of risk theory, the courts start from the premise that the practice of certain sports inherently carries risks. The potential injuries and violent contact between opponents are known to the players in advance, and therefore are accepted by them. Accordingly, the realisation of these “normal” risks should not in principle engage anyone's liability. This position is only different in the event of “abnormal” risks, which could not have been accepted by the player and are not known in advance. These “abnormal” risks arise where the damage suffered is the direct result of a fault representing an infringement of the rules of the game. It is therefore necessary that there has been causation between the infringement and the injury.

However, the French courts have sometimes interpreted this principle in a way which goes beyond the objective criterion involved. Thus, on 5/10/2005, the *Cour de Cassation* ruled

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that an incident involving lifting in the scrum by a pack of forwards seeking to avoid the opponents' push, which had caused the hooker of the Elne team to become tetraplegic, represented a fault representing an infringement of the rules of rugby. It continued:

*“the challenged decision (by the Court of Appeal) held that the avoidance of the push effected by the opponents constituted a fault, the practice of lifting in the scrum being dangerous for an opponent imprisoned between the forward line which no longer went backwards and pressure by his own team of which he incurred the full force and which no longer had any impact on the opponents. It is established that a fault had been committed by the players of Fleurance, who had systematically lifted in the scrum, and that this fault could be blamed collectively on the players of the team who could not be ignorant of the overall tactic operated by the forwards, which consisted in avoiding the pressure emanating from the opponents. This is a violation of both the letter and the spirit of rugby. On the basis of these findings and statements, from which it emerges that the players of the Fleurance team had deliberately lifted in the scrum in the course of which (the applicant) was injured, the Court of Appeal was correct in deciding that they had committed a fault representing an infringement of the rules of the game” (translation by the author).*

It is clear that lifting in the scrum was a deliberate tactic deployed by the Fleurance team in order to avoid the opponents' push. It appears, moreover, that the lifting in question was not caused by pressure exercised upwards by the Elne front-row forwards, but by the attitude of the Fleurance players who refused to do battle, which is contrary not only to the letter of the rules, but also to the spirit of the game. Nevertheless, the introduction of “the spirit of the game” as an element which might contribute towards a finding of liability is a little troubling – surely it is the letter of the rules rather than their spirit which should form the exclusive basis for liability.

It should also be observed that the notion of risk acceptance only operates in relation to official sporting competitions. This was held by the *Cour de Cassation* in its decision of 28/3/2002 (reported in these columns at the time), where it found that the challenged decision had applied this theory where it ruled that the injury had occurred on the occasion of

a game improvised by minors, and not in the context of a sporting competition, but should have found a basis for this theory in a legislative rule.

As has been mentioned before, it will be the club or association to which the player belongs, rather than the players themselves, who will be liable in tort for the loss incurred. The *Cour de Cassation* has refused to make this fact the basis for introducing a system of automatic or no-fault liability – as it did in its decision of 29/6/2007, where it ruled that

*“in order to hold the relevant committees liable and to order them to pay damages to (the defendant), the (challenged) decision found that (a) it suffices for the victim to provide evidence of the tortious event and to succeed in doing so by proving that the injuries were caused by the collapsing of a scrum during a fixture organised by those committees, and (b) the lack of clarity as to the circumstances of the accident and the absence of any infringement of the rules or of any established fault are irrelevant to the liability of these committees, since the latter have been unable to prove the existence of neither an outside cause nor of contributory negligence on the part of the victim. By thus ruling, given that it was obliged to establish the existence of a fault representing an infringement of the rules of the game committed by one or more players, even if these could not be identified, the Court of Appeal has infringed the Law referred to above” (translation by the author)*

Naturally, there are occasions when the referee may, by virtue of his decisions, have contributed towards causing the injury. In the 2005 decision concerning the tetraplegic player referred to earlier, the scrum in question had obviously been ordered by the referee as a result of an incident such as a knock-on, crooked throw-in, etc. He was criticised for having failed to blow his whistle as soon as the Fleurance players committed the infringement – had he done so, the push by the Elne forwards on their hooker would have ceased immediately. There was even some reason to believe that the causation in question could have engaged the referee's liability more than that of the Fleurance players. However, the *Cour de Cassation* at this point applied its established case law in relation to acts committed by officials where it ruled that the liability of an official who acts without going beyond the limits of the task assigned to him by his principal shall

not be engaged towards third parties. Viewed in this light, a referee who commits a mistake in failing to whistle up for penalties – or who is incompetent – has not exceeded the limits of his assignment and incurs no liability – instead, this will be the case for his “principal”, i.e. the federation.

### **Criminal liability of sporting performers**

There was a time when what could be described as “on-field” criminal liability which could be incurred by the sporting performer was restricted to offences committed on the site of play. However, nowadays such criminal liability can also extend to external incidents. This has been mainly relevant to doping cases. A turning point here was the Festina affair, which resulted from several doping scandals in cycling which came to light mainly during the Tour de France of 1998. It involved police searches which were spread very widely, even including the hotels where the cyclists were staying, and resulted in penalties ranging from fines to imprisonment (suspended). The same trend is noticeable worldwide – a typical example being the BALCO affair, widely reported in this organ and elsewhere, in which the US authorities played an active part in rounding up those administering systematic doping to athletes. The involvement of the state authorities at this level is explained by their anxiety to protect public health and the fight against supply lines which, although conducted in a sporting context, can degenerate into mafia-like movements and associations. For the purpose of such investigations, the sporting performer may be subjected to skin samples or other controls, and even undergo provisional detention.

Offences committed on the site of play or on the occasion of a competition are often linked to violent behaviour with varying degrees of damaging consequences. The sporting performer may be prosecuted for assault or even voluntary or involuntary homicide. Assaults which result in the victim being unable to work for three months are qualified as misdemeanours (*délits*) under Article 19 of the new Criminal Code. Dangerous behaviour can also be qualified as an act endangering the life of others (Article 223-1 Criminal Code). Although it is not necessary for the action in question to have been penalised on the sporting field before becoming indictable, criminal penalties are often imposed on those who have voluntarily and deliberately adopted an attitude which is

contrary to the rules of the game. It is expected that video refereeing as well as the broadcasting and recording of sporting events will play an increasingly prominent part in criminal prosecutions and assist the courts in assessing whether there was an intention to commit the offence.

One famous case where a footballer was not only prosecuted, but also imprisoned, for an assault committed on the field of play is the decision made by the Criminal Division of the *Cour de Cassation*, dated 12/3/2003. During a fixture, the player concerned, a goalkeeper, had deliberately injured an opposing forward by kicking him in the legs, in order to prevent him from scoring a goal. The court found that the keeper in question could have attempted to block the ball which was slightly in front of the forward, and that the victim was no longer in possession of the ball when the goalkeeper assaulted him. The accused had admitted that he had made the tackle in question with his right leg as he was lying on the ground. The fact that he went through with the tackle when the ball was the target in question rather than the tackle itself, as well as the violence which necessarily accompanied the gesture if it was to cause a broken leg, indicated the voluntary nature of the action. The court continued:

*“On the one hand, a misdemeanour of voluntary assault has only been committed where there is a voluntary act of violence – i.e. where the accused acted with the conscious will of hitting whilst being aware that this would result in an infringement of another person’s physical integrity. Where the challenged Court of Appeal decision found that, by violently kicking the defendant, a forward of the opposing team, at a time when the ball was slightly ahead of the forward, and by performing, at a time when he was lying down, a tackle with his right leg, whilst admitting that it was the ball which was “his target” – i.e. that it was the ball which was his target and not the forward, the court of appeal did not find that there was a deliberate intention on the part of the defendant to damage the other person’s physical integrity and, therefore, did not qualify the offence as deliberate. However, in the context of a violent sport such as football, a voluntary fault involves not only an infringement of the rules of the game, but also a deliberate intention to commit an assault upon another person. The infringement of a rule of the game, which has been penalised in disciplinary terms does not, therefore, automatically imply the existence of the offence of assault.*

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*By ruling that the assault was voluntary on the grounds that the accused had been the subject-matter of a disciplinary penalty, the Court of Appeal has infringed the provisions referred to above.*

*The distinction between voluntary and involuntary assault is based on the individual's behaviour and not on the outcome of the incident. By ruling that there was a voluntary assault on the grounds that the blow in question caused the victim to incur a fractured leg, the Court of Appeal has ruled on the basis of an inappropriate reason and infringed the provisions referred to above"*  
(translation by the author).

It would be interesting to perform some comparative research in this field – maybe a regular feature to consider by the editors of this organ?

## Sporting agency

Unlike a certain country which one is too polite to mention, France regulates the status of sporting agent extremely rigorously. The provisions governing the profession are found mainly in the Sporting Code. Under Article L222-6 thereof, a sporting agent is a person who, against payment, and on an occasional or habitual basis, brings into contact with each other those parties who are involved in the conclusion of a contract concerning paid sporting activity. Legally, the contract in question is a brokerage agreement, which is restricted to enabling the parties involved to conclude the agreement without being personally involved in its conclusion.

In order to be a sporting agent, one must be in possession of a licence issued by the relevant sporting federation for a period of three years. The holder must have this licence renewed after a period which is normally three years. There are a number of incompatibilities associated with the status of sporting agent, including certain criminal convictions and bankruptcy. The payment due to the agent may not exceed 10 per cent of the amount involved in the underlying contract. Anyone exercising the profession of sporting agent without an appropriate licence, or who infringes any other rule governing the status of the profession, is liable to criminal prosecution which may result in a penalty of two years' imprisonment and €30,000 (Article L222-19).

In a famous cases involving sporting agency, 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 of agency 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).

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.

## The Sports Law scene in France

### Websites

www.legifrance.gouv.fr (general – official government website)  
www.droit-du-sport.org  
www.legisport.com  
www.centrededroitdusport.fr

### Courses

The University of Nice – Sophia Antipolis organises a *Master Juriste du Sport* (Sports Lawyer Master's). This is a highly practical course and includes such topics as the legal status of the sporting performer, sports litigation, sporting risk, etc. There is also an internship of three to six months with a business, law firm or sporting association.

The University of Montpellier organises a University Diploma in Sport and Sporting Institutions (*Diplôme Universitaire en Droit du Sport et des Etablissements Sportifs*), conducted over seven modules which include the institutional context of sport, employment law and sport, the sporting performer's health, etc.

The University of Bourgogne organises a *Master pro professions juridiques du sport* (Master's in Legal Professions). This is a two-year course and is supplemented by an internship with an administration, business or law firm of at least two months.

### Leading authors on sports law

**Fabrice RIZZO**, co-author of a massive handbook called *Droit du Sport* (Sports Law) (Lamy, 1500 pages) regularly updated since 2003.

**Didier PORACCHIA**, also co-author of *Droit du Sport* (see above) and numerous academic articles

**Jean-Michel MARMAYOU**, also co-author of *Droit du Sport*, and author of *Contrats de sponsoring sportifs* (Sporting sponsoring contracts) (Lamy – Wolters Kluwer) in co-operation with F. Rizzo. Has also written many academic articles.

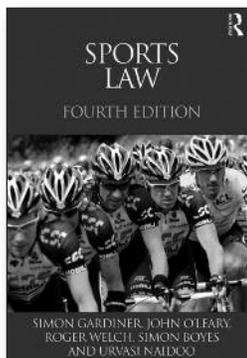
**Virginie MERCIER**, author of many academic articles.

**Jacques SAUREL**, author of *Le sport face à la fiscalité* (Sport and taxation).

### Periodical

*Les Cahiers de Droit du Sport* (Editor : Jean-Michel Marmayou)

# Book reviews



**SPORTS LAW by  
Simon Gardiner, John  
O'Leary, Roger  
Welch, Simon Boyes  
and Urvasi Naidoo.**

(Routledge 2012, 4th Edition, 606pp). £90.00 hb; £39.99 pb.

**The popularity of Simon Gardiner's Sports Law is underlined by the recent**

**publication of a fourth edition. Once again the author has employed a co-operative approach to this developing area of law by combining his own recognised expertise with that of four other leading sports academics.**

The aim of this edition remains the same, that is to reflect the growing importance of Sports Law through providing an exposition, critical analysis and evaluation of this area of law. The format of the text follows his previous editions in that it is divided into three core parts which are sub-divided into separate chapters which combine to produce a common theme.

The first part of the text relates to 'The Regulation and Governance of Sport' and consists of four chapters. Here the emphasis is aimed at regulation in sport through the impact of law. The opening two chapters, compiled by the principal author, concentrate on the evolution and socio-cultural role of law when found by sporting issues and disputes. Simon Gardiner skillfully combines theory with extensive reference to up-to-date material published by various other sports law commentators.

The second half of the opening part is produced by Simon Boyes who concentrates on the role of Sports Governing Bodies in relation to decision making and challenges to such decisions via the domestic courts, tribunals and importantly the Court of Arbitration for Sport. The fourth chapter of this part covers extensively the increasing role of the European

Union and its impact on English Sports Law. His analysis of the Bosman case and its ramifications for free movement and competition in sport is particularly instructive.

Part two of the work covers the growing importance of commercialisation in sport together with a foray into the regulation of financial dealing within the business of sport. Topically, the chapter which deals with corruption and match fixing focusing on the current problems facing cricket, football and tennis provide compulsive reading for those interested in these criminal activities. The final chapter of this part gives readers a detailed view of the impact of the protection of various intellectual property rights and interests in connection with the forthcoming Olympic Games. Coverage is also given on the organisation of major sports events especially in relation to sponsorship, ambush marketing and brand protection.

The third and final part of the text considers the extensive legal issues, including ethics, which arise from the context of the Sports Workplace. The opening chapter undertaken by John O'Leary deals with the hugely contentious matter of drugs and doping in sport. Here, the workings of the World Anti-Doping Code is given prominence through the use of academic commentaries as well as extracts from the judgments given in important cases such as Modahl and more recently Meca-Medina. Interestingly, O'Leary provides us with a view regarding the future development of this aspect of sports law in the light of possible challenges by athletes and sporting bodies relating to the interpretation of the Wada Code.

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The chapter undertaken by John O'Leary deals with the hugely contentious matter of drugs and doping in sport.

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The leading case law is extensively commented upon, aided by the use of recent judgments and quotations from relevant academic works relating to the issue of 'sports culture'

Roger Welch provides in this part coverage of sporting contracts of employment and matters concerning discrimination in sport. He looks at restraint of trade and transfer issues which build on the views expressed in an earlier chapter. In addition he gives a further detailed insight into the procedural matters in relation to sporting contractual disputes.

The final section concludes with an examination of criminal and civil liability attached by sports participants, followed by a detailed commentary on the major elements regarding safety at sporting venues. On the question of sporting participant liability the authors look at violence and negligence in contact sports.

The leading case law is extensively commented upon, aided by the use of recent judgments and quotations from relevant academic works relating to the issue of 'sports culture' together with a look at the developing attitude of the criminal courts to violence on the field. The role of the Crown Prosecution Service is also dealt with concerning violent conduct of participants in sport.

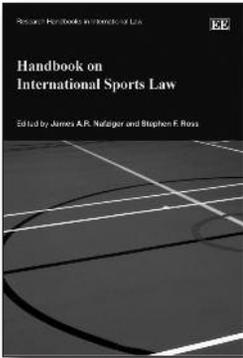
Consideration of the safety of sporting venues is well documented with reference to the disasters at Heysel, Bradford and Hillsborough. Again use is skilfully made of the various official reports and articles arising from those tragic events. Importantly, the authors deal with the question of

hooliganism, particularly at football matches, as well as the ways in which the legislature has sought to combat the problem.

In conclusion it is suggested that the fourth edition compares favourably with those previously published. The publishers have introduced a revised format and combined with useful indexing enhances the overall impression of this work. The provision of a 'key facts' section which acts as a summary of the subject matter contained in each chapter is innovative. To summarise, therefore, one views this new text by Simon Gardiner et al as providing essential reading, not only for students and lecturers in sports law, but also presents a valuable addition to the texts available to practitioners and those generally interested in sporting matters. **BASL**

**David Dovey**  
**Buckinghamshire New University**

BOOK REVIEW



**James A.R. Nafziger and Stephen F. Ross (editors) (2011) Handbook on International Sports Law Cheltenham Edward Elgar (584 pp)**

**This is a collection of essays gathered together by two distinguished American sports lawyers. It covers a wide range of issues under**

**the rubric of international sports law. Describing itself as a handbook, it is intended in the words of the editors to ‘comprehensively address the emerging process of international sports law’.**

The first section of the book deals with the structures of international sports law. James Nafziger addresses the issue of what international sports law covers in his opening chapter. He argues that it is a distinctive set of rules and principles that govern transnational sports activity. This chapter sets out clearly and analytically the institutional structure and issues in international sports law. But Nafziger also develops an interesting and important argument that the central principle of *lex sportiva* is fairness. He proceeds to use this concept to illuminate many of the current controversies in sports law. Richard McLaren follows with an excellent chapter on the Court of Arbitration for Sport (CAS) which uses the concept of *lex sportiva* to present a clear exposition of the emerging jurisprudence of CAS. He ends with a plea for further reform of CAS to ensure its continuing effectiveness.

The remaining three chapters in this first section are more mixed. Ian Blackshaw describes in very general terms the role of mediation in sports disputes. James Nafziger updates a previous article on the differences between the European and North American models of sports organizations. This is an analytically clear exposition but it may be that the European sports model is now much less important in shaping the policies of the European Commission and so this distinction is less relevant to our understanding of sports law. Robert Siekmann and Janwillem Soek describe the conclusions of an empirical study of how far the state in European Union nations intervenes in the affairs of sports bodies. Organized around a dichotomy of interventionist versus non-

interventionist, this account is very descriptive and inevitably somewhat superficial.

The second section of the book covers the protection of competition and athletes, dealing with issues such as doping, gambling and discrimination. Again there is a wide variety in the approach of different authors, which is contrary to the declared aim of a unified collection to deal with international sports law. Klaus Vieweg and Saskia Lettmaier give a very useful introduction to issues of discrimination in sport in the widest sense, which covers sex, disability, nationality, religion, race, and age. Their organizing framework is helpful but the law discussed is mainly comparative, especially in relation to the United States and Germany. Matthew Mitten and Timothy Davis discuss eligibility requirements in sport. This is an important and under researched issue in sports law. However after a brief discussion of CAS awards, they devote the bulk of the chapter to updating a previous article on US law. Whilst this may be interesting to American scholars, the lessons for a wider canvas of international sports law are very limited.

The third section of the handbook covers commercial issues in sport with an emphasis on intellectual property rights. Stephen Ross contributes a clear introduction on the legality of labour market restraints by sports leagues. The remainder of the chapters in this section are more mixed. Some are very specific. Lewis Kurlantzick deals with the problem of ‘tampering’, which is the unauthorized approach to a sportsperson under contract. The chapter deals almost exclusively with US law and the major sports leagues in the USA. This narrow focus, without any sustained comparative analysis, seems a little misplaced in a book on international sports law. Anthony Dreyer similarly covers recent sports cases in US intellectual property law without any

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James Nafziger addresses the issue of what international sports law covers in his opening chapter. He argues that it is a distinctive set of rules and principles that govern transnational sports activity

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Overall the aim of the handbook is admirable; to bring together scholars to illuminate emerging concepts and issues in *lex sportiva* or international sports law

focus outside his own jurisdiction. Even when an overtly comparative approach is adopted, as in Steve Cornelius's chapter on image rights, the level of analysis and the conclusions are general. He ends with the unsurprising conclusion that the concept of image rights is recognized in 'all modern legal systems' but 'the extent of the protection differs'.

Overall the aim of the handbook is admirable; to bring together scholars to illuminate emerging concepts and issues in *lex sportiva* or international sports law. However it disappoints in several respects. Almost inevitably in a multi-authored work, there is a range of quality displayed. But more relevantly there appears confusion amongst the authors as to the approach required. In a handbook on international sports law, chapters that deal exclusively with a single jurisdiction seem inappropriate. Even if the issues raised are of wider concern it should be the author's responsibility, not the reader's, to draw meaningful comparisons. At a more theoretical level, there is a blurring of the distinction between comparative and international sports law. Even chapters that are excellent on comparative issues, such as Vieweg and Lettmaier on discrimination, are slow to address how far global sports institutions, such as the IOC have regulated these matters. CAS decisions are mentioned too infrequently by several authors where they could be relevant, which seems outdated in a book on the emerging *lex sportiva*.

As a handbook the editors say they have aimed to be comprehensive. Much is covered; and some issues, in particular the protection of young athletes and the regulation of sports agents, receive the attention that they deserve having been under represented in the literature. But it makes an interesting comparison with two recent student textbooks, James and Anderson. James for example has substantial sections on liability for sports injuries and on the safety of sports stadia and

spectators. Some of this is of course the difference in aims of a student textbook for the domestic market and an international handbook. But it does raise the question of for whom is the book intended. The cover price alone would deter students, and UK practitioners will find many of the chapters redundant or superficial for their needs. For an academic audience there is too little theoretical debate. Simon Gardiner briefly touches on the juridification of sport in his chapter on the use of technology in sport. Nafziger and McLaren, in the two opening chapter, both tackle the thorny question of the nature of global sports law. But more 'cutting-edge' questions are absent; the legal control of private transnational networks of sports regulation and the privatization of sports law through increasing use of arbitration, to take just two examples, are not extensively addressed. So this is a curate's egg collection, with much useful material, but not quite the comprehensive handbook promised. **BASL**

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