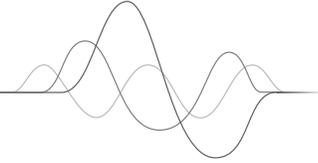


# BRITISH ASSOCIATION FOR SPORT AND LAW JOURNAL



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BRITISH ASSOCIATION FOR  
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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 a number of topical issues. First, Mark Gay and Chris Davies' **'Police charges at football grounds – some clarity at last'** provides analysis of recent litigation involving Leeds United F.C. concerning what are the types of policing around sports events that clubs and event organizers can be expected to pay for. Second, Robert McTernaghan's **"Crouch", "Touch", "Pause", "Tickets?"** focuses on the recent Supreme Court decision concerning the ability of sports event organizers to restrict reselling of game tickets on web sites. Third, Alexandra Felix and colleague's **'Lessons to be learned from other regulatory bodies?'** provides a wide ranging examination of what sport can learn from regulatory developments in other spheres including the Leveson Report. Fourth, Louisa Riches' **'Gay footballers should not be 'outed' in order to prove that discrimination has not taken place'** examines an issue considered to be one of the last taboos in football, namely the denial concerning gay players in professional football. Lastly, **Walter Cairn's interview** with the opposition spokesperson on Sport, Gerry Sutcliffe can be found.

The Analysis section has two articles. First, Kaisa Kirikal's **'Critical Analysis of the World Anti-Doping Code: Timely Issues Related to Andrus Veerpalu v FIS and other Relevant Case Law'**, focuses on concerns of reliability of the testing procedure around failed drugs tests involving Human Growth Hormone. Second, Zia Kantar's **'Sport Arbitration, Swiss legal code and Due process'** provides an analysis of the supervisory function of the Swiss federal Court over the Court of Arbitration for Sport.

The Reviews section has the usual items, Walter Cairn's **'Corruption watch'**, a regular survey of recent developments, both at home and abroad, of corrupt activity in sport, Walter's **National Focus on Germany**, and lastly, the **Sport and the Law Journal Reports**.

Recent events involving athletes Tyson Gay and Asafa Powell who have tested positive for prohibited substances have highlighted the ongoing modifications being proposed to the World Anti-Doping Code. This is due to be finalized at the WADA conference in Johannesburg in November, when the new code will be unveiled with an intended start date of the 1st January 2015. The next issue of the Journal will provide an in-depth evaluation of the modifications to the Code that are proposed. One of the significant changes is to increase the length of bans for positive tests from two to four years for first time infringers.

The International Association of Athletics Federations (IAAF) has been the first major international Sports federation to embrace this new regime. At its congress in Moscow during the recent World Championships in August, it indicated that it would return to four-year bans for first time infringers from the start of 2015. The IAAF does however recognize that the move to four-year bans is not a universal desire and that some other organisations and international sports bodies don't want tougher sanctions. Abby Hoffman, IAAF council member states, "we need to make sure that space is carved out in the anti-doping campaign for athletics to impose the bans that we know our athletes and our members want".

The rhetoric from both WADA and the IAAF is that the strengthening of sanctions for doping offences need to take into account the principle of proportionality and human rights. The aim is to increase the effectiveness of

anti-doping, and athletes having a clear deterrent message that for doping, that the risks are high. The ongoing work on the new draft Code currently provides that this increased length of ban will be for the intentional use of prohibited substances. The term ‘intentional’ is viewed as meaning ‘that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute an anti-doping rule violation and manifestly disregarded that risk. (WADC 2015 – Draft Version 3.0). This wide definition of fault-based liability seems to encompass states of mind of both intention and recklessness and is an interesting development in the context of the primacy of the test of strict liability in anti-doping over many years.

A common view of the organisations such as WADA and the IAAF is that this increase in length of ban to four years will survive legal challenges across the world. However this is open to doubt. Legal challenges became commonplace for the IAAF when they had a four-year ban in place in the 1990s and they lost the majority of their court battles as their ruling was considered overly harsh under the domestic law in a number of European countries. The most high-profile case involved the German sprinter Katrin Krabbe, the 100 and 200 metres world champion in 1991, who was suspended for four years for taking the banned drug clenbuterol in 1992, but successfully sued the IAAF in a Munich Civil Court. The Court found her penalty unlawful on a number of grounds including restraint of trade arguments, effectively restricting the German Athletics Federation to two-year bans for drug use. Krabbe’s move, and other successful legal challenges in other European countries, forced the IAAF to drop four-year bans to avoid potentially huge legal bills.

How has the legal environment changed over the intervening twenty years or so? The growth of the influence of CAS over this period and its fast developing body of authorities concerning the enforceability of playing bans and determination of their proportionality, suggest that it will play a significant role in supporting the

new provisions proposed in the new draft WADA Code. Additionally, when these issues concerning playing ban and the test of proportionality have been tested in the Courts, the authority of sports governing bodies had been acknowledged. In the judgment of Richards J in *Bradley v The Jockey Club*, he stated that ‘the court’s role, in the exercise of its supervisory jurisdiction, is to determine whether the decision reached falls within the limits of the decision-maker’s discretionary area of judgment. If it does, the penalty is lawful; if it does not, the penalty is unlawful. It is not the role of the court to stand in the shoes of the primary decision-maker, strike the balance for itself and determine on that basis what it considers the right penalty should be’.

There is however guidance on the issue of proportionality over playing bans that may be less supportive concerning the proposals of WADA. In *Meca Medina*, the CJEU provided that if sanctions including playing bans are too severe they could be overturned as being disproportionate as far as the objectives being pursued by the relevant sporting rule.

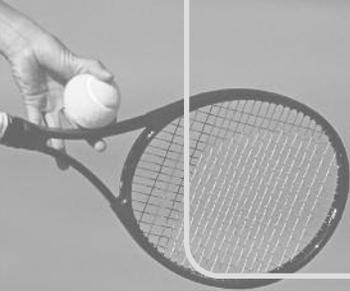
There is widespread agreement that changes need to be made to the anti-doping regime. A recent WADA Working Group Report published in August, highlights failures in all aspects of the anti-doping system and recommends wide-scale reform. What is certain is that whatever changes are made in the next WADA Code, there will be plenty of issues of controversy and uncertainty.

**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



# Police charges at football grounds – Some clarity at last

BY MARK GAY AND CHRIS DAVIES BURGESS SALMON, BRISTOL

The recent decision of the Court of Appeal in *Leeds United v West Yorkshire Police*<sup>1</sup> helps clarify a festering controversy that had developed between football clubs and local constabularies on the question of who pays for match day policing. It became a contested issue against a background where the police had formed a skewed view of what the law was following Mann J's decision in *Greater Manchester Police v Wigan Athletic FC*<sup>2</sup> and where cuts in resources available to the police were mandated by the state of the economy.

The argument of the police ran as follows: football is rich, football needs the police because it has a problem with violence, and, therefore, football should pay for the full cost of policing football matches. This argument might have held some populist appeal, however, as Lord Justice Neill remarked in his judgment in *Harris v Sheffield United*<sup>3</sup>: "that is not the law".

## Genesis of the issue

Prior to the decision of Mann J in *Greater Manchester Police v Wigan* the legal position regarding the costs of policing seemed fairly clear and straightforward. Following the decision of the Court of Appeal in *Harris v Sheffield United*, policing within a ground on match day was regarded by the Court as Special Police Services within Section 25 of the Police Act 1996 and hence fell into the exceptional category of services that the police provide that may be charged to the public. Section 25 of the Police Act 1996 re-enacted Section 15 of the Police Act 1964 which itself represented no more than the statutory codification of the common law derived from the decision of the House of Lords in *Glasbrook Bros Ltd v*

*Glamorgan County Council*<sup>4</sup>. This established that police have a duty to conduct public order policing in a public place and cannot charge for the discharge of that duty. However, if the police provided services pursuant to a request, charges could be levied for Special Police Services where those services were so characterised.

At first instance in the Wigan<sup>5</sup> case, Mann J was asked to consider policing which was provided on private land outside Wigan's stadium which was leased and controlled by the club on match day. Specifically, he had to decide, first, whether the policing was capable of constituting Special Police Services and, secondly, whether there had been a "request" by Wigan to supply those services (the latter being a necessary requirement under the 1996 Act). Mann J answered both in the affirmative. The policing on the private land fell outside the normal duties of a police constable and were therefore capable of being (and indeed were) Special Police Services for the purposes of the 1996 Act. Mann J held that it was possible to imply a request and, therefore, the police were entitled to claim payment for the Special Police Services.

The Court of Appeal begged to differ on appeal by Wigan<sup>6</sup>, the Court of Appeal held that there had been no such request and consequently the police were not entitled to charge the policing to Wigan.

The Wigan first instance decision was important in that Mann J decided that the "stadium" also included land owned, leased or controlled by the Club, which was likely to be land within the curtilage of the stadium. However, there are two pertinent points to note here. First, the question in the Wigan case related to policing on private land only. At no point was the High Court or Court of Appeal asked to opine on policing on public land.

POLICE CHARGES AT FOOTBALL GROUNDS  
- SOME CLARITY AT LAST

Secondly, given that there was no request, the Court of Appeal was not required to (and did not) consider whether the policing was capable of constituting Special Police Services.

Therefore, the Wigan case did not significantly change the previously settled position as to what could be charged to the public as Special Police Services. The Association of Chief Police Officers (“ACPO”) believed that it did. In July 2009, having read the Wigan judgment of the High Court and Court of Appeal, ACPO produced a new guidance document entitled “*Guidance for Football Deployment and Cost Recovery*”. This document had no legal force, but had the effect of disseminating ACPO’s misinterpretation of the Wigan case to other constabularies in the country. ACPO (wrongly) concluded that a new basis for potential charging existed and that the judgment of Mann J in the first instance Wigan case (despite the fact that he had been overruled and Wigan actually won their case) entitled constabularies to charge football clubs not merely for policing within the stadium but at a “locality” which could potentially embrace the public highway and land generally accessible to the public (such as car parks).

This approach was completely at odds with the view of the Home Office in Circular 009/2011 which was published on 1 August 2011:

*“The aim in principle should be to recover the full cost of those police officers who are deployed for the purposes of a football match within a defined footprint area, including the football ground itself and other land owned, leased or controlled by the football club (or manager of the event).”*

As with the ACPO guidance, this Circular has no legal authority. Rather, it indicated that the “land grab” position adopted in the wake of Wigan by ACPO (and West Yorkshire Police (“WYP”)) was not adhered to at the Home Office. Leeds United believed that the Circular represented the true state of the law. ACPO attempted to use the Wigan case as a vehicle to allow constabularies to change the basis upon which they charged for policing in relation to football and to substantially increase those charges.

It is in this context within which the Leeds United case arose.

**Background to the Leeds United case**

Prior to the 2009/10 season, WYP charged Leeds United as Special Police Services on the uncontested basis that was applicable to the vast majority of football clubs in the country at that time. Namely, the club was charged for those match day deployments at the stadium. These charges were never in dispute in the Leeds United case.

In advance of the 2009/10 season and in accordance with the ACPO guidance, WYP sought to levy charges to Leeds United for match day policing on the “Wigan” principles. They did so by unilaterally imposing a “footprint” over Elland Road Stadium. This footprint encompassed the areas surrounding Elland Road including public land, the public highway and third party owned land such as car parks and bus stations. By its very nature, the club could not dictate (or audit) who entered or exited this land and could not deploy club stewards on this land.

The financial impact of the imposition of the footprint regime was stark. Leeds United’s policing bill for Elland Road doubled in the first year. It then increased by £350,000 per annum for the following two seasons. Leeds United disputed the legitimacy and legality of such additional charges for policing on land that it neither owned nor controlled.

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POLICE CHARGES AT FOOTBALL GROUNDS  
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Perhaps more worrying for the club, the policing by WYP was claimed to be a condition of the Safety Certificate attached to Elland Road. Leeds United was faced with the threat by WYP that unless it agreed to the police's interpretation of the Wigan case, and accepted the extended footprint (with its concomitant being a new and far more expensive basis for charging) all policing would be withdrawn from matches, thus closing the stadium. Faced with this ultimatum, Leeds United had no alternative option but to make the payments in advance of matches on a without prejudice basis pending the outcome of the dispute as to what the police could lawfully charge as special police services.

Subsequently, attempts were made at a national level to resolve the dispute involving ACPO and the Football and Premier Leagues. No resolution was achieved. No agreement having been reached, and with no resolution in sight, Leeds United commenced proceedings on 26 May 2011.

### **The contentions of the parties**

Leeds United sought two key declarations from the Court:

- a) First, that as a matter of law WYP is prohibited from charging as special police services for those deployments outside the land owned, leased and controlled by the Club.
- b) Secondly, that as a consequence, the Club was entitled to a rebate from WYP for the three seasons in which it had been subjected to the footprint regime and overcharged.

The Club's position, put simply, was that public order policing on public land fell within the common law duty of the police to prevent disorder, a position expounded in the *Glasbrook* case. The classic common law statement of the consequence of those duties in the context of charging is to be found in the decision of Viscount Cave LC in that case, where he says at pages 277-8:

*“No doubt there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to seem to be necessary for keeping the peace, for preventing crime or for protecting property from criminal injury; and the public, who*

Shaun Harvey, then CEO at the Club, made it clear to the police that Leeds United were willing and able to pay for policing on land owned, leased or controlled by the Club. However, the club disputed the additional charges raised by imposition of the footprint.

*pay for this protection through rates and taxes, cannot lawfully be called upon to make a further payment for that which is their right... I think that any attempt by a police authority to extract payment for services which fall within the plain obligations of the police force, should be firmly discountenanced by the Courts.”*

The police were under an absolute duty to attempt to keep the peace; but an almost unreviewable discretion as to how they propose to do so. Accordingly, WYP could not charge as special police services those deployments which were fulfilling the police's common law duty to keep the peace.

Shaun Harvey, then CEO at the Club, made it clear to the police that Leeds United were willing and able to pay for policing on land owned, leased or controlled by the Club. However, the club disputed the additional charges raised by imposition of the footprint. One of the wider concerns for the club was that the footprint had been drawn up in an unprincipled manner by the police without any meaningful discussion with the Club. As such, if the footprint approach was accepted, there would be nothing preventing the police from extending the footprint in future seasons. Indeed, witness evidence of senior officers suggested that the police intended to charge Leeds United for policing at the Woolley Edge Service Station in Wigan (which was used as a ticket collection point for coaches carrying away fans to Elland Road).

## POLICE CHARGES AT FOOTBALL GROUNDS - SOME CLARITY AT LAST

In contrast, WYP contended that the match day policing on land not owned or controlled by the Club was legitimately chargeable as Special Police Services. This was on the basis that the policing was provided “*exclusively (or nearly exclusively) for the protection of those attending LUFc’s matches and the benefit of LUFc and not for the safety of the public at large*”. By reference to the judgments of Neill LJ in *West Yorkshire Police Authority v Reading Festival*<sup>7</sup> and Scott Baker LJ in *Harris v Sheffield United Football Club*<sup>8</sup>, WYP argued that there was a separate “benefit test”, i.e. that if policing on public land was provided for the benefit of the Club, it could legitimately be charged as special police services.

WYP’s arguments focused heavily on the small section of Leeds United “risk” supporters, previous disorder at the club and the fact that the policing operation on match day constitutes the single biggest drain on WYP’s resources. This was, to ignore a number of key considerations, not least the fact (recognised by Eady J) that the vast majority of Leeds United supporters are well behaved, tax paying members of the public.

### The Judgment of Eady

At first instance, Mr Justice Eady agreed with Leeds United’s contention that public order policing on public land fell within the “*normal constabulary duty to keep the peace*”. He recognised that there was no request, express or implied, and that the policing was provided on land not controlled by the club. In rejecting WYP’s submission that the policing was for the benefit of the Club or “*purposes of the match*”, Eady J noted that the policing would also benefit the local residents whose properties were occasionally vandalised. The key legal principle to extract from this judgment is that public order policing can only be charged as Special Police Services to a private entity where the deployments are on public land.

Accordingly, Eady J granted Leeds United the declarations that it sought and the club was entitled to a rebate for the deployments that had been charged in the three seasons in question being 2009/10, 2010/11 and 2011/12. The quantum of this rebate is significant, has not yet been decided and the club will save in future seasons. WYP appealed to the Court of Appeal.

### Appeal to the Court of Appeal

The Court of Appeal dismissed WYP’s appeal and upheld the Judgment of Mr Justice Eady. WYP chose not to appeal to the Supreme Court.

The only judgment in the case was delivered by the Master of the Rolls, Lord Dyson. The essential basis of the Judgment is that the services provided by WYP on public land constitutes the discharge by WYP of their general duties as constables, rather than constituting Special Police Services within section 25 of the Police Act 1996. The nature of the services provided on public land was to maintain law and order and to prevent the commission of crime. This is the basic duty of a constable going back hundreds of years and described most recently in the decision of the House of Lords in *Glasbrook*.

Interestingly, the Court of Appeal noted that on the strict terms of *Glasbrook* even policing within the ground, if it has as its aim the object of the maintenance of order and the prevention of crime, would appear on its face to constitute ordinary policing and not SPS. Had they taken this approach, though it would have effectively overruled *Harris*. However, having toyed with the idea, they decided that a more “nuanced” approach was required and that *Harris* was not inconsistent with *Glasbrook*, primarily on the basis that services were being provided on private land and that the Police could not enter without the permission of the owner of that land, unless there was the imminent threat of a criminal offence being committed. Consequently, this made the ordinary policing “special”.

Equally interesting was the fact that they described the *Glasbrook* case as being “good law”. If they had taken issue with *Glasbrook*, then this would have possibly provided grounds for an appeal to the Supreme Court. However, they clearly do not regard *Glasbrook* as unsound; indeed they regard it as settled good law.

In the context of football matches, the judgment reaches a very important conclusion. This is that professional football matches attended by thousands of members of the public are essentially public events and not private events. Therefore, members of the public attending such events are entitled, as members of the public and not as paying customers of the venue, to protection.

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Finally, they turn to a factor which was not present in Neill LJ's Judgment in *Harris*, which is the so-called "benefit test". While doubting whether it is a test at all, the Master of the Rolls makes it clear that:

*"I do not consider that a benefit test should be regarded as determinative or even necessarily of great weight in all cases."*

Therefore, the central plank of ACPO's argument that Mann J's Judgment in *Wigan* had produced a benefit test, for what constituted SPS, has been comprehensively shot down by the Court of Appeal.

This case is of wider importance in that it is applicable to other football clubs (who have been watching the case develop eagerly), other sporting events where there is a police presence (such as horseracing and cricket) and potentially other large public events such as festivals for which the police currently charge or have aspirations to charge. Another likelihood is that those entities previously charged on a "footprint" basis will be entitled to a rebate.

It now remains to be seen whether the on-going Home Office consultation with stakeholders will result in legislation changing the common law following the Court of Appeal's judgment in the Leeds United case. In particular, it is unclear how such lines will be drawn without being deeply unpopular and it will be interesting to see whether there is any appetite in Government to take on football.

## Conclusion

In conclusion, it is the authors' view that the decision of the Court of Appeal is a welcome one. It restores the position as understood between the parties before the decision of Mann J in *Wigan*. It provides a fair balance between what Clubs have to pay for and what are the legitimate commands on the public purse bearing in mind that football is a public activity. It curtails the land grab (and indeed cash grab) that constabularies engaged in post *Wigan*. Finally, it provides much needed clarity to help govern the relations between football clubs and police forces going forward. This can only be a good thing. ■ **BASL**

1 [2013] 2 All ER 760

2 [2007] All ER (D) 394 (Dec)

3 [1987] 2 All ER 838

4 [1925] All ER Rep 579

5 *Ibid.*

6 [2008] All ER (D) 222 (Dec)

7 [2006] 1 WLR 2005

8 [1988] 1 QB 77

# “Crouch”, “Touch”, “Pause”, “Tickets?”

BY ROBERT McTERNAGHAN LUNDY & CO SOLICITORS, BELFAST

## Introduction

I was fortunate to attend this year's Lord MacDermott lecture in the Great Hall of Queens University, Belfast. This year's lecture was given by Lord Kerr of Tonaghmore, Justice of the Supreme Court of the United Kingdom. Lord Kerr in somewhat of a joking retort stated that Lord Dyson called him “the great dissenter”.

This could not be further from the truth when we look at Lord Kerr's judgement in *The Rugby Football Union (Respondent) v Consolidated Information Services Limited (Formerly Viagogo Limited) (In Liquidation) (Appellant)* on the 21st of November 2012.<sup>1</sup> This judgement could be seen by commentators as a stand for the normal person in the street. This was an unanimous judgment (5-0 in favour) which sets out guidance, policy and application as to the circumstances in which Norwich Pharmacal disclosure orders will be granted.

According to the House of Commons: Culture, Media and Sport Committee:

*“Ticket touting is an emotive subject on which very strong and polarised views are held, by those involved in the selling of tickets for sports fixtures, concerts and theatres, and by some of the people who go to the events. There is no consensus as to whether “touting” means all reselling of tickets, all reselling not authorised by the original issuers, or only the shady or less reputable activities”.*<sup>2</sup>

They went on to state that the “The secondary market is by no means a new phenomenon, but the growth of the Internet has transformed and expanded it, so that tickets can now be bought and sold on an enormous scale in a very short time, and it is easy for individuals to trade in

tickets from their own homes in their spare time<sup>3</sup>. The current Legislation relevant to secondary selling UK Legislation is set out under section 166 of the Criminal Justice and Public Order Act 1994 (amended) and it is a criminal offence for an unauthorised person to sell or otherwise dispose of a ticket for, *a designated football match, which covers the vast majority of professional football matches played in England and Wales or featuring professional English and Welsh clubs and national representative teams playing abroad.*

## The legal position within in the UK

The legislation was introduced following the Hillsborough disaster as a public order and safety measure, to ensure that fans of different teams are segregated. Within the above legislation there is power to extend this offence by the means of a Statutory Instrument to any sporting events where more than 6,000 tickets are issued for sale. The Olympic and Paralympic games had legislation adopted to cover the same point by way of section 31 of the London Olympic Games and Paralympic Games Act 2006.<sup>4</sup>

The committee said that many event organisers have sought to control secondary selling by imposing terms and conditions which prohibit resale (for profit) and provide for cancellation of tickets sold in breach, but “however, the enforcement of such conditions raises its own problems. While there is technology which makes it possible to prevent the use of resold tickets for events”.<sup>5</sup>

Moreover, there is uncertainty as to the extent to which such terms and conditions are enforceable in law. In part this is because conditions will not be enforceable against consumers if they are found to be “unfair” within the

Unfair Terms in Consumer Contracts Regulations 1999 as they may be if they prohibit transfer without providing some other way for consumers to get their money back on unwanted tickets.

The case will concern all sporting fans who love to attend sporting events and those who work in the data-sensitive/privacy fields. The Supreme Court has upheld a Court of Appeal decision requiring a ticket sales website to disclose to the RFU the personal details of people who had advertised or sold rugby match tickets through the site breaking the RFU ticket policy.

### **The Injunctive Relief**

The RFU required a ‘Norwich Pharmacal order’ [NPO] to stop the resale of tickets or the selling of tickets an inflated quantum. A NPO requires a respondent to disclose certain documents or information to an applicant. The respondent must be either involved or associated with the court proceedings, A NPO will only be granted by the court where it is “necessary” in the interests of justice. An NPO can be obtained pre-action, during the course of an action. There is authority that indicates that a NPO can probably be made in one jurisdiction to identify a defendant for the purpose of proceedings in another jurisdiction under the Brussels convention.

The RFU is in charge for tickets in relation to rugby matches played at Twickenham, England. Tickets availability and demand for these rugby matches are high because the ground has limited capacity and the tickets are a sought after commodity. The RFU’s policy not to inflate ticket prices so as to develop the sport of rugby and grows its popularity. The RFU’s terms and conditions stipulate that “any resale of a ticket or any advertisement of a ticket for sale at above face value will constitute a breach of contract rendering the ticket null and void, so that all rights evidenced by the ticket are extinguished”.<sup>6</sup>

Applicants for tickets indicate agreement to these terms and conditions when they submit their ticket applications. The above condition is also printed on the ticket. The terms on which tickets are supplied also include a condition that, “the ticket remains the property of the RFU at all times”.<sup>7</sup> Viagogo sellers used the website to register tickets that they intended to sell and interested purchasers could then buy. Viagogo is a Swiss based company that was originally established in London in 2006 it describes itself as “an online ticket marketplace”. The seller opts to use “Fixed Price”, they set the price. If the seller opts to use “Auction” or “Declining Price”, then the price is effectively determined by the market. Depending on the demand for the particular ticket, this can be higher or lower than the face value of the ticket

The Society of Ticket Agents and Retailers has been working with the Office of Fair Trading with a view to producing model terms and conditions which would be approved by the OFT.<sup>8</sup> “The website provided a means by which persons were able anonymously to sell event tickets at the going market price”.<sup>9</sup> A price was calculated based on the “current market data”, Viagogo received a percentage of the sale.

The website carried a privacy policy. This policy could be accessed through a link at the bottom of the website page, “Use of this website constitutes acceptance of the Terms and Conditions and Privacy Policy”.<sup>10</sup> The RFU sought injunctions to discover the identity of the individuals or clubs involved in the sale of the tickets on Viagogo’s website. The RFU also bought tickets from the Viagogo website and found tickets with a normal price of £20 to £55 were being advertised for sale at up to some £1,300.

After mounting these test purchases, the RFU’s legal team wrote a letter to Viagogo seeking information about the identity of those involved in the sale and purchase of the tickets. Viagogo refused to divulge this information. The RFU therefore issued proceedings seeking “the disclosure of the information which it considered was required in order to take the action that it considered was necessary to protect its policy in relation to the sale of the tickets”.<sup>11</sup>

“CROUCH”, “TOUCH”, “PAUSE”, “TICKETS?”

## The Proceedings

The RFU issued proceedings seeking disclosure, under the *Norwich Pharmacal* principles, of the identity of those who had advertised for sale or sold the tickets. The High Court agreed and the judge agreed that the information “was necessary to achieve that redress; and that it was appropriate to exercise his discretion to grant the relief sought”.<sup>12</sup> The Defendant appealed the High Court’s decision and the ground for granting a *Norwich Pharmacal* order. The Defendant argued that the order would be disproportionate interference with the rights of the sellers under Article 8 of the Charter of Fundamental Rights of the European Union which guarantees the protection of personal data.

The Court of Appeal dismissed the Defendants appeal and cemented the jurisprudence of the High Court that the RFU had an arguable case on the ground of breach of contract and trespass and that there was no readily available alternative means of discovering who the possible wrongdoers were other than by means of a *Norwich Pharmacal* order. The Appeal court also found that this measure was proportionate under Article 8.<sup>13</sup>

A *Norwich Pharmacal* order established by the by the House of Lords in *Norwich Pharmacal Co v Customs and Excise Commissioners*.<sup>14</sup> Its scope was described by Lord Reid.<sup>15</sup> Lord Kerr stated that “the need to order disclosure will be found to exist only if it is a “necessary and proportionate response in all the circumstances”: Ashworth at paras. 36, 57 per Lord Woolf CJ”.<sup>16</sup> Furthermore Lord Kerr said that the essential purpose of the remedy is to do justice.<sup>17</sup>

In his judgement he went on to set out ten principles that have to be taken into consideration when balancing all the relevant factors.

- (i) the strength of the possible cause of action contemplated by the applicant for the order<sup>18</sup>
- (ii) the strong public interest in allowing an applicant to vindicate his legal rights<sup>19</sup>
- (iii) whether the making of the order will deter similar wrongdoing in the future<sup>20</sup>

- (iv) whether the information could be obtained from another source<sup>21</sup>
- (v) whether the respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing<sup>22</sup>
- (vi) whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer any harm as a result<sup>23</sup>
- (vii) the degree of confidentiality of the information sought<sup>24</sup>
- (viii) the privacy rights under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of the individuals whose identity is to be disclosed<sup>25</sup>
- (ix) the rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclosed<sup>26</sup>
- (x) the public interest in maintaining the confidentiality of journalistic sources, as recognised in section 10 of the Contempt of Court Act 1981 and article 10 ECHR<sup>27</sup>

Lord Kerr, after setting out these ten principles, went on to say that Many of the factors are relevant to the question of whether the issue of a *Norwich Pharmacal* order “is proportionate in the context of article 8 of the Charter”.<sup>28</sup>

## EU Law

As mentioned above, this case had a European Law aspect to it and the Supreme Court considered the arguments raised. The Data Protection Directive was the first aspect of European legislation that the court deliberated over. The EU data protection is Directive 95/46/EC (the Directive). Article 1(1) of the Directive provides:

*“In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.”*

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Lord Kerr stated that “it is clear that it is open to member states to make provision in domestic legislation that there should be disclosure of personal data in civil proceedings, where that is necessary to enable a person with a viable cause of action to pursue it in the courts”.<sup>29</sup> This principle as far as the directive was upheld in *Productores de Musica de Espana (Promusicae) v Telefonica de Espana*.<sup>30</sup> The U.K. implemented the European Directive by enacting the Data Protection Act 1998. Section 35 of the Act implemented Article 13 (1) (g) of the Directive that all disclosures of personal data which were required by law or made in connection with legal proceedings,

“it must first take into account and weigh in the balance the right to privacy with the respect to the processing of personal data which is protected by Article 1(1) of the Directive”.<sup>31</sup>

The European Charter was adopted into national law by the signing in December 2009 of the Lisbon Treaty, it is important to remember that it *only* binds members when they are implementing EU law. Article 8 of the European Charter stipulates:

*“(1) Everyone has the right to the protection of personal data concerning him or her;*

*(2) Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law...”*

In the RFU case, defence counsel argued that a key point was whether obtaining information about a particular person who had sold a ticket at more than face value would benefit the RFU to an extent that outweighed that individual’s right to have his or her personal data protected from disclosure.<sup>32</sup>

Furthermore it was argued that, “making that assessment, the court must conduct the examination solely by reference to the particular benefit that obtaining the information relating to an individual data subject might bring”.<sup>33</sup> Does this valid point prevent the future sale of tickets for international matches at inflated prices?

In the case of *Goldeneye (International) Ltd v Telefonica*,<sup>34</sup> the Court evaluated the rights of the claimants and those whose personal data would be disclosed if a Norwich Pharmacal order was made. As far as the Claimants’ rights, “they are owners of copyrights which have been infringed on a substantial scale by individuals who have been engaged in ... file sharing (in our case selling tickets at an inflated price). The only way in which they can ascertain the identity of those individuals and seek compensation for past infringements is by:

- (i) obtaining disclosure of the names and addresses of the Intended Defendants,
- (ii) writing letters of claim to the Intended Defendants seeking voluntary settlements and
- (iii) where it is cost-effective to do so, bringing proceedings for infringement.”<sup>35</sup>

In contract as far as the defendants’ rights, “the grant of the order sought will invade their privacy and impinge upon their data protection rights. Furthermore, it will expose them to receiving letters of claim and may expose them to proceedings”.<sup>36</sup> This gave an interesting perspective on this case but the Supreme Court did not see that Viagogo rights outweighed those of the RFU’s. Lord Kerr went on to say that he no difficulty in accepting this as a correct statement of the approach to the question of proportionality in the Norwich Pharmacal context.

“But I do not accept that its application to the present appeal leads to the conclusion that the order should not be granted. An “intense focus” on the rights being claimed in individual cases does not lead to the conclusion that the individuals who will be affected by the grant of the order will have been unfairly or oppressively treated. On the contrary, all that will be revealed is the identity of those who have, apparently, engaged in the sale and purchase of tickets in stark breach of the terms on which those tickets have been supplied by the RFU. The entirely worthy motive of the RFU in seeking to maintain the price of tickets at a reasonable level not only promotes the sport of rugby, it is in the interests of all those members of the public who wish to avail of the chance to attend international matches. The only possible outcome of the weighing exercise in this case, in my view, is in favour of the grant of the order sought”.<sup>37</sup>

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## Conclusion

The House of Commons: Culture, Media and Sport Committee received over 40 written submissions. About one third of which came from organisers of sporting, music and other events, while another third came from bodies involved in the ticket market. In both cases there was some element of overlapping between submissions; for instance, they received a joint submission from “the Five Sports” (the England and Wales Cricket Board, Football Association, Lawn Tennis Association, Rugby Football League, and Rugby Football Union).<sup>38</sup>

There is a diverse secondary market in which tickets are sold, without the authority of the promoters, and often also in breach of terms and conditions prohibiting resale and in the face of the efforts of promoters and primary agents to prevent reselling. The market is currently estimated to be worth around £1 billion in the UK.<sup>39</sup> The scale of the secondary market according to the Parliamentary Committee is that there is “... a great deal of the evidence to the inquiry emphasized that secondary selling now took place on a scale such as to cause real problems for promoters, there was no consensus, and no research statistics to show what proportion of tickets passed through the secondary market”.<sup>40</sup>

This judgement at first light was seen as a great victory for the normal sports fan but when you start to analyse it up close, you can see that Parliament needs to legislate on this issue. This was made clear in the recommendations of the Parliamentary Committee back in 2007:

*“The question for legislators and policymakers, however, is to define the extent to which this has become a “problem”, why it is so—generally or on a case by case basis—and whether legislation is a proportionate response. They must bear in mind, too, the extent to which legislation will be enforceable, and at what cost, and whether it may have unintended consequences”.*<sup>41</sup>

It is clear that policy makers have not stepped in and legislated on this issue, reluctantly it has been forced upon the courts who at first light through the Viagogo judgement have decided in favour of the public.

This will be an expanding area of law that big sporting bodies will have to look at closely and will have to decide to either go through the expensive routes of court proceedings or lobby Parliament, but one thing is clear and this was stated by Lord Kerr, that Parliament should step in and look at this issue. **IBASL**

- 1 *The Rugby Football Union (Respondent) v Consolidated Information Services Limited (Formerly Viagogo Limited) (In Liquidation) (Appellant) [2012] UKSC 55*
- 2 *House of Commons: Culture, Media and Sport Committee, “Ticket touting Second Report of Session 2007–08 Report, together with formal minutes, oral and written evidence” ordered by The House of Commons Published on the 18th December 2007 at page 3*
- 3 *Ibid* above
- 4 *Ibid* above at Page 24 at No 40
- 5 *Ibid* above
- 6 *Ibid* above, 1 at Para 3
- 7 *Ibid* above
- 8 *Ibid* above, 2 at page 4
- 9 *Ibid* above, 1 at 4
- 10 *Ibid* above at 5
- 11 *Ibid* above at 9
- 12 [2011] EWHC 764 (QB).
- 13 [2011] EWCA Civ 1585
- 14 *Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133*
- 15 *Ibid* above at 175
- 16 *Ibid* at 1 at para 16
- 17 *Ibid* above at 17
- 18 *Norwich Pharmacal at para 199 per Lord Cross of Chelsea, Totalise plc v The Motley Fool Ltd [2001] EMLR 750 at para 27 per Owen J, Clift v Clarke [2011] EWHC 1164 (QB) at paras 14 - 38 per Sharp J*
- 19 *British Steel at Para 1175 per Lord Wilberforce, Norwich Pharmacal at para 182 per Lord Morris of Borth-y-Gest & Para 188 per Viscount Dilhorne*
- 20 *Ashworth at para 66 per Lord Woolf CJ*
- 21 *Norwich Pharmacal at para 199 per Lord Cross, Totalise plc at para 27, President of the State of Equatorial Guinea v Royal Bank of Scotland International [2006] UKPC 7 at para 16 per Lord Bingham of Cornhill*
- 22 *British Steel per Lord Fraser at para 1197, or was himself a joint tortfeasor, X Ltd v Morgan-Grampian (Publishers) Ltd [1991] 1 AC 1, at para 54 per Lord Lowry*
- 23 *Norwich Pharmacal at para 176 per Lord Reid; Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2) [1974] AC 405, at para 434 per Lord Cross*
- 24 *Norwich Pharmacal at para 190 per Viscount Dilhorne;*
- 25 *Totalise plc at para 28*
- 26 *Totalise plc v The Motley Fool Ltd at paras 18-21 per Owen J;*
- 27 *Ashworth at para 2 per Lord Slynn of Hadley.*
- 28 *Ibid* 1 above at para 19
- 29 *Ibid* above at 23
- 30 *C-275/06 Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU [2008] 2 C.M.L.R. 465*
- 31 *Ibid* at 1 at Para 25
- 32 *Ibid* at 34
- 33 *Ibid* at 40
- 34 *Goldeneye (International) Ltd v Telefonica UK Ltd [2012] EWHC 723*
- 35 *Ibid* above at 118 per Justice Arnold
- 36 *Ibid* above at 119
- 37 *Ibid* at 1 at Para 45 per Lord Kerr
- 38 *Ibid* above, 2 at Page 8 No 3
- 39 *Ibid* above at Page 9 at No 7
- 40 *Ibid* above 2 at Page 22 at No 36
- 41 *Ibid* above 2 at Page 38 “Conclusions and recommendations” at point

# Lessons to be learned from other regulatory bodies?

BY ALEXANDRA FELIX, BARRISTER & COLLEAGUES, QEB HOLLIS WHITEMAN CHAMBERS

**It is only a matter of time before regulation in sport again becomes the focus of public attention, given the growing disquiet at a succession of high profile scandals involving doping, match-fixing and racist conduct. Searching public inquiries such as the Mid Staffordshire NHS Trust and Leveson Inquiries are the seemingly inevitable result of internal regulatory failure in the public eye, and bring with them calls for external intervention to ensure perceived failures cannot be repeated.**

Regulation is concerned with the upholding and maintenance of standards, which in sport can be said to encompass fair play, fair competition and sportsmanlike conduct. Unlike other areas of professional regulation, where standards may include reasonableness principles and regulatory bodies seek to ensure the fitness to practise or participate of its members, in sport, norms are, by definition, absolute. Put simply, the central tenets any sporting regulator must uphold can be described thus: no cheating, no fixing, no doping and no discrimination, the breaking of which requires sanction, irrespective of any remediation there may be after the event and before the determination in question.

In sport, most “National Governing Bodies (NGBs) are typically, self-appointed organisations that govern their sports through the common consent of their sport.”<sup>1</sup> This relationship between the NGB and its members (and in some cases non-members) lends itself to a “contractual” rule-book<sup>2</sup> and is therefore not governed by Acts of Parliament or other external sources of legitimacy, as would be the case for Public Authorities or Statutory Regulators. This allows the relevant NGB a broad degree of autonomy, and self-determination of the scope of its

regulatory obligations and the mechanisms through which they are fulfilled. The legitimacy and effectiveness of an NGB is therefore contingent on the participation and consent of its members. However, in contrast with the medical regulatory environment where, despite the independence of the individual regulators, it is often perceived by the public as being the responsibility of the government of the day, in sport, the buck stops with the regulator.

Consistent with the absence of governmental or legislative oversight of the regulation of sport, the Courts have hitherto expressed a reluctance to involve themselves in sporting decisions, particularly those concerning on-field disputes. The Court of Arbitration for Sport (CAS) has, however, recognised the sporting specificity in their determinations, and this can be seen in the *Matuzalem* case [CAS 2008/A/1519-1520].

The ECJ has already signaled its jurisdiction in the *Meca-Medina* case over sporting activity that constitutes “economic activity” thereby dismissing the notion that ‘purely sporting’ rules fall outside the scope of EU competition law<sup>3</sup>

A failure adequately to uphold and maintain standards through a robust regulatory system will lead inexorably to public outrage, public inquiry and calls for external intervention, whether statutory or otherwise. The Leveson Inquiry demonstrates that an absence of those fundamental components is unlikely to be tolerated where the regulator has a high public profile. Given the central role sport plays in wider society, a regulatory scheme instituted by sports regulatory bodies that does not practically and effectively meet those demands runs a real risk of external regulation. The continuing impasse over

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press regulation, and the apparently central role played by the single issue campaign group ‘Hacked Off’ in formulating government proposals, demonstrates the extent to which events can spiral out of the regulator’s control.

In the sporting sphere, a scathing recent report from the Culture, Media and Sport Select Committee into the perceived failure of the Football Association to reform its governance of the game, particularly in relation to finance, demonstrates an increasing impatience with self-regulation. In response, sports minister Hugh Robertson called for reforms to be carried out prior to the commencement of the 2013-2014 season, failing which the government would “look at bringing forward legislation”.<sup>4</sup>

The fundamental components of any successful regulatory scheme are:

- (i) clear public standards,
- (ii) an expedient, transparent, effective and robust procedure to determine compliance, followed by
- (iii) a credible, meaningful sanction for breach. Only by adopting these principles can sports regulators hope to avoid such intervention. The message is clear: regulatory lessons learned today will preserve the independence and autonomy of sports regulators tomorrow.

No doubt any sport regulator would profess to incorporate the fundamental components set out above into its regulatory systems. What the Mid-Staffordshire inquiry clearly shows is that even where the basic mechanism is well-established, a regulator can fall short by failing to instil a culture which proactively seeks not only to investigate individual breaches of the fundamental principles, but also to systematically address their root cause. In the context of sport, this calls not only for the proactive investigation of specific allegations, but also the implementation of strategies and policies to engender a culture which minimizes breach.

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For example, proactive investigation into cricket spot-fixing might have ameliorated the public embarrassment of cricketing authorities portrayed as oblivious or impotent by the media. Long-term prophylactic approaches could encompass everything from the introduction of increasingly comprehensive anti-doping measures to the sustained involvement of anti-racism campaigners in sport from the grass-roots to elite level. An example of an area ripe for such intervention is the incidence of homophobia in sport.

The final component of effective regulation is the imposition of appropriate sanctions. Whilst the imposition of sanctions must be reasonable and proportionate to transgression and transgressor, the role of sanctions as both deterrent and regulatory legitimator must not be overlooked. High profile cases, such as the John Terry racial abuse scandal, do little to inspire confidence. Terry’s four game ban and fine of £220,000 roughly equates to little more than one week’s salary. In the context of fines for criminal offences this would be equivalent to a Band B fine; a penalty awarded in only the most minor of offences. To ensure compliance the sanction must be meaningful. Not only did the sanction palpably fail to send a strong deterrent message to the game as a whole, but also the Football Association’s

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credibility as a regulator was inevitably undermined as a result. Put simply, sanctions need to be meaningful in order to be an effective deterrent and in order to give the regulatory regime public legitimacy. Clearly giving Terry a Band C Fine did not do this.

And so it is that arguably an issue in professional sport today is the lack of impact in deterring transgression. To be effective regulators may need to include a wider use of banning of individuals from sport for longer periods. However, as seen in *McKeown v British Horseracing Authority* [2010] EWHC 508 (QB), where a sport regulator takes decisions which affect a person's livelihood, the regulator's decision can be subject to the High Court's supervisory jurisdiction on a contractual basis. This puts an added demand on regulators to act in a manner consistent with well-established principles of fairness and natural justice.

A discussion of sanctions also raises the question of rehabilitation, a concept which is fundamental to sentencing in both the criminal and regulatory sphere. Recently in medical regulation the concept of "remediation" has developed, whereby an individual can demonstrate that he has "remediated" himself such that, whilst he may strictly have breached the relevant rules/requirements, nonetheless his fitness to practise is no longer impaired. Rather than acting as mitigation of the sanction to be imposed, remediation effectively equates to a finding of "not guilty". It is not about sanction, but about recognition where someone has learnt lessons and fixed past problems. The concept goes to the heart of what regulation should be about – seeking to maintain and uphold proper standards. If the concept of remediation could be meaningfully implemented into sporting regulation, this might go some way to addressing the inadequacy of sanctions such as in the Terry case.

There is currently no shortage of examples of high profile regulatory failures in sport. An illustration of self-regulation breaking down can be seen in the sport of cycling. Whilst the supra-national nature of some sports, such as cycling, prohibits statutory regulation, the current system of self-regulation has been left in reputational tatters following the high-profile doping scandal involving Lance Armstrong and many others that has led to a "lost decade" in the sport. Such scandals have effectively

extinguished the legitimacy of the international cycling body, *Unione Cycliste Internationale* (UCI), as policeman and promoter of the sport. When asked whether the promotional and regulatory functions of the body should be formally split, the president of the UCI, Pat McQuaid refuted the suggestion emphasising that the body's three-pronged responsibilities of regulating, developing and promoting the sport include tackling doping. In the wake of the doping scandal, the sport is arguably left without credibility, where a team now not only seeks to win, but to "win clean". This is a direct result of a weak regulatory scheme. The current predicament of cycling exemplifies not only the need for transparency in the sport's regulatory system but also the need to learn lessons to ensure one that is fit for purpose in the context of criticisms meted out in other regulatory contexts.

The consequences of a failure to appreciate and address regulatory weakness is clear. As David Millar, WADA athletes' commissioner has said, "regarding the UCI, there needs to be change. Some will not resign, so they will have to be removed. If they don't and there isn't a change then it would have to be forced upon them".<sup>5</sup> **BSL**

1 *The Sport England website* - [http://www.sportengland.org/about\\_us/how\\_we\\_recognise\\_sports.aspx](http://www.sportengland.org/about_us/how_we_recognise_sports.aspx)

2 *Lewis and Taylor, Sport: Law and Practice*, London (Second Edition), Tottel Publishing 2008, page 9, paragraph A1.20

3 *Case C-519/04 P*

4 <http://www.guardian.co.uk/football/2013/jan/29/english-football-mps-threaten-reform>

5 <http://www.bbc.co.uk/sport/0/cycling/20034768>

# Gay footballers should not be ‘outed’ in order to prove that discrimination has not taken place

BY LOUISA RICHES SENIOR LECTURER AND SOLICITOR (NON-PRACTISING),  
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Football and homophobia are unsurprising bedfellows. It is strongly argued that on the pitch, off the pitch and in the terraces, ‘gay bashing’ is rife.<sup>1</sup> Many footballers like other high profile sportsmen and women and those in the public eye do not disclose their sexual orientation in order to avoid homophobic discrimination from fans and employers alike.<sup>2</sup>

For some, the burden of living a double life is too much; Marcus Urban could no longer endure what he described as a prison of his mind and sacrificed his promising career as an East German footballer in order to live as an openly gay man;<sup>3</sup> only recently was Jason Collins the first US professional sportsman to come out;<sup>4</sup> and earlier this year Robbie Rogers left Leeds United and subsequently revealed he was gay and announced his retirement but has now found sanctuary playing for LA Galaxy.<sup>5</sup>

It comes as no surprise, therefore, that a Romanian appeal court referred to the Court of Justice of the European Union (CJEU, formerly the European Court of Justice) for guidance, amongst other questions, whether a football club could be permitted to disclose the sexuality of footballers it employs in order to defend allegations that the club had a homophobic recruitment policy, given that such disclosure would potentially infringe those footballers’ right to a private and family life.<sup>6</sup>

## Legislative context

In relation to *Asociatia Accept v Consiliul National pentru Combaterea Discriminariilor (Accept v CNCD)*,<sup>7</sup> the CJEU was asked to consider, with reference to a specific set of facts, the interpretation of Articles 2(2)(a); 10(1); and 17 of Council Directive 2000/78/EC8 (the Directive) as to

the meaning of, respectively, the concept of discrimination, the shifting of the burden of proof from the claimant to the respondent in prima facie cases of discrimination, and the requirement for sanctions to be effective, proportionate and dissuasive. The judgment of the CJEU in response to this referral is not confined in its importance to the scope of the right to a private and family life and the protection of that right in favour of a robust defence; the CJEU also made it clear that an organisation’s liability for potentially discriminatory statements goes beyond those made by its employees and can include liability for remarks made, and presumably the behaviour of, those closely and publicly associated with the organisation.

## ‘There’s no room for gays in my family’

The case involved remarks about the future recruitment (or not) of gay footballers by Romanian football club, FC Steaua (the ‘Manchester United’ of Romanian football clubs). Mr Becali, for a time the majority shareholder of the company governing FC Steaua, was a notable figure and perceived by many as a spokesperson for the club. Although not involved in recruitment, in a public statement made during an interview concerning the possible transfer of a player, Mr Becali declared that he would prefer to close the football club down rather than hire a gay footballer, claiming it ‘... would be better to play with a junior rather than someone who was gay’ on the basis that ‘there’s no room for gays in my family and [FC Steaua] is my family.’

### Questions referred to the CJEU

It was submitted by Asociația Accept in the main proceedings that FC Steaua had made no effort to distance itself from Mr Becali's remarks; Asociația Accept alleged that FC Steaua's lawyer '...confirmed that that policy had been adopted at club level for hiring players because 'the team is a family' and the presence of a homosexual on the team 'would create tensions in the team and among spectators'.<sup>9</sup> In response to Accept's initial complaint to the Romanian National Council for Combatting Discrimination (Consiliul Național pentru Combaterea Discriminării – CNCD), the CNCD had found that Mr Becali's remarks could not be regarded as emanating from an employer, its legal representative, or a person responsible for recruitment. However, the CNCD did find that the comments amounted to harassment and issued a warning, which was the only penalty available at that stage under Romanian law.

Four points were referred by the Romanian appeal court to the CJEU for consideration. The first question related to whether remarks made to the mass media by a shareholder of the football club who was not involved in recruiting players could fall within the provisions protecting individuals from less favourable treatment in the field of employment, including recruitment.<sup>10</sup>

Secondly, the CJEU was asked to address to what extent the comments made might amount to facts from which it could be presumed that direct or indirect discrimination had occurred. In relation to the first and second points, a similar issue had previously been addressed by the then European Court of Justice (the ECJ) in the case of *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV (Feryn)*.<sup>11</sup> The facts in *Feryn* related to a Belgian firm that fitted garage doors. The employer had made a public statement implying he would not recruit fitters from ethnic minorities because his clients would not be happy having such workers in their homes. The ECJ was asked to consider whether Article 2(2) of the Directive was engaged given that there was no specific identifiable victim of the remarks made. Article 2(2) refers to direct

discrimination as being a situation in which 'one person is treated less favourably than another is [due to one of the protected characteristics]' (emphasis added). This might indicate a need for there to be a particular person(s) specifically subjected to less favourable treatment and/or a person or person(s) making a complaint about the (potential) impact upon them personally of such general remarks. However, the ECJ highlighted that the purpose of the Directive as stated in its preamble was 'to foster conditions for a socially inclusive labour market' and as such, there was no requirement for an identifiable victim of the discrimination complained of. A key difference between *Feryn* and *Accept v CNCD* was that in the latter the statement was made by an individual that was not an employee and, in particular, played no role in the actual recruitment of players.

The third question before the CJEU in *Accept v CNCD* was whether the burden of proof under article 10 of the Directive could be reversed. The requirement for the respondent to prove there had been no breach of the principle of equal treatment could lead FC Steaua to disclose the sexuality of its footballers, thereby breaching the right of those footballers to a private and family life. Finally, and of lesser relevance from a UK perspective, would a court declaration sufficiently satisfy the requirements of the Directive that sanctions be 'effective, proportionate and dissuasive' given that Romanian domestic legislation meant the claim for pecuniary compensation was out of time.

### Findings of the CJEU and their implications

The CJEU indicated that Mr Becali's comments could fall within the remit of article 2(2)(a) of the Directive despite his lack of involvement in recruitment and the fact that he was not an employee of the club. It found that there was nothing in *Feryn* to suggest that statements had to be confined to those with authority to recruit; that the perception of the public or social groups concerned may be relevant for the overall assessment of the statements at issue; and further, that it was open to the domestic court to

## GAY FOOTBALLERS SHOULD NOT BE 'OUTED' IN ORDER TO PROVE THAT DISCRIMINATION HAS NOT TAKEN PLACE

take into consideration the attempt, or lack thereof, by an organisation to distance itself from such remarks. Secondly, the comments made by Mr Becali were deemed to be sufficient to amount to facts from which direct or indirect discrimination could be presumed, even though no individual complaint had been raised.

Thirdly, the CJEU was of the opinion that FC Steaua would not need to provide evidence that it *had* recruited gay footballers in the past. To do so would have led the club to disclose the sexuality of its footballers, and interfere with those individuals' right to privacy. In this situation an organisation finds itself stuck between a rock and a hard place; remarks have been made by someone arguably 'on a frolic of their own' and there is tangible evidence to counter subsequent allegations, but that evidence cannot be disclosed. All the more reason to ensure that those in the public eye are fully briefed as to what is and is not appropriate, especially when they might be perceived to be speaking or acting on behalf of an organisation that is not their direct employer.

The final aspect of the CJEU's judgment has limited application to the UK. Under the Equality Act 2010, there is no differentiation between the limitation period and the remedy available, although before making an order for compensation a tribunal needs to have first considered whether to make a declaration and/or recommend action to be taken.<sup>12</sup> Nonetheless, the guidance from the CJEU in *Accept v CNCD* should be heeded: a declaration may not be a sufficient remedy in instances of serious cases of discrimination and might fall foul of the Directive by failing to amount to a sanction that is effective, proportionate and dissuasive.

### Tackling homophobia

Practical guidance can be taken from this case as to how football clubs should tackle the issue of recruitment and homophobia, and the broader issue of homophobia in afield which remains inextricably linked to homophobia. Football clubs and other sporting organisations should:

- ensure that policies relating to equality and diversity are robust, up to date and make specific reference to the protected characteristics identified in the Equality Act 2010;<sup>13</sup>

- review equality and diversity policies to make sure they refer to all stages of the employment process including recruitment and termination and that they include codes of behaviour to be observed by employees and also, importantly in the light of *Accept v CNCD*, individuals that are associated with the organisation, particularly those in the public eye;
- bring such policies and codes expressly to the attention of all employees of the club and those closely linked to the organisation;
- respond proactively to any incriminating statement that is made, or discriminatory behaviour demonstrated, be that by an employee or other key individual, in order to immediately distance the club; and
- remember that a defence that there is no identified or identifiable 'victim' of the discrimination will most likely fail, thus making it harder to rebut the presumption of discrimination or discriminatory policies being in force – so be warned...

### Final thoughts

As host to 'the world's only national LGB&T [lesbian, gay, bisexual and transgendered] football league'<sup>14</sup> there are grounds to argue that the UK is a trailblazer when it comes to addressing head-on the issue of football and homophobia. Nonetheless, despite the efforts of straight footballers appearing on the front cover of the gay magazine *Attitude*, in an apparent bid to encourage their peers to feel confident about coming out,<sup>15</sup> it is evident that the beautiful game needs to improve conditions in and outside of the locker room before gay footballers feel safe enough to be open about their sexuality. ■ **BASL**

GAY FOOTBALLERS SHOULD NOT BE  
'OUTED' IN ORDER TO PROVE THAT  
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# THE JOURNAL INTERVIEW

## GERRY SUTCLIFFE

BY WALTER CAIRNS SENIOR LECTURER IN LAW AND LANGUAGES,  
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Gerry Sutcliffe was born in Salford in 1953 and subsequently moved to Bradford. He left Cardinal Hinsley Grammar School at 16 to work as a salesman for local department store Brown Muffs. He continued studying during his spare time at Bradford College, where he met his wife Maria.

Time at the Telegraph & Argus newspaper followed, before he joined Fields Printers in Lidget Green in 1975. Here, he was increasingly involved in the printing union SOGAT (now Unite), becoming its Deputy Branch Secretary. He also became involved in local government, and by 1992, he was the Labour Leader of Bradford Council. Following the accidental death of Bob Cryer, MP for Bradford South, in 1994, Mr. Sutcliffe retained the seat for Labour in the subsequent by-election.

Mr. Sutcliffe has battled for a long list of improvements in the Bradford area. At Westminster, he served in the Treasury and Whip's office before becoming Employment Relations and Consumer Affairs Minister at the Department for Trade and Industry. He then moved to the Home Office and the Ministry of Justice until he succeeded Richard Caborn as Sports Minister in 2007.

**Can I ask you first of all what is the general drift of the Opposition's policy on sport and sports administration?**

Essentially, we wish to build on the success we achieved during our period in office from 1997 to 2010 – i.e. to invest in sport at all levels and to use sport in order to try to influence other policy areas. We invested in athletes, infrastructure, coaching, as well as school and community sport, and a variety of other strands. We are sad to note that, under the present administration, this cohesion has been weakened. There has been a reduction in school sport etc.

So what would you like to achieve when returned to Government is to resume where we left off and increase expenditure on, and influence exerted by, sport, particularly in the wake of the London Olympics. Money is currently available from the National Lottery to continue to invest in sport and sporting activity. Sporting activity is the key to policy areas in which pre-emption is preferable to cure – particularly in the area of health and the obesity crisis facing the country. So one can make out a good case for saying that sport affects every area of governance, and a sound sporting and physical activity policy can solve many of the problems currently facing our people.

**But you must be aware that the last Labour government did come in for considerable criticism on this question of sporting infrastructure, more particularly as regards the sell-off of school sporting fields.**

I would accept some criticism of our record in sporting infrastructure – even though I should point out that, between 1997 and 2010, we ploughed £4 billion into sport, through investment in local authorities, building

schools for the future and direct investment in sports governing bodies. On the specific question of schools playing fields, the criticism is somewhat unfair. We did introduce the reduction in size of playing fields – and more generally playing areas – that could be set off. Of course we had to listen to organisations such as Fields in Trust who quite rightly wanted to protect playing fields. But for me, it wasn't just about playing fields – it was about sports provision more generally. Even though we inserted a defence mechanism under which Sport England had to adjudicate on every planning application involving the sell-off of a school playing field or indeed a village green – if the alternative to the playing field was something better, I was prepared to accept that. Thus I can show you examples where sports centres were built and other sporting infrastructure put in place that was not a field as such, but did represent alternative provision. And on the question of playing fields, we are actually in a stronger position than is the current administration, since their rules on free schools and similar bodies make no provision for playing fields or for recreational activities!

**Would you be in favour of legislation setting minimum standards as regards sporting infrastructure – such as compelling all local authorities to spend a minimum amount of their budgets on sport, or to make minimal provision in terms of a leisure centre which would include a minimum number of services?**

I think it would be difficult to expect local government to do that, given the cuts in local authority spending and the fact that many of them are now outsourcing their leisure and recreation departments. From a central government perspective, I would require for each local authority to have a sports policy, which would include provision in terms of infrastructure, what sports would be available, and how the appropriate funding mechanisms would be agreed, set against local health and education priorities. It would be entirely appropriate to say: these are the minimum standards we would expect in our cities and regions.

**You have already made some critical observations of the sports policy pursued by the present Government – are there any other areas in which you feel they are deficient in this regard?**

Well, on the positive side, spending levels on UK Sport and athletes that we set are being maintained up to 2016, which is important, because that is the momentum we need to maintain. Less satisfactory has been the present administration's record on sports participation. Part of the Olympic legacy and our agreement with the International Olympic Committee was to reach a target of 2 million more people engaging in sporting and physical activity; that target has now been lost. We reached a target of 92 percent of schools providing two hours of sporting activity per week; that has now been dropped. There are also the losses of specialist sports colleges and of the schools sports partnerships – that is a very big mistake, and that is not just me saying that but also elite athletes such as Jessica Ennis and Mo Farrah, who are saying that if you fail to invest in school sport, you won't get the champions of the future. What is also a great pity is the loss of cross-party understanding. During the run-up to the 2012 Olympics and Paralympics there was not an ounce of difference between us in what we were trying to achieve – that unfortunately has been lost now.

**So does that mean that, if you will forgive the mixed metaphor, sport was becoming less of a political football?**

We were well on our way towards achieving that, but unfortunately that aspect has reared its head again.

**From that perspective, do you perceive any differences in the approach towards sporting policy at the local level depending on which party is in power or in control?**

No, I can't really say that, because when we introduced our "free swimming" policy it was agreed to by all councils, Tory, Liberal or Labour. Thus I had the great pleasure of visiting a Liberal council in the South-West in order to open their pools in accordance with this policy.

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Most local authorities are very much aware of what sporting activity can achieve, but the problem with many authorities, regardless of their political persuasion, is that sport and recreational activity are not statutory spending areas, so that when you are in a situation where budgets are being cut, these will often be the first to go. That in my view is a mistake – in times of economic difficulty, sport and leisure activity should be to the fore, because people have more “down time”, and also at a time when younger people are becoming more obese. On the other hand, the good news is that we have an elderly population who want to become and keep fit. Sport should be the lever used to keep people engaged in the things they are interested in.

**So would you advocate a greater degree of integration between sporting policy and public strategies on employment, leisure, etc...?**

Yes, and that brings me once again to criticism of the present administration.. The Department for Culture, Media and Sport (DCMS) has been allowed to wither on the vine so that it has now become a very small ministry, swallowed up by the Treasury, and I think that it will not be long before it becomes split up and integrated into other, bigger, departments. I think that is a mistake, in fact I and my Labour colleagues believe that the sports ministry should command a Cabinet position, and should be linked to the Cabinet Office because of its ability to influence other areas of Government policy, be that employment, education, health – you name it, I think we could make out a case for sports ministry input into all these areas.

**Of course, one ideological element that constantly enters the debate and the equation on sporting policy is whether the funding should come mainly from public or from private sources. Where do you stand on this issue?**

I believe it should be a combination of three main components – public money, private money and the National Lottery. The lead in sporting policy should come from the Government, and therefore public money should be to the fore. However, depending on the type of sport, its popularity, etc, it is safe to say that different sports attract different types of funding...

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I always thought that it was somewhat dangerous to talk about a “legacy” of the Olympics. We never said that it would mean an improvement in sporting facilities in every part of the country.

**But in terms of value for money, it should be said that the record has been mixed. Thus in spite of the success of a certain young Scot, all the millions of public money poured into the Lawn Tennis Association (LTA) have thus far failed to produce the results one could expect in terms of top players.**

Well, the LTA cannot even claim the credit for Andy Murray’s success, since he received his training not in this country but in Barcelona! One of the criticism I had of the LTA and of tennis in general, and the reason why we threatened to have their Sport England funding withdrawn, was that they did not foster the game at the grass roots in the way they should have done, and as countries which regularly produce top players have undoubtedly done, on the basis of a mix of public and private funding. To the £25 million of public money add that a large part of the proceeds of the Wimbledon championships are also poured into the LTA’s coffers, and we are definitely not getting value for money – except perhaps where women players are concerned.

**What can be achieved through focused taxation policy in this regard?**

Taxation certainly can potentially a prominent part in sport. First of all, you have the fact that the sporting performers and clubs earning large sums of money pay taxes on those amounts and thereby contribute to the national wealth. But we could also use taxation policy as an inspiration to encourage investment and to stimulate involvement from the private sector in sport. We do have a slight problem in the fiscal area in the shape of international bodies demanding tax concessions in return

for the staging of events in this country. Thus in order to stage the (football) European Champions' League final at Wembley this year, we had to give way on some taxation issues – in terms of VAT and the requirement that the players be taxed in their home countries rather than in that where the event was being held.

**The “legacy of the 2012 Olympics” is a frequently-debated topic among the public authorities, sporting or otherwise. What, in your view, will be the main long-term consequences of the London Olympics?**

I always thought that it was somewhat dangerous to talk about a “legacy” of the Olympics. We never said that it would mean an improvement in sporting facilities in every part of the country. What we can claim, however, is this: these were the most successful Olympics of modern times, and all the Olympic venues have been reclaimed for community use, or been replaced, or gone elsewhere. So in terms of infrastructure, the Olympics have produced definite benefits; the communities adjacent to the venues have also witnessed an increase in sporting participation. In more general terms, it is unfortunate that the target of increased participation by 2 million people, mentioned earlier, looks as though it will not be met. However, the Olympics have inspired people and caused a greater involvement in a wider range of sports. They have also enhanced what I would call “Brand GB”, the international community having witnessed what this country can organise such events to the highest possible standards – so these are all direct and indirect benefits which we have reaped from this event.

In purely sporting terms, more particularly school sport, I am less sure. I am aware that the Government have provided £100 million for primary school sports, and that of course I can only endorse. However, this has to be based on a cohesive, grass-roots framework. Our approach when in Government was to operate on the basis of three strands. First of all, the Youth Sports Trust, dealing with school and youth sports, which succeeded in advancing the top performers without damaging anyone else - these top people were taken out but not burned out, and put on pathways aimed at enabling their success. Secondly there is Sport England, which dealt with community sport through national governing bodies’ “whole sport” schemes, involving four-year plans for participation

growth subject to loss of funds if they failed to deliver on their pledges; and at the top of the pyramid was UK Sport and the funding for elite athletes which ensured that they be supported on a tripartite basis through public, private and National Lottery money.

**One consistent criticism that is cast at the Olympic Games is that it is always allocated to one city, leaving behind a heritage of huge debts and increasingly derelict stadiums and facilities. It has been suggested that this should change, and that a permanent site for the Olympics should be chosen – maybe in Greece as the site for the original Olympics?**

I certainly have some sympathy for the view that they should not be allocated to one city; allocation to one country might be preferable. In that sense, Britain as a whole can be said to have benefited. As a Northern-based MP, I was in a good position to assess this on the occasion of the 2012 Olympics, what with the Nigerian and Tanzanian boxers, as well as the Vietnamese Paralympic team, being located here in my constituency. And here in Bradford we also witnessed the spectacle of training camps opening their doors to the public and to the schools; in addition, the UK team enjoyed the participation of athletes from all parts of the UK. There was also the success of the torch relay passing through all areas of the country. So, in all, it can be said that although these were officially the “London” games, they did in fact involve large tracts of the UK. And, more particularly in regard to the emerging nations, it is particularly unfair to place the onus on one city, given the guarantees they are required to give in addition to those on a sporting level (in terms of security, transport etc.). I take heart from the way in which the European governing body in football, UEFA, have arranged the coming European national championships across several European nations. That is a positive development, it spreads the involvement, and I believe that this will be very much to the benefit of emerging nations wishing to stage international events.

**On a more technical issue of sports law, I would like to address the issue of special sporting courts. Spain and Italy are numbered among the countries which have such courts, separate from the ordinary court system – and, of course, there is, on an international**

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**scale, the Court of Arbitration for Sport (CAS).**

**Should we in this country also institute such courts?**

To be honest, I will have to reserve judgment on this issue. It is, of course, closely related to a problem which we will touch on later, i.e. the “fitness for purpose” of sports governing bodies. I am particularly concerned at their lack of professionalism, and I do not mean that in any overly critical way. One can understand how sporting bodies have developed over the years, through participation and volunteer service, which one will always need, as you can never get rid of the volunteers – nor should you. But as sport continues to increase its commercial profile, you need decision-makers who are able to govern sport in that environment, and I will admit that one of our shortcomings in Government was to fail to invest in assisting and developing governing bodies to be able to deal with the issues facing them, whether that be commercial activities, disciplinary matters, and drug-related issues (to which we will also return). On the arbitration issue – the Court of Arbitration is a fine body, but rather long-winded and takes too much time over its decisions. But now that we have our own national anti-doping agency we could perhaps in this country consider that notion of a specialist sports adjudicating body.

**It may go against the grain of the “British way of doing things”, but would sporting policy not perhaps benefit from greater central direction, as is the case for example in France?**

I must say I do have a problem with centralisation and, more generally, with the international bodies, especially FIFA and, to a lesser extent, the IOC – they are very bureaucratic, very difficult to “get the wheels moving”, and some of the individual international sporting federations, also present some concerns about their corporate competence and their ability to function properly. In terms of UK sports policy, I think we need to look closely at our own national governing bodies, and, rather than issuing them with diktats from central government, simply say to them: you are in receipt of public money, you do have certain responsibilities in terms of growing and developing your sport; therefore we need to assist you in becoming more professional in the way you operate. As said earlier, this does not mean getting rid of volunteers. However, too often you have the scenario whereby a good coach gets representation at the

local level, then at regional level, and with the national body. People then say: he has been successful for 30-40 years, why should he not have a say in the running of his sport? However, I don't think that such a person necessarily has the right skills to handle the other aspect of the governing body's activity, which is the commercial side, the contracts, and all the other issues that modern sports throw up.

The other issue I have a problem with is this parrot-cry from bodies such as FIFA and the IOC: “don't bring politics into sport”. Well, I'm sorry, but it is they who, as it were, “invited us in” and laid down a number of guarantees to stage world-class events – so it is nonsense to say that you cannot have politics in sport. Now I agree that politics and politicians shouldn't influence the rules governing a sport, but I do believe that there is a role for politicians in sport, and that can be done by advising governing bodies about what is expected of a modern governing body.

**On the question of politics, human rights, etc, in sport, there has been the controversy over the staging of the F1 race in Bahrain in spite of alleged human rights abuses taking place there...**

The current position in Bahrain is that there is unrest in the country, but that that has been fomented by a process of infiltration by countries that wish to undermine the current regime. That is not to deny, of course, that there are human rights issues in Bahrain, and indeed in the Middle East as a whole. However, on a more positive side I was in Qatar recently, and their expressed view was that the Middle East, and its young people in particular, need an alternative to fanaticism, and that sport could be a medium for providing that alternative. That is why I feel that the international bodies and federations should invest more in sport and physical activity in the Middle East as a peace-keeping opportunity rather than criticising those countries for their involvement in motor sport, etc. But let's get back to my main argument, which is: when we speak to the IOC and FIFA, they want the level of political activity to be able to stage their competitions, so it is a little rich on their part to say to the politicians “you're not invited to the table when we want to discuss other issues” - I think that we are there by default.

**Sometimes, of course, the response to political developments and alleged human rights abuses on the part of sport is a little confused. Take, for example, the 2003 cricket World Cup and the fragmented response, with some countries refusing to play Zimbabwe, to their detriment others not following suit...**

... and you could for that matter go back to Moscow and the 1980 Olympics! Generally speaking, if politicians try to use sport as a political tool, that is unacceptable, but I don't think that there is anything wrong with politicians trying to help sport in a positive way. There is a line to be drawn somewhere, and I believe that it is possible to draw that line.

**Another spectre that has haunted sport is that of corruption, what with the infamous 2002 Winter Games scandal at the IOC, and, more recently, various people being disciplined by FIFA. Would a greater degree of professionalisation help to frustrate that spectre?**

I definitely think it would. As we all build up experience as to how we organise Olympics, World Cups and other similar tournaments, each country starts to amass a reservoir of knowledge on how these events operate and what particular governing bodies want or don't want. So we can build an expertise on these matters. In addition, each of these countries are involved in the fight against crime, illegal drugs and betting, etc., so I would not be averse to an international force that would act as a kind of overseer over the way in which certain sports conduct themselves. We already have sport falling within the competency of the European Union (EU) so it might be conceivable to think about a United Nations (UN) force which would be responsible for policing the ability of sports to deliver on their aims and objectives.

**Another thorny problem that besets sport and has been very much in the news lately is the doping issue, highlighted particularly by the Lance Armstrong affair. The issue has reached such a pitch that some commentators have concluded that the "war on doping" in fact amounts to the pursuit of the uncatchable, and that perhaps the time is ripe to revisit the issue and adopt a more tolerant stance...?**

No, I definitely would not agree with that. One of the

things I was very keen to do during my time in office was to separate the funding of our athletes from the funding body that also developed our drugs policy. At one stage, UK Sport was responsible for the funding of our elite athletes as well as a funding body for the anti-drugs agency. I formed the view that this arrangement could not work – you need to separate the two. So we set up a separate National Anti-Doping Agency, funded by sport and government and operating under the umbrella of the World Anti-Doping Agency (WADA). The problem with WADA is that it represents the lowest common denominator...

**...and Dick Pound...**

(laughs) Well, to be fair to Dick, he has tried to change things. His argument is that it is always better to have something than nothing (and some people have answered "nothing" because of the corruption that is definitely there) but if we truly aspire to take doping out of sport we need to take on these people and continue the fight, however hard it is and however long it takes, and the apprehending of people like Lance Armstrong and others who have been caught in the act does have a deterrent effect – alongside, of course a really effective education programme for the sportsmen and sportswomen of the future which can show them that exposure to drugs, exposure to gambling, etc., are capable of ruining their careers.

**Obviously the highest sporting bodies do not like to see their sport tarnished by association with illegal drugs, which has prompted some accusations that the relevant governing bodies have attempted cover-up operations – notably the UCI cycling body in relation to Lance Armstrong...**

I think that this is true and it is not necessarily confined to cycling. When I campaigned for a betting integrity report, in order to assess the influence of betting on sport, I was amazed to discover that even though the bookmakers were experts at trying to establish who was trying to cheat, they either wouldn't or couldn't pass on the relevant information to the sporting bodies who were therefore unable to deal with the problem at their own level. The reasons for this reticence can be found not only in those you referred to earlier, i.e. the reluctance on the

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part of governing bodies to incur bad publicity by having their sport tarnished with these accusations, and they didn't have within their framework an understanding of the problem or the technical ability, or even the rules, to be able to deal with these issues at a fast enough pace to be meaningful in their action.

**But when it comes to the actual penalising of corruption, the response from the governing bodies has been criticised, for example in relation to the measures taken by the International Cricket Council (ICC) against the Pakistani cricketers found guilty of match-fixing.**

There is a balance to be struck, depending on the nature of each sport. Sport should at all times be about trying to be the best in the fairest way possible. Obviously that objective will be tarnished if people no longer trust that sport – inevitably that sport will lose its sponsorship, its fans, and wither on the vine.

**Finally, could I broach with you the subject of attempts made at levelling conditions in order to create a fairer competing environment – thinking more particularly of salary caps or further restrictions such as those which operate in US baseball, for example as regards crowd capacity?**

As co-chairman of a Rugby League club, a sport which operates a salary cap, I can say that I have a lot of sympathy for such measures – and as you say, US sports which operate such restrictions seem to do so without undue difficulty. Obviously the sport which comes most readily to mind here is football. When I took part in meetings of European Ministers of Sport, the subject of the proposed UEFA Fair Play rules came up. I argued against this scheme, even though I agreed with it, because they were not comparing like with like. Thus in France and Germany, most of the stadia are built by either the regional governments or by the local authority, whereas in the UK this was not the case. So I certainly argued in favour of making football fair, but let's measure the fairness and ensure that we stick to it. I did, however, agree with the requirements made of the club chairmen, and the personal guarantee they have to give if things do go wrong, and I am pleased that now all the English Premier League clubs do meet the European Fair Play criteria. The

problem with this country is that the Football Association is not in charge of the game – it is the Premier League who run the FA, which is not the way it should be. So in conclusion, I would say that the salary cap is an issue that should be addressed by all sports; fairness in terms of who provides the infrastructure, and how well that works out, needs to be addressed. The distribution of players is also something we need to look at, and the transferability of younger players from different continents needs to be considered as well. These issues are essentially for the individual sports to decide through their national and international bodies, taking into account their key constituencies.

**Speaking of young players, there have also been problems as regards real and alleged cases of “tapping up” by clubs. Do you see this as an issue?**

This problem has been addressed by the rule that a club is not allowed to field a player under the age of 17 unless they have been trained at that club's academy, and after the age of 17 the player must be offered alternatives. A fact that has caused me some distress when visiting the Premier League clubs' academies has been to be told that only 30 per cent of all these trainees would make it as professional footballers. Most of these youngsters would then be in a situation where they could well give up the sport. What we have managed to persuade many clubs to do is to get those who will not make it to look at other sports, and to give advice on other walks of life if sport is not going to be their career path at the end of the day. Sports have a responsibility towards their individual athletes to look after them at every level, such as when a player's career is ended through injury, if they fail to make it at a certain level. This is particularly the case in the early stages, such as football where they are picking up players at 8-9 years of age – we have to take some responsibility for what happens to those kids.

**Mr. Sutcliffe, thank you very much for a wide-ranging and illuminating interview.** ■ **BASL**

# ANALYSIS



# Critical Analysis of the World Anti-Doping Code: Timely Issues Related to *Andrus Veerpalu v FIS* and other Relevant Case Law

BY KAISA KIRIKAL

## Introduction

The economic and political power of international athletic organizations has expanded tremendously since the inclusion of professional athletes in the sporting world.<sup>1</sup> Thereby the problem with doping has emerged being one of the most important issues facing professional sports today.<sup>2</sup> As the majority of doping cases often involve scientific matters in the courts, then there is a need to put science and law together and see how they accommodate each other in the anti-doping world. This paper examined doping from the medico-legal discourse and raised attention on the issues around human growth hormone (HGH) and cases related to it, most importantly, the case of *Andrus Veerpalu v FIS*, 2012, CAS. Part of the context of the study includes past commentaries or challenges on testing for nandrolone and its threshold fail levels.<sup>3</sup> This study was partly interested in whether or not the same issues are around Human Growth Hormone (HGH). Also the significance of *Andrus Veerpalu's* case will be examined, being the first case successful to challenge some aspects of the testing of HGH in CAS. There is also a need for contemporary research on “sports science topics, related to doping control and medico-legal discourse with sports authorities, outside the adversarial courtroom”.<sup>4</sup> It is beneficial for anti-doping research to use a dual strategy, combining two different perspectives.

## Discussion of Methodology

This study used a qualitative research and a case study, getting information out of semi-structured interviews. The aim of the interviews was to get answers to research aims and questions. Participants were allowed to lead the conversation as much as possible with some guidance questions. This is useful as it allowed establishing a semi-structured conversation style, with a set of core questions which still allowed flexibility.<sup>5</sup> Interviews were carried out with this purposive sample of six individuals. The interviews were around 60 minutes long, tape-recorded and transcribed, and assurance of anonymity was given and the proposed research gained the appropriate ethical approval.

## Discussion of *Andrus Veerpalu v International Ski Federation 2012*

One of the main cases that were discussed in this study was *Andrus Veerpalu v International Ski Federation (FIS)*.<sup>6</sup> The case was heard by CAS (11/12 of June, 2012), however it was not decided by the time of writing the project. The final decision came out on the 25th of March 2013, and the appeal filed by *Andrus Veerpalu* was upheld. On the 29th of January 2011, *Andrus Veerpalu* was subject to an out-of-competition testing in Otepää, Estonia. Both, blood and urine tests were taken. The samples were analyzed in WADA accredited laboratory in Köln, Germany, using HGH Isoform Differential Immunoassays.<sup>7</sup> The tests resulted in an adverse analytical finding (AFF). The analytical values of test A were 2, 62 (1) and 3,07 (2), which were greater than the corresponding threshold level of 1,81 and 1,69 respectively and the B analysis showed 2,73 for kit 1 and 2,00 for kit 2.<sup>8</sup> In his defence, *Andrus Veerpalu* presented two main groups of arguments: firstly the circumstances

of collecting and handling of the samples and secondly the reliability and suitability of the testing method used to verify the existence of rHGH, but these were rejected and he was sanctioned a three-year ban.

He was the focus of negative media coverage straight after the positive B test result prior to any formal hearing, or before looking more deeply at the science surrounding his case.<sup>9</sup> Furthermore, his arguments in front of the FIS doping panel were that relevant circumstances included three and a half hour intense training session before the testing plus the high altitude level, where he was at the time of the training, could have increased the natural HGH level.<sup>10</sup> The FIS doping panel is not in a position to review a method of analysis that has been introduced by WADA and the accredited laboratories.<sup>11</sup> However there are a lot of debates around the reliability of HGH blood test.<sup>12</sup> It was reported in the sport business news that the biggest sports league in the USA, the NFL, did not accept WADA's testing methods and claimed that there were issues of a lack of transparency and reliability of the current HGH blood-testing methods.<sup>13</sup>

*WADA has repeatedly refused to provide scientific evidence that could be used to independently establish the reliability of the HGH isoform ratio test developed by Christian Strasburger. If this cannot be accomplished, then its fairness to the athletes subjected to HGH testing cannot be guaranteed. Every test will have false positives. The question is, what percentage can a sport stand?<sup>14</sup>*

Andrus Veerpalu and his team now had to prove their arguments to the comfortable satisfaction of the hearing panel. Veerpalu challenged the reliability of the adverse analytical finding based on departures of the requirements of the International Standards for Laboratories (ISL), and the laboratory was WADA-accredited, then it was up to his team to show in the "balance of probabilities, that there has been a departure from the mandatory requirements of the ISL".<sup>15</sup> Or on the other hand, Veerpalu's team had to prove that the abnormal

concentration of the HGH was due to a physiological or physical condition.

After the hearing in CAS, 11/12 June, 2012, the decision was postponed several times as CAS requested some more evidence from both sides. In the hearing, FIS also argued that, in addition to the positive A and B sample, Andrus Veerpalu's longitudinal study also showed the use of HGH; however that argument was rejected by CAS as not enough evidence was provided (DCO reports). Andrus Veerpalu, on the other hand, argued in the CAS hearing, that the test is unreliable particularly because of the decision limits; that the laboratory was not accredited to carry out the test; the test was improperly applied by the DCO and the laboratory; and that his individual circumstances render the test meaningless (81.). One of the arguments that the FIS made is that as the laboratory is WADA accredited, then the presumption is that the test has been conducted in accordance with the ISL is valid (91.). That reinforces the fact that there is a clear presumption of competence from all the WADA accredited labs. The fight against doping would be made extremely hard without it. So there cannot be one right answer to it. CAS made it clear that Andrus Veerpalu's team did not demonstrate any violations of the ISL that led to a false positive finding. In contrary to it, the panel was satisfied with the arguments from the FIS that if the samples were affected, it was more likely to cause a false negative result.

Andrus Veerpalu's individual circumstances were not accepted. The appellant failed to convince the panel to the required standard of proof that those circumstances (high altitude level, genetic predisposition) caused the positive or adverse analytical finding (AFF). Furthermore, coming to the reliability of HGH testing, as mentioned earlier, not enough data is given out by WADA about the reliability of HGH testing methods. However CAS agrees, that the article by Bidlingmaier *et al*<sup>16</sup> publicly disclosed the essential elements of the test.<sup>17</sup> Another reason for not making the Kit's anti-doping purpose available to all laboratories is that it can be used for reverse engineering

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of the test in effort to develop new doping methods, which seems fair. Well-accepted reasoning behind that accusation. Also all the other arguments by the appellant were not accepted in terms of the reliability of the test. FIS and WADA made enough evidence available to the panel to review the reliability of the test. Even though Andrus Veerpalu's team did note some minor flaws in the testing method, they did not show it to the relevant standard of proof that this caused the AAF.<sup>18</sup>

The core of the proceedings related to the decision limits of the HGH isoform test. Andrus Veerpalu's team argued that the decision limits were flawed and thus rendered the test invalid or at least be set to higher limits that would exceed Veerpalu's test results.<sup>19</sup> Several studies were examined and evidence given by both teams, and CAS still found at the end that FIS has failed to establish to "the comfortable satisfaction of the panel that the decision limits were correctly determined and that they would lead to the claimed specificity of 99.99%" (pt.203.). Sufficiently large samples were not used in the verification studies for setting the decision limits, and thus making the limits for Kit 2 and possibly also for Kit 1, unreliable. The CAS bearing in mind the seriousness of the allegations made, "is not comfortably satisfied that an anti-doping rule violation has occurred". Even though the appellant failed to meet the required burden of proof regarding the reliability of the test, he succeeded on the question about decision limits. Andrus Veerpalu's AAF was not upheld and he was cleared of the sanction.

This case was a triumph for Estonian scientists (Terasmaa, Kõks and Fischer) as they were able to prove that the decision limits are wrong. The fact that they worked for free really shows the faith they had in Veerpalu. Krista Fischer said that "as a scientist, I would have accepted the test's decision limits if they were correctly and reasonably explained and worked. But there was no scientific proof."<sup>20</sup> However, CAS reported in the final decision that there were several signs pointing to rHGH in Andrus Veerpalu's body, but as the decision limits were flawed, the sanction must be overruled. CAS was sure that Veerpalu administered some form of HGH but they cannot prove it. This is rather contradictory and difficult to grasp a clear conclusion or indeed closure for the athlete. Upholding the decision but still saying that Veerpalu used HGH with no proof being presented does not appear

logical. Will this decision make it really hard to successfully sanction athletes using HGH in the future? It is important to review/revise the decision limits as soon as possible to make the fight against HGH more effective.

Sandor Liive, the current president of Estonian Ski Federation, said that there are two lessons to be learnt from that case. "Firstly, the way this case was communicated from the beginning. If there are difficulties on the way, you need to be able to publicly talk about them. And secondly, you need to support your national hero during difficult times" Many people turned against Veerpalu. "You should not tramp your heroes into mud straight away when some difficulties come around; they need our support"<sup>21</sup> Andrus Veerpalu lost his chance to protect his World Championship title due to all the postponing and trouble with his case. His physiotherapist Lauri Rannamaa mentioned that Veerpalu was in his best shape before Oslo World Championships 2011.

At the time, when the research interviews were completed, the case of *Andrus Veerpalu v FIS* was not yet heard in the CAS. The case was in CAS on 11/12th of June, 2012. Unfortunately, due to the London 2012 Olympics and Paralympics, the decision was postponed till the end of September, and then again to February, and then to 25th of March. His attorney-in-law, Aivar Pilv, said that the main question in CAS was still about the isoform test; its method, reliability and validity. He also said that the judges had a whole series of questions about the test.<sup>22</sup> The questioning is probably because of the fact that this

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FIS and WADA made enough evidence available to the panel to review the reliability of the test. Even though Veerpalu's team did note some minor flaws in the testing method

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was the first time the isoform test or any other HGH test was being questioned in a CAS case. Prior to this case being heard in the CAS the fact that people are still questioning the legitimacy of the test makes the Veerpalu's case important, as "this case provides athletes and governing bodies with some direction, whether or not the test is scientific or isn't" (Interviewee D).<sup>23</sup> So it was kind of a test case for the isoform test. The entire sample thought the same in that there was an agreement that the case is very timely and "great case to do" (Interviewee C). "Sports and athletes can have confidence in CAS (that it) gives a critical verdict of whether or not the test is scientific and robust enough" (Interviewee D). Interviewee F believes that it will be 'almost impossible to overturn the decision'. This indicates the challenges which Veerpalu would be facing in this case.

The main issue raised by the case is that until the correct decision limits are set in place, the test could be questioned and it could make the fight against HGH more difficult. In addition, the Finnish skier Juha Lalluka, was cleared of the same charges, following the Veerpalu case. In addition to this, the final words by CAS saying that they still think Veerpalu used HGH, left questions in the air and did not really end the ongoing process for him. He is still facing a lot of criticism by the domestic media.

Predictions by the interview sample prior to the CAS case was varied. First of all, the *Andrus Veerpalu v FIS* was probably an "uphill struggle as he is going to need a very good expert" (Interviewee E). That is definitely what it was. So it seems Andrus Veerpalu's experts were believable. Furthermore, D is questioning Andrus Veerpalu's team's argument around the production of HGH with excessive training: "Whenever I hear that excessive training excuse that always makes me think if that is really possible to produce excessive amounts of HGH out of excessive training" (Interviewee D). E is also saying "HGH doesn't necessarily strike me as something that would be exercise induced, because it is there to reconstitute muscle" (Interviewee E). Another issue in his case now is that as he did not claim no significant fault or negligence, or no fault or negligence, because he is not arguing an alternative, "that so if it was there, I have no idea how it got there or that it wasn't my fault, because to do that he'd have to prove how it did come to his body" (Interviewee E). If the

science is right, then he cannot deny that the substance was found and it probably can only be a deliberate taking. "So his sole chance is showing that the result, the testing of the substance and the finding of this above threshold level of a HGH was wrong" (Interviewee E).

C says that "yes, there is a mechanism now to challenge the testing methods. The scientists behind isoform testing method would need to come in and explain the set threshold levels and that it rules out false positives" and "would need to prove it to the comfortable satisfaction of the panel that this was an exogenous HGH "in the circumstances where, everyone's got a HGH in them, and he's been exercising continuously for three hours and he's got all this good character" (Interviewee C). So at the end, "it is going to be up to the panel, whether they are comfortably satisfied, that these results indicate exogenous use" (Interviewee C). "I would assume the FIS have got some very good lawyers and they will be able to get the science together, so I hope his lawyers are good as well" (Interviewee C). The case was probably "solely up to the scientific experts and who can convince the panel that they are right" (Interviewee F). This highlights the central role of scientific data and their interpretation in such anti-doping cases. All his arguments were "very, very difficult" (Interviewee F).

And the last point to be made is that it was probably very, very difficult for Andrus Veerpalu's team to question a test that WADA has approved. However, interviewee E adds that although he might be a bit skeptical, but he is "not sure that this is necessarily true" and that if WADA thinks "they've got something, which they can use to tackle doping, then they'll have a crack at doing it" (Interviewee E).

It is very fascinating to read the sample's comments now, when the case is decided. Some really good critical comments were made that connect to CAS's arbitral award, with a range of precise predictions. His case definitely was "very tricky and the outcome most certainly will give confidence to CAS and will probably improve the ability of the detection of HGH" (Interviewee D). Andrus Veerpalu managed to prove that the decision limits were flawed, even though it may make the detection of HGH quite difficult.

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Patrik Sinkewitz, a professional German cyclist, who returned positive doping samples in 2011, February, appealed his doping sanction to German Court of Sports.<sup>24</sup> Sinkewitz, who had fully confessed in his first doping case, maintained that he is innocent this time. “The Sinkewitz party says that none of the lab documents they had asked for to validate the results and testing procedure, had been provided to them.”<sup>25</sup> The German Sports Court in Cologne<sup>26</sup> heard Sinkewitz’s case and he has been cleared of charges that he illegally used HGH. The question here is what is the significance of this case? “The World Anti-Doping Agency’s guidelines for the values were not shown to be scientifically reliable.”<sup>27</sup> The NADA appealed the decision as they were not satisfied with it, and the German now faces a three-day hearing in CAS. The CAS reported that Germany’s anti-doping agency is seeking a minimum eight-year ban for Sinkewitz.

Similar case is with Juha Lallukka, who is a Finnish cross country skier and competed in 2010 Winter Olympics. Slightly after Andrus Veerpalu, he was tested positive. He argued that he has not taken any artificial drugs and is planning to take his case to CAS, questioning the validity of HGH testing. Finnish Anti-Doping Agency’s medical team leader brings out that Veerpalu’s and Lallukka’s cases are very different. The outcome of Veerpalu’s case does not have any effect on Lallukka’s, as the handling and collecting of the data was different (Gregor, 2013). However, FINADA has cleared Lallukka of all charges.

Another case was the one of *Vadim Devyatovskiy and Ivan Tsikhan v IOC, CAS, 2010*, where The CAS Panel stated that the departures from the ISL, which constitutes mandatory procedural safeguards, justify the annulment of the tests’ results for both athletes.<sup>28</sup> The arbitral Panel has established a violation of the laboratory’s documentation and reporting requirements, in addition to a violation of the “different analysts” rule. More particularly, the laboratory was unable to provide a plausible explanation for the interruption of the automated testing procedure of the IRMS (isotope ratio mass spectrometry) instruments for the purpose of manually exchanging aliquot fractions.<sup>29</sup> Such “movement” was not properly documented. Furthermore, the same laboratory analyst should not have performed activities on the “A” and on the “B” samples.<sup>30</sup>

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The World Anti-Doping Code was adopted to provide a uniform set of rules, harmonized and effective antidoping programs at international and national levels

**Review of The Main Framework of Anti-Doping**

After the World Conference on Doping in 1999, where the limitations of anti-doping system and harmonization of the use of prohibited drugs was discussed,<sup>31</sup> WADA was created as an independent agency to govern doping practices and assuring a level playing field and coordinating the fight against doping at international level.<sup>32</sup> Amongst WADA’s responsibilities is conducting testing, developing a harmonized code, funding research, observing doping control, managing Athlete’s passport program, providing education, and fostering the development of national antidoping organizations.<sup>33</sup> The significance of the tension between the value of world-wide harmonization and the value and autonomy of individual sports federations or bodies was highlighted recently in the recent case of *BOA v WADA*,<sup>34</sup> where CAS also reinforced the fact that “international anti-doping movement has recognized the crucial importance of a worldwide harmonized and consistent fight against doping in sport.”<sup>35</sup>

The World Anti- Doping Code was adopted to provide a uniform set of rules, harmonized and effective antidoping programs at international and national levels and to protect the right to participate in doping free sport.<sup>36</sup> The Code works in conjunction with four international standards issued by WADA and aiming at bringing harmonization among anti-doping organizations in various areas: testing, laboratories, therapeutic use exemptions and the list of prohibited substances and methods.

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One of the main principles, that the Code is based upon, is the strict liability principle. According to the Code, doping is fundamentally contrary to the spirit of sport and in order to maintain the intrinsic value of sport, strict liability principle needs to be applied.<sup>37</sup> Under the strict liability doping offence, the mere presence of a prohibited substance is enough for the offence to be committed. The WADA Code establishes that:

*Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.8 of the Code. It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.*<sup>38</sup>

It is thought that the strict liability rule is the only way for doping free sport and necessary for the fight against doping to avoid the openness of floodgates to cheats.<sup>39</sup> Strict Liability can prevent injustice to the collective<sup>40</sup> and it can prevent that a sports federation has to incur great expense.<sup>41</sup> On the other hand, it is believed that strict liability goes against the fundamental right of athletes (innocent until proven guilty, right to a fair hearing).<sup>42</sup>

Coming to sanctions, the new Code has the principle of *modified strict liability*.<sup>43</sup> Under Article 10.5, an athlete can prove no fault or negligence or no significant fault or negligence. The ineligibility period can be reduced or eliminated, however, the standard of proof for an athlete to show it may be so high that they will be unable to prevent the imposition of the limited sanction.<sup>44</sup>

CAS supports strict liability "right across the boards, all CAS decisions support the principle" (Interviewee E). Interviewee G gives a very short, but reasonable justification for SL: "without SL, it becomes impossible to punish those, who have cheated" adding that "without it, it becomes possible to blame external sources for drug violations." A quote from E makes a good continuation: "It would be too difficult to prove that somebody had

acted deliberately". It is very hard to prove guilt, when an athlete just says that he or she does not know how it got into their system. "Real drug cheats would escape" (Interviewee E). "Without SL, each doping case would have taken years and years to progress and to process a results management" and as "anti-doping is a complex and very difficult scientific area" then "prosecuting athletes would be a nightmare and you would probably end up prosecuting very few athletes" (Interviewee D).

One of the interviewees was also in a disagreement of SL being fair. He agreed that it is very difficult to prove a deliberate act, but also that:

*SL is inherently unfair... So if you start from the point that SL necessarily presupposes that somebody is going to set to be liable, even if that haven't actually done anything wrong, then you are going to have a situation, where there will be people who are sacrificed on the altar of that expediency of the system working.* (Interviewee E)

So that is the utilitarian view for the greater good. Questions were also asked in the interviews about the challenges in proving no fault or mitigation, which is the groundsel of modified SL. C states that there are very tough standards in proving no fault or mitigation or no significant fault or mitigation and "you will basically be in fault, unless someone spiked your drink or something like that."

Challenges against the strict liability rule have been made regularly in cases stretching over decades but have generally failed. It is seen as necessary and proportionate for the fight against doping by the sample, and also is consistently appearing in the literature.<sup>45</sup> SL has been accepted throughout the population and also, CAS supports it. Without it, it would be quite impossible to catch any athletes.

**Presumption of competence**

The Prohibited List consists of substances and methods prohibited in and out of competition times. Mostly, the prohibited substances are drugs, "which can alter the biochemical systems of the body."<sup>46</sup> It also includes mimics and analogues- substances that are not located in

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the List, but have similar chemical structure or biological effects- the so called open list, which really shows how harsh is the strict liability principle.<sup>47</sup> The testing for prohibited substances needs to conform to the International Standard for Laboratories.<sup>48</sup> The main purpose of the International Standard for Laboratories (ISL) is to ensure the laboratory conducts its testing validly and achieves uniform and harmonized results from all Laboratories.<sup>49</sup> Article 3.2 of the code states that:

*WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred, which could reasonably have caused the Adverse Analytical Finding. If the Athlete or other Person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then the Anti-Doping Organization shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.*<sup>50</sup>

When a prohibited substance is found in an athlete's body, the athlete is guilty of an anti-doping rule violation, and there is the presumption of competence from WADA accredited laboratories to conduct the procedures in accordance with the ISL.<sup>51</sup> It is also seen unfair to assume that the laboratories have conducted the tests in accordance with International standards. "The laboratory should have to demonstrate this by presentation of their evidence package."<sup>52</sup>

McLaren<sup>53</sup> gives an overview of different cases trying to challenge the laboratory. He discussed unsatisfactory chain-of-custody documents and unreliable testing methodology that can result in false positives and negatives. Pre-2007 the main attack by athletes was the procedural aspects of the testing regime (*Diane Modahl v IAAF*), however now; the challenges lay more and more in the actual scientific testing method<sup>54</sup> just like in the *Veerpalu v FIS*, CAS 2012, case. "The newly-developed tests are often subject to scientific attacks from athletes."<sup>55</sup> Links can be made to testing EPO, where in the case of

*Meier v. Swiss Cycling*, CAS, 2001, the validity of rEPO testing was in question. Meier argued that the test does not distinguish between recombinant and naturally occurring EPO, but the appeal was dismissed.

In support to the competence of laboratories, interviewee C brought out the accreditation of labs, saying that all the labs are accredited and "there are various blind tests otherwise done to ensure the competence of the labs and some labs have been suspended." He added that there can be incompetence, but it would be surprising. Furthermore, A also supports the presumption, because "these laboratories after all have to be validated by WADA and if they are validated we have to presume competence," adding that there was a loss of accreditation case last year (2011) and some others were under scrutiny, "but that shows that WADA takes these matters very seriously." D believes that without the presumption, every case can be a year or two-year long battle and become overly difficult to prosecute an athlete, because there are so many steps "from the minute the athlete walks into the doping control station, to when the sample finally arrives to the laboratory" that an athlete could question when there would be no presumption. "And again it comes back to having faith in the WADA Code, IST, the efficacy of the laboratories, the doping control staff" (Interviewee D).

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On the other hand, the difference between different WADA-accredited labs can be quite strong:

*If I was an athlete competing with some of the nations..... where doping control isn't as strong, where the resources are simply not there to fight the war of doping in sport. I'd be frustrated I think. (Interviewee D)*

Interviewee E is noting the same point saying, "Not all laboratories are the same by any stretch of the imagination". Again, it is common to have faith in for example in the London, LA or Cologne laboratory as "quite frankly, they are not going to make mistakes. Genuinely they are not going to make mistakes" (Interviewee E). Some other laboratory, which doesn't have the same set of standards, like in the Devyatovskiy case, "in relation to Beijing, where I think they were not impressed in the way that the tests were carried out at all" (Interviewee E). On the other hand, E is also quite critical:

*If you can expect the individual athlete to prove that what happened could have altered the results, why... you shouldn't expect the laboratory, which actually knows much more about it, to actually prove that it couldn't. It seems that they want to secure convictions. (Interviewee E)*

Unfortunately there is not much critical testing research done around the presumption of competence. Only Hooper<sup>56</sup> gives a comment that it is seen unfair to assume that the laboratories have conducted the tests in accordance with International Standards, but there have been significant developments in ISL oversight in the years since the Hooper article was published. "The laboratory should have to demonstrate this by presentation of their evidence package."<sup>57</sup> WADA does its own research on testing, but that is not open to the public. More medico-legal research is needed around laboratory practices and test procedures. Furthermore, it can be understood why the presumption of competence is needed. As the interview sample said, it can be agreed that it is much easier for laboratories to show, that the testing procedure is right, rather than an athlete, who probably knows nothing about the science, does not have access to

the best scientists, and has to show the incompetence of the laboratories. The presumption of competence was strongly reinforced by the CAS in Veerpalu's case too.

"One of the most controversial performance enhancing substances in sport today is HGH."<sup>58</sup> As HGH is central in the case of Andrus Veerpalu and as there are several contemporary issues around the testing of HGH, which can be connected to Strict Liability and presumption of competence from the labs, then this will be examined more thoroughly. HGH controls the natural growth of almost every body system and occurs naturally in the body.<sup>59</sup> Recombinant HGH is said to considerably increase muscular strength and decrease body fat. Research also shows that it has strong anabolic properties regulating body composition<sup>60</sup> and protein synthesis that is "commonly acknowledged in sport."<sup>61</sup>

HGH is being advertised as one of the miracle drugs of this century. However, along with the touted benefits of using HGH, there are also many potential side effects. RHGH use can inhibit recuperation from exercise<sup>62</sup> and result in lower stamina with higher rates of fatigue. The other side effects HGH can produce are "tremors; sweat; anxiety; diabetes in prone individuals; worsening of cardiovascular disease; muscle, joint and bone pain; fluid retention" in adults.<sup>63</sup> Artificially increasing HGH in the body might have temporary performance increases, but there are severe side effects, including increases in the size of the jaw and brow, enlarged tongue, and damage to the heart, liver and kidneys.<sup>64</sup>

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The Prohibited List consists of substances and methods prohibited in and out of competition times. Mostly, the prohibited substances are drugs, "which can alter the biochemical systems of the body."

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HGH use was banned by the IOC in 1989, however the detection of it “poses a formidable challenge, as it is almost identical to that which is produced naturally in the body”<sup>65</sup> and exogenously administered rHGH is “cleared from the body within 24h after the last injection and its sensitivity and specificity have not been reported.”<sup>66</sup> “Exogenous recombinant HGH and endogenous HGH have identical amino acid sequences, making chemical distinction impossible.”<sup>67</sup> HGH was long considered undetectable and as exercise and altitude levels are potential stimulus for HGH secretion, then it is even harder to distinguish naturally occurring and recombinant HGH.<sup>68</sup> Andrus Veerpalu’s defence team in his case in CAS also used both of those arguments, however they were not accepted. Instead, FIS gave evidence that proves exercise and altitude levels may have the opposite effect.

One of the testing ways is the blood testing to measure GH isoforms. Pituitary GH contains many isoforms while recombinant consists of only 22kD.<sup>69</sup> It is also said that the sensitivity of the test is unclear in relation to the “rHGH dosage and the window of opportunity after the last injection or rHGH.”<sup>70</sup> It was first piloted at the 2004 Athens Olympic Games however no positives were detected probably because the isoform method is able to detect HGH in a short window of 24h after the injection.<sup>71</sup> Due to that, testing for HGH can only be reliable when the sample is taken out-of-competition without warning.<sup>72</sup> In addition to this, there are many questions because “WADA does not want to publish the results of the quality of the tests used by the WADA-accredited laboratories.”<sup>73</sup>

Even though WADA believes that the isoform method has a clear preference for recombinant HGH over pituitary HGH in human serum,<sup>74</sup> and there sincerely have been cases, where athletes admit the usage of HGH,<sup>75</sup> there are still many debates around the validity and complicity of the testing.<sup>76</sup> NFL players’ Union in the USA is still not 100% supportive of the test, even though they accepted included it in the collective bargaining.<sup>77</sup> Doubts about the reliability of the isoform test continued until the biomarker test was developed and first used in London 2012 Olympic Games. So now, it is final, CAS has said in its decision in *Veerpalu v FIS*, that “the (isoform) test itself is reliable, but that, as a matter of procedure, it has not proven the same in respect of the decision limits” (234.).

HGH use was banned by the IOC in 1989, however the detection of it “poses a formidable challenge, as it is almost identical to that which is produced naturally in the body”

WADA itself is extremely disappointed with the decision, however accepts CAS’s authority and understands the reasoning behind the decision. This decision however, has made it almost impossible to prosecute any other athletes based on the same test. And America’s NFL’s Players’ Association is already using the outcome of the case to avoid using HGH testing.

*“There obviously is a difficulty for any anti-doping regime in relation to substances that are endogenous as distinct from exogenous, produced by the body itself” (Interviewee A). According to this, “tests have to be devised that are sufficiently sophisticated to determine whether or not the quantity of whatever it is in the sample” is an exogenous production (Interviewee A). E brings up the issue around the threshold level. Every substance, which is also naturally occurring in the human’s body, has a certain threshold level, over which the substance in the body should not raise. Interviewee E sees it from two sides, first that some athletes simply dope up to the threshold; “So you get a benefit and you get a benefit being doped up to the threshold” (Interviewee E). On the other hand, with a nandrolone metabolite, norandosterone, some athletes had it endogenously and were done for having too much. “And the metabolite could have come from something that was endogenous or could have come from nandrolone” (Interviewee E). So WADA scientists have to be very precise, when setting the thresholds. As it came out from *Veerpalu v FIS*, for HGH the decision limits were too low.*

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And coming to the testing of HGH, E sees the difficulty in “whether or not the same chemical substance is actually derived from human production or whether it is actually derived from some other form of production” (Interviewee E).

*If something is a natural human substance, the science has got to address how much of that substance somebody could have, and they would have to address where the particular substance in their body actually came from. And until it does that it's going to be very difficult, I think. Until it gets to the latter when they can actually identify the source of the substance.*  
 (Interviewee E)

Even though it is very difficult to make a difference between endogenous and exogenous HGH, none of the sample would agree that WADA takes in hand an invalid test. Rather, they brought on the new biomarker test, because of the short window of detection of the isoform method (Interviewee C). In addition to this, C argues that still, a great deal of science went behind it and:

*WADA and the scientists of WADA has been spending a lot of time on this and have decided after several years that yes, there is enough consensus in this community that these methods are reliable way to distinguishing between exogenous and endogenous. And you know, they are not, you know, creased Nazis over there, they are trying to be fair and trying to get a test that does distinguish.*  
 (Interviewee C)

## Conclusions

What can be learned from this study is how hard it is to challenge an anti-doping rule violation? It is shown how specific principles and articles of the WADA Code, like strict liability, presumption of competence and proving no fault or negligence, make the challenge nearly impossible. However Andrus Veerpalu's case was upheld in CAS. Testing for HGH is facing the same difficulties as nandrolone and EPO previously, and that is why Veerpalu's case was so significant. It was the first HGH case in CAS and also an upheld one. CAS did not accept the main argument that the HGH isoform test is invalid. However the decision limits were flawed and until the

threshold level is validated, it is may be very difficult to see a case involving alleged use of rHGH through to a successful conclusion. It can be concluded, that the case of Andrus Veerpalu offered some interesting and timely opportunities to explore those issues. There is definitely a need for vigorous measures to control performance-enhancing drug use in sport.

However, some might argue that the primary method for deterring athletes from doping (testing and penalties) is inherently flawed because testing procedures are always likely to remain several steps behind the advancement of new drugs and procedures. **IBASL**

**Kaisa Kirikal has selected material from her dissertation on the M.A. Sport, Law and Society at Leeds Metropolitan University. A significant amount of new material has since been added following the completion of the Veerpalu case in the Court of Arbitration for Sport. She is extremely grateful to the interviewees who very kindly contributed their time and expertise.**

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# Sport arbitration, Swiss legal code and due process

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## Introduction

The arena of sports law has been growing with increasing rapidity and has a developing body of jurisprudence. Its dispute resolution is carried through by means of arbitration and the procedure is conducted by the Court of Arbitration in Sport. This body was created by the International Olympic Committee (IOC) in 1983 to arbitrate solutions to problems between the sportsman and their regulatory bodies. The arbitration is contingent on the agreement of the parties prior to the process and the issue is their consent and whether the awards can be annulled by the Swiss Supreme Court that has powers to oversee the jurisdiction in circumstances where the rights of the sportsmen are infringed.

In recent times the Federal Tribunal of Switzerland (Supreme Court) has been called on several times to adjudicate on the issue of consent after CAS decisions. They have intervened under Article 27 which protects 'legal personality' and 'excessive burden' to ensure that athletes do not forfeit their legal capacity to act in their own interests. This raises issues of due process and if there is enough procedural justice given the powers of the Swiss Supreme Court to annul decisions on grounds that the CAS process is structured to uphold.

The Court of Arbitration in Sport (CAS) is a globally recognised sports arbitration forum and is headquartered in Lausanne, Switzerland, and it also has two permanent offices in Sydney, and New York, and employs a minimum of 150 arbitrators from 37 countries, who are specialists in arbitration and sports law. They are appointed by the International Council of Arbitration for Sports (ICAS) for a four-year renewable term and are obliged to sign a 'letter of independence'.<sup>1</sup>

Its jurisdiction is wide ranging and covers the regulatory rules, which embrace the constitutional aspect of organised sport including the disciplinary procedures of the various sport governing organisations. The organisation also covers the player's rights and obligations that includes legal issues that arise from employment, such as discrimination, personal injury and terms and conditions in contracts, such as fees, national selection and transfers. It has increasing opportunities to adjudicate the disputes that arise at the hearings before the panel.

There are three kinds of issues that can arise between sportsmen and their governing bodies. These involve either selection, commercial or disciplinary matters. The first category essentially involves disputes relating to being selected on merit. This in sports can be contentious because ruling bodies can form a view that the sportsman is not competitive or is over their peak in which they case they may be making a policy decision. It often happens in sport that decisions are made at the highest level that seem unfair. There is not much redress in these circumstances because there is another candidate that takes their place who may have his own attributes and potential.

The disputes that relate to commerce relate to the execution of contracts such as those relating to sponsorship, the sale of television rights, the staging of sports events, player transfers and relations between players or coaches and clubs and/or agents (employment contracts and agency contracts).

The disciplinary cases represent the second group of disputes submitted to the CAS, of which a large number are doping-related.<sup>2</sup> In addition to these cases, the CAS is called upon to rule on various disciplinary cases (violence on the field of play, abuse of a referee etc). Such

disciplinary cases are generally dealt with in the first instance by the competent sports authorities, and subsequently become the subject of an appeal to the CAS, which then acts as a court of last instance.

Those sporting federations whose sport bodies are not part of the Olympic federations, such as Formula 1 racing, the governing bodies often have their own rules and dispute settlement tribunals. However there are some sports such as soccer whose federations are members of the Olympics Federation or have a governing structure such as FIFA who have recourse to a disciplinary tribunal. They are supported by the 53 UEFA member national associations who have unanimously declared their determination to uphold the statutes and regulations of football on the ground that '[t]he independent sports justice system is the best guarantor of equality and fairness for all participants in sports'.<sup>3</sup>

The CAS judgments that result in arbitral awards may only be annulled by the Swiss Supreme Court. The number of such rulings being set aside has greatly increased, to the point that almost half of the Supreme Court's case load relating to international arbitration now concerns CAS awards. Since 1984 the CAS arbitration hearings have increased to more than 2000 requests for arbitration and advisory opinions. The CAS tribunals have rendered more than 1,200 awards and 20 advisory opinions. There are also increasing grounds upon which these judgments can be invalidated. In 2010, the CAS supervised 298 arbitrations – a rise of 11 per cent on 2009 figures (270). The record for the CAS conducted arbitrations in a single year is at present 311 for 2008, that reflects of a higher caseload in the year before the 'Olympics'.<sup>4</sup>

This article deals with the arbitration process at the CAS, its formal rules and benefits of arbitration and the issue of consent of the sportsmen to the arbitration that is mandatory in sports related cases. It impacts on the due process of athletics by the impact of the judgments that needs evaluation in the light of the recent rulings. The

original question it addresses is if the consent process to participate in the hearings in any compromises the athletes independence and if there should be an option to consent to the proceedings.

### **Jurisdictional limits of the CAS process**

The International Council of Arbitration for Sport (ICAS) was created to supervise the administration of the CAS, replacing the IOC. The CAS was placed under the organizational and financial authority of ICAS after the *Gundel decision (1993) TF 4P.217/1992* in which the Swiss federal Supreme Court heard a judicial challenge to a CAS award. It affirmed the power of the CAS to legally bind parties to its determinations. The Court also recommended that the CAS reduce its dependence on the IOC which had the outcome in 1994, of creating the ICAS to replace the IOC as the manager and its funding source. Almost all international sports federations or associations, which are part of the International Olympic body refer sports disputes arising between themselves and sportsmen to the CAS.

The CAS is governed by its own Statutes and Rules of Procedure, namely the Statutes of the Bodies Working for the Settlement of Sports Related Disputes, Code of Sports Related Arbitration and Mediation Rules. According to Articles S12, S20, R27 and R47 of the Code, the Appeals Arbitration Procedure is open for appeal against any decision rendered by a federation or club and not limited to disciplinary matters, especially doping cases. In addition, Article R57 empowers the CAS Panels not only to annul a certain decision, but also to replace a decision by a ruling of the arbitrators, or to refer the case back to the issuing body.

There was an important decision in *USA Shooting & Q. / Union Internationale de Tir (UIT) (1995) CAS 94/129* where it was held that the CAS has full power to review the facts and the law. The consequence of this decision flows from the rule that in the jurisprudence developed by the means of arbitration if the hearing in a given case is

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insufficient in the first instance the fact is that, as long as there is a possibility of full appeal to the CAS, the deficiency will be cured.<sup>7</sup>

Moreover, Article R58 authorises the Panel to apply the 'rule of law' it deems most appropriate for the case. Thus the Panels may deviate from the laws of the country in which the federation is domiciled and reach a decision on the basis of laws of another country or other rules of law, such as general principles of law. The CAS process in any particular dispute can only arbitrate through the mutual consent of the parties involved. Currently, all Olympic International Federations and many National Olympic Committees have recognised the jurisdiction of the CAS and included in their statutes an arbitration clause referring disputes to it.

While it was the international response to the rise in the use of performance-enhancing drugs and the resulting doping cases that prompted the creation of the CAS, the court is called upon to assist in a wide range of sport conflicts, including sponsorship disputes, the eligibility of a particular athlete to be disciplined in accordance with a sport's constitution, as well as the resolution of disagreements concerning competition results. The outcome of issues arising in doping cases remains a significant portion of the CAS caseload.

### Standard and Burden of Proof

Prior to the establishment of CAS as the final court of arbitration the rule as to the process as far as burden of proof was contained in the case law and were formulated in certain arbitration decisions which predate the formulation of the Code. In *N.J.Y.W. v. Federation Internationale de Natation (FINA) (1998) CAS 98/208* the tribunal held that in a doping case, the burden of proof lay upon FINA, the sports body to prove that an offence had been committed. The tribunal ruled that the standard of proof required of FINA was higher than the civil burden of proof but did not amount to proof beyond the reasonable doubt.

In this case the tribunal applied a concepts of burden of proof and of strict liability and decided that the interpretation of the doping control regulations and the proof of presence of a prohibited substance in a

competitors bodily fluid the comfortable satisfaction standard requirement had been satisfied and an anti-doping violation was proven. In subsequent cases the burden of proof was shifted on the athletes and they had to disclose when why the maximum sanction should not be applied.

The case established that under the FINA rules which were adopted by the Code it was only at the level of determining sanctions and not determining guilt, that the shifting of burden becomes an issue. The tribunal ruled in favour of FINA establishing that the athletes had not discharged their burden of proof, and applied the maximum period of ineligibility on the athletes under the relevant rules.

This was encapsulated by the Article 3.1 of the Code, the Anti-Doping Organization which is prosecuting a case shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof which the Anti-Doping Organization is required to meet is that the Anti-Doping Organization has to establish to the 'comfortable satisfaction' of the hearing panel that an anti-doping rule violation has occurred, bearing in mind the seriousness of the allegation made.

This requirement of 'comfortable satisfaction' is higher than a mere 'balance of probabilities' (which is by and large the standard of proof required in civil cases in most jurisdictions) but less than proof beyond a reasonable doubt (which is the standard of proof required in criminal cases). Therefore, the burden of proof which an Anti-Doping Organization seeking to establish an anti-doping violation has to meet is mid-way between the burdens of proof required in civil and criminal cases.

Article 3.1 of the Code places the burden of proof upon the athlete or any other person such as support staff etc. alleged to have committed an anti-doping rule violation, to rebut a presumption or establish specified facts or circumstances, the standard of proof is a balance of probabilities, except as provided in Article 10.4 and 10.6 of the Code dealing with reduction of penalty with proof of no-significant fault or liability and enhancement of penalty respectively. This standard of proof of balance of probabilities for rebuttal of presumptions or establishing specified facts or circumstances by an athlete is lower than

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the standard of proof required of the Anti-Doping Organization alleging the occurrence of an anti-doping rule violation.

In 2004, the CAS arbitration panel ruled that American sprinter Tim Montgomery be banned from international competition for two years as a result of breaching code 3.1 of the World Anti Doping Code despite the fact that Montgomery had never failed a doping test. The CAS ruled that it could find a doping violation on the basis of the third party evidence called against Montgomery, most of which connected Montgomery to the Bay Area Laboratory Cooperative (BALCO) athlete steroid scandal that had arisen in the United States in 2003. The outcome of the procedure where the determination took place was made public by CAS.

In February 2010, five-time Olympic speed skating champion Claudia Pechstein lost her appeal against a two-year ban for blood doping. In *Pechstein, DESG v/ISU (2009) A/1912-1913* the CAS dismissed the German's appeal against a ban imposed by the International Skating Union. The arbitration panel applied the normal "comfortable satisfaction" standard provided under Article 3.1 of the ISU, which states as follows:

*"The standard of proof shall be whether the ISU or its Member has established an Anti-Doping rule violation to the comfortable standard of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond reasonable doubt".*

The arbitration panel ruled that the ISU evidence established that the alleged offender did engage in a prohibited method of blood manipulation to artificially increase her endurance and speed in ISU speed skating competitions, and that this proscribed method was shown and confirmed by the blood and urine samples taken from the Alleged Offender over a period of time and most recently at the 2009 World Allround Speed Skating Championships in Hamar, Norway, as an anti-doping violation.

The evidentiary proceedings in the CAS case are regulated by the (R44.3), which operates when the CAS arbitration does not provide for proceedings whereby evidence is

produced upon the request of the parties, similar to the 'pre-trial discovery' in Anglo-American law. However, the regulations do allow for one party to request the Panel to order his opponent to produce evidence in his possession or placed under his control. The Panel may at its discretion require additional evidence to be produced, order witnesses to be heard or appoint an expert witness to attend the proceedings to provide evidence

### Range of Sports arbitration

The sports industry accounts for 3% of world trade and more than 1% of GNP of the EU.<sup>5</sup> The arbitration process has become a major source of settling disputes in the industry.<sup>10</sup> The panel receives a new case nearly every working day and the practitioners who conduct the arbitration are experienced in the forms of commercial or investment arbitration. The process has many distinct features such as expedited hearings process that entails a 24-hour round the clock sitting.

The CAS arbitration are confidential but the rulings are disclosed publicly and this had led to sportsmen revealing facts that has caused them being investigated by other bodies in their own jurisdiction. This was true of the case of the American cyclist Floyd Landis who won the Tour de France in 2006 but failed a doping test afterwards. In a CAS hearing, *Landis v USDA (2007)A/1394* a year later was found to have used performance enhancing drugs and was suspended from the sport for two years from cycling.

The decision was confirmed on appeal and effected retrospectively on June 30, 2008, with the result that the conviction and the ban were upheld. Landis issued proceedings in the U.S. federal court to cancel the CAS arbitration award, arguing that the granting of the award was effected by partiality and conflicts of interest. He further argued that the \$100,000 U.S. "costs" award against him by the tribunal was a punitive award for damages. The parties then agreed to dismiss the case 'with prejudice' in December of that year finally terminating the court process in this case.

However, on April 14, 2009, the French newspaper *L'Express* revealed Landis had obtained doping test details from hacking into the French national laboratory for drug detection.<sup>6</sup> The results were sent to a Canadian

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counterpart lab from a computer owned by Arnie Baker, Landis's former trainer. On August 25, 2009, *The New York Times* reported, "No evidence has surfaced to connect Mr. Landis or Dr. Baker to the hacking, and each has denied any involvement." However, on February 15, 2010, it became known that a French judge had issued an arrest warrant for Landis on the hacking charge in late January. In later proceedings in the US Landis was charged for crimes arising from obtaining pecuniary advantage as a result of business transactions.<sup>7</sup>

Besides the transparency the great advantage of settling disputes by means of arbitration at CAS is the speed of the proceedings. There is a process in place that allows for an expedited measures and leads to results that can allow the sportsmen to continue training for the tournaments. This has been commented on in the thesis *Sports Arbitration* by William McAuliffe, Antonio Rigozzi and Lévy Kaufmann-Kohler who state that there are advantages of settling disputes by means of arbitration as follows:

*The most obvious and perhaps the most important differentiating feature of sports arbitration is its speed. The legal maxim that 'justice delayed is justice denied' could not be more apposite than when discussing the resolution of sports disputes. The particular urgency in the sporting context stems from the fact that the entire sports industry revolves around a series of regular sporting events and competitions: for the resolution of a sports dispute to be effective, it generally must be concluded before a particular competition or event takes place. For example, a finding by an arbitral tribunal that a particular athlete may compete at the Olympic Games, or that a certain team may participate in the World Cup final, would be of limited value if the arbitral award were issued after the competition in question has already been completed.*<sup>8</sup>

One of the most significant instances of speed in sports arbitration is the Ad Hoc Division of CAS. This is the forum that is active only for the duration of specific international sporting events, such as the Olympic Summer and Winter Games, the Commonwealth Games, the UEFA European Football Championships and the FIFA World Cup. In each of these events the CAS has a panel of arbitrators, who remain in the venue for the duration they remain available on a round the clock basis,

for the requirement to be on the panel of three-people to resolve any legal disputes arising during the event.

If this happens the Ad Hoc Rules for the Olympic and Commonwealth Games state that the arbitral awards should be issued within 24 hours of the submission of the application for arbitration, and the same time span for the soccer's European Championships and World Cup is 48 hours. In cases of absolute urgency the CAS is empowered to issue ex parte orders.

At the CAS Ad Hoc Division there is normally a 24-hour period in which the parties will make written and oral submissions, before the tribunal deliberates and issues its award. Arbitrations heard by the Ad Hoc Division generally consist of at least one round of written submissions followed by an oral hearing, after which the tribunal immediately enters deliberation. At the recent London Olympics where 11 cases were dealt with, there was even a case where a matter was concluded within four hours of its filing.

The process of issuing arbitral awards by CAS is in the form of provisional judgments reflects the process of the international commercial arbitration. This arises when determining an application for provisional measures, and sports arbitration tribunals generally apply Article 14 of the CAS Ad Hoc rules that provides "not only shall the interests of the other parties to the arbitration be considered when evaluating an application for provisional measures, but also that the interests of 'the other members of the Olympic Community' shall be taken into consideration".

There is also the acceptance of precedence in the rulings of the CAS tribunal. This is a requirement in the judgments and is part of the certainty of the proceedings. Gabrielle Kaufman-Kohler states in *Arbitration at the Olympics, Issues of Fast track Dispute Resolution and Sports Law* as follows:

*One of the most interesting aspects of sports arbitration is that awards issued by an arbitral tribunal tend to be regarded as authoritative precedent by subsequent arbitral tribunals from the same sports arbitration institution. While sports arbitration awards are not binding legal precedents, previous awards are regarded as being of highly persuasive value and, as such,*

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*arbitral tribunals that deviate from an established line of 'jurisprudence' are generally expected to provide reasons for such a deviation in the text of their award.<sup>9</sup>*

Most of the sports disputes that CAS considers involve a number of additional parties which are directly affected by the granting of provisional measures. This may be considered by the arbitral tribunal, even in cases that are not governed by the CAS Ad Hoc Rules. The tribunal has to evaluate if the relief is necessary to protect the applicant from irreparable harm; the likelihood of success on the merits of the claim; and whether the interests of the applicant outweigh those of the other parties.

In *Fenerbahce v UEFA & Turkish Football Federation (2011) A/2551* the Turkish football club Fenerbahce sought provisionary measures to gain entry in the 2011/2012 UEFA Champions League tournament, following their non-admittance against the backdrop of match-fixing allegations. The CAS rejected the provisional measures request largely on the grounds that such an intervention would directly affect another club that would then be eliminated and which was not a party to the proceedings.

There is another outstanding aspect of sports arbitration that under several of its rules the sport arbitral institution can issue provisional measures even before the constitution of the arbitral tribunal. This can have the effect of expressly prohibiting the parties from seeking

provisional measures from state courts of the individual athletics. The enforceability of such prohibition was challenged in *FC Sion v UEFA (2011) O/2574* where the football Association prevented the club from taking part in the lucrative UEFA Europa League due to a breach of a transfer embargo based on the fielding of ineligible players by the Swiss club in two matches against Celtic FC.

The plaintiff, FC Sion sought and obtained an injunction from a local court ordering UEFA to reinstate the club in the competition. In their refusal UEFA refused to comply with the local court order, which provided an example of the strict adherence to the arbitration requirements of the sports governing bodies' on arbitration as an effective method to resolve disputes speedily and without court proceedings. The arbitration hearing resulted in sanctions imposed by UEFA to be upheld by CAS in January 2012. In July the Swiss Federal Supreme Court declared Sion/OLA did not have any actual, legitimate interest in appealing against the CAS award, so that the appeal was declared inadmissible.

Furthermore, the ruling states that "the provisional measures ordered by the Tribunal Cantonal of Vaud (Cour Civile) on 5 October 2011 shall be lifted" and that "OLA is ordered to pay CHF 40,000 (forty thousand Swiss francs) to UEFA as contribution towards its legal and other costs incurred in connection with this arbitration". The CAS memorandum confirmed that UEFA was right in enforcing the FIFA regulations and that the UEFA disciplinary bodies were right in declaring the games of FC Sion in the UEFA Europa League were forfeited.<sup>10</sup>

The reasons for the decision have been set out in a separate document which the Supreme Court released that states that CAS had exclusive jurisdiction on the basis of Article 61 of the UEFA Statutes. There were seven claims filed and they examined if there was an abuse of the dominant market position in the light of the Swiss Cartel Act. The arbitration proceedings had explored if UEFA was entitled to review the qualification of the players for the UEFA Europa League following that, in accordance with the rules of the Europa League, the UEFA was entitled to proceed notwithstanding the fact that the players were qualified at the national level.

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At the CAS Ad Hoc Division there is normally a 24-hour period in which the parties will make written and oral submissions, before the tribunal deliberates and issues its award.

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The CAS noted in its deliberations that in any event, the UEFA must be in position to ensure the uniform application of its regulations at the European level in order to guarantee the equality between all clubs participating in its competitions. The arbitration hearing finally concluded that with its decision to disqualify FC Sion from the Europa 2011/2012, the UEFA did not commit an abuse of dominant market position.

### Issue of Consent and the due process

The process of sports arbitration is concerned with the athletes agreement for the determination to be made by a CAS tribunal. This is because the decision has repercussions for sportsmen if the matter reaches the courts. The Swiss Supreme Court has historically viewed arbitration agreements as satisfying the requirement of objectivity and impartiality. The rules applicable to arbitration before the CAS have been drawn up in such a way to be fully integrated within the framework established by the Swiss Federal Law on Private International Law and they are contained in the Procedural Rules 1987 which form an integral part of the Code of sports-related arbitration. These regulations ("LDIP") govern international arbitration and set out the Swiss Supreme Court jurisdiction over arbitration from CAS.

Under Chapter 12 Article 176, the scope of application of the of application of the Swiss Supreme Court or Federal Tribunal is framed in the provisions by the clause (1) which applies to arbitrations if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland. Clause (II) the provisions of this chapter shall not apply if the parties have excluded its application in writing and agreed to the exclusive application of the cantonal rules of procedures concerning arbitration and Clause (3) if the arbitrators shall determine the seat of the arbitral tribunal if the parties or the arbitration institution designated by them fail to do so.

The recognition of the Swiss Supreme Court as the final court of deciding on the CAS arbitration rulings has been achieved through the courts. The precedence was established in the case of Larissa Lazutina & Olga

Danilova v CIO, FIS & CAS (2004) 29 Y. B. Com. Arb. 206, 219 when the Supreme Court issued a landmark judgment upholding the ban by CAS of the two athletes by rejecting their arguments put forward by them. They had been disqualified by the IOC for doping in the Salt Lake City Winter Olympic games. In June 2002, the International Ski Federation (FIS) suspended both athletes for two years and they appealed to the CAS, calling for the IOC and FIS decisions to be overturned, but their appeal was rejected.

They then appealed against the CAS awards to the Switzerland's Supreme Court. Their decision stated that the CAS offered all the guarantees of independence and objectivity to be regarded as a real court of arbitration whose awards were on par with the judgments of a state court. The Supreme Court also erased all reservations about proceedings to which the IOC is a party, adding that the CAS has today become "one of the chief pillars of organised sport", and their jurisdiction "ensures that the arbitrators are specialists in the area of sports and will thus be able to issue fast and consistent decisions".

The CAS President, Judge K Mbaye, welcomed this decision. "It is a historic moment for the CAS", he said. "This judgment recognises almost 20 years of work and effort to build an effective independent jurisdiction specialising in the resolution of sports disputes. The FT has given a clear signal in support of the CAS, thereby confirming its emergence as a jurisdiction, in the interest of world sport. The International Council of Arbitration for Sport (ICAS) will take on board the FT's suggestions on how to fine tune the functioning of the CAS."<sup>11</sup>

CAS's Secretary General Matthieu Reeb, who represented the organization in the proceedings before the Federal Tribunal, was also satisfied with the result: "After recognition of our jurisdiction by the IAAF in 2001 and FIFA in 2002, this decision comes at just the right time. It is an encouragement for the future, particularly as the World Anti-Doping Code comes into force, which establishes the CAS as the last instance body of appeal for doping cases."

Lawrence Burger in his article 'Sports Arbitration and the Due Process' states that the reason why the courts, and in particular the Swiss Supreme Court have infrequently

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held arbitration agreements in the sports domain to be against the principle of due process. This is because the process of arbitration represents the functional equivalent of judicial process. An athlete cannot be deemed to enter into an engagement violating its personality rights (and in particular Article 27 of the Swiss Code) when entering into an arbitration agreement. Moreover the recourse to arbitration is often in the best interest of federation, by ensuring a harmonious case law and of the athletes, by ensuring in particular a speedy resolution of their dispute.<sup>12</sup>

Nevertheless, the situation changes when as a result of entering into an arbitration agreement by reference, a party loses his right of appeal for the hearing before a judge. This matter has been considered by the Supreme Court in *X v société Y en liquidation et Z. Limitada (2009) 4A\_600/2008* where there was a challenge to the CAS decision that an appeal had to be withdrawn after the appellant failed to pay the advance on costs. This was based on a claim filed with the International Football Federation by a football club against the club's former coach, whereby the club claimed EURO 400,000 paid back to the coach for early termination of the employment agreement. The coach, alleged that the sum had already been paid, and therefore, that the claim be dismissed. The Commission of the Player's Status considered that proof of payment had not been brought with regularity held that the defendant pay the amount plus interests.

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Arguably, only the biggest events possess the financial and political muscle to persuade Governments to give legislative protection to their respective "events".

The defendant appealed this decision before the CAS, which referred them to the need to settle by paying an advance of costs, which was an amount of CHF 19,000 each, and asked it to be met by 15 September 2008. The appellant did not pay this amount by the stipulated deadline and there was another time limit that was also breached. However, the issue before the Supreme Court was if the appeal could be terminated despite the late payment. The CAS argued that it could dismiss the challenge on the ground that the order was not an award.

The appellant contended that the CAS had been excessively formalistic in holding the appeal as withdrawn even if the payment had been made belatedly. The Supreme Court admitted the challenge but rejected it on the merits holding that it was not excessively formalistic for the CAS to withdraw the appeal when it was conditioned upon the payment of an advance on costs and when the appellant had been duly informed of the amount of the advance and of the deadline for payment.

The case raised issues that went beyond that of consent and raised concerns such as due process to the fore. In this instance the defendant had not been provided with the opportunity of a hearing by the CAS and the judgment by the FIFA was not availed. In this instance the defendant did not elect to have the matter arbitrated, but ended up without the possibility to have his dispute reviewed by the civil court or be resolved by means of the alternative disputes resolution because of the late payment to have the appeal heard.

In his article *Challenging Awards of the Court of Arbitrators* Antonio Rigozzi comments on the apparent omission of due process in the thrust of the ruling. He states that the violation of the due process is a fundamental issue for the CAS arbitration. This is based upon the following factors:

*Pursuant to Article 190(2)(d) PILA, an arbitral award can be set aside 'if the principle of equal treatment of the parties or the right of the parties to be heard in adversarial proceedings was violated'. This ground sanctions (i) the violation of the procedural guarantees set out in Article 182(3) PILA, (ii) as well as a specific aspect of the parties' right to be heard, namely the arbitrators' failure to consider important allegations, (iii) and the prohibition against taking the parties by surprise.*

SPORT ARBITRATION, SWISS LEGAL CODE  
AND DUE PROCESS*(i) The procedural rights guaranteed by Article 182(3) PILA*

*The Supreme Court has reiterated at various times that this ground for setting aside an award is intended to safeguard the fundamental principles of due process that, pursuant to Article 182(3) PILA, the arbitrators have to observe irrespective of the applicable procedural rules.*

*In order to avoid any misunderstanding, one should clarify that this ground does not concern the rules of procedure adopted by the parties or contained in the applicable arbitration rules. Thus, for example, the fact that the CAS accepts a party's submission after the time limit fixed by the CAS Code has expired will not entail the setting aside of the award. However, if the CAS refuses to accept a reply to that submission, if submitted with a similar delay, this may give rise to a violation of the principle of equal treatment of the parties.<sup>13</sup>*

The Supreme Court in Switzerland has pronounced on the issue of consent in sports arbitration. There has been consideration of the non-signatory's athlete's locus standi to proceed with a claim before the CAS tribunal. In *A and B v World Anti-Doping Agency (WADA) and Flemish Tennis Federation (VT) (2010) A 428/2011* A and B were Belgian professional tennis players who were affiliated to the Dutch speaking branch of the Belgian tennis federation, the Vlaamse Tennisvereniging (VTV), whose disciplinary commission is entitled the Vlaams Doping Tribunal for doping matters (VDT). In 2009, the VDT decided to suspend A and B for one year on the basis that they had breached anti-doping rules which they both challenged before the CAS hearing, as did the World Anti-Doping Agency (WADA) in a separate hearing.

In granting them "partial" awards, the CAS upheld its jurisdiction by denying both A and B's requests to suspend their arbitral proceedings, despite actions pending before Belgian state courts, and the European Court of Human Rights. A and B then filed a petition to set aside these awards, and claimed that the arbitration clause incorporated in the VTV rules was not valid because it originated in a statutory act. The Swiss Supreme Court dismissed the appeal on the basis that the

petitioners had raised the argument that the CAS is not an independent tribunal in doping-related disputes because it is a decentralised organ of a number of federations which appear before it and which have an interest in the outcome of the dispute, including WADA.

The Supreme Court dismissed this argument on the ground that it had not been raised before the CAS itself. The Court then examined Article 190(2)(a) of Swiss Private International Law Act (PILA) and confirmed the exceptional basis of sports arbitration with respect to professional athletes' by its mandatory application whether they had consented to the arbitration process. This is in contradiction to the international principle of voluntary arbitration, which governs commercial arbitration. The judgment of the CAS had been based on the jurisdiction both on a Belgian Decree granting exclusive competence to the CAS for doping disputes and on the VTV rules which integrates the same arbitration clause.

Both A and B had contended that there was no valid consent to arbitration which could be sourced to the VTV arbitration clause because its incorporation in the VTV rules had been set out by the Belgian Decree. They argued that an athlete cannot validly consent to the arbitration clause if it emanates from a statutory act. The Supreme Court dismissed their arguments and held that where the athlete has no other choice but to adhere to the arbitration clause contained in the federation's rules, it made no difference from the freedom of contract viewpoint that the federation adopted the arbitration clause on its own initiative or if such an adoption was prompted by state laws where the sports federation had its seat.

The Court ruled that the issue as to whether a non-signatory to the arbitration agreement in a sports related agreement can challenge the arbitral tribunals' decision is connected to the locus standi (*qualité pour agir*). This was a procedural question and had to be determined with regard to the precedence in decisions on the suspension of arbitral proceedings before the Swiss Supreme Court. While in a "typical" arbitration the issue as to whether the arbitration clause binds a non-signatory party triggers the *ratione personae* jurisdiction of the tribunal, in sports arbitration by contrast, it is a procedural question which relates to the party's legal standing.

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In a 'typical' commercial arbitration, this would raise a question of jurisdiction; whereas in sports arbitration it is characterised as a procedural question of standing.

The Supreme Court was adopting a more flexible approach that was geared towards enabling a swifter resolution of the disputes by specialised tribunals providing guarantees of independence and impartiality. This also applies to the CAS process. The Court developed the concept of *lis pendens* (*exception de litispendance*) provided by Article 186(1) bis PILA which is based on requesting the adjournment of arbitral proceedings by satisfying three conditions cumulatively. These are procedural orders and, as such, they cannot be challenged before the Supreme Court, and the only exception was when the tribunal effectively ruled upon its jurisdiction or on the validity of its constitution.

### **Procedural justice in Supreme Court rulings**

The Swiss Supreme Court has an established procedure in dealing with arbitration disputes that are referred to it by CAS. This is part of the private international procedure and it is grounded in the constitutional clauses that are part of its framework. It has to adjudicate the cases under the rules of natural justice and provide a fair hearing to both the parties.

The court has to apply the rules that satisfy the minimum standards of procedural and substantive justice. There is a need to adhere to the European Convention of Human rights 1952 in its consideration of cases. The jurisdiction will be contingent with the *locus standi* of the parties who both need to meet that criteria to be represented.

In a comment piece by Nathalie Voser and Elisabeth Leimbacher entitled the *Swiss Supreme Court: Challenges for alleged breach of procedural principles must be raised during arbitral proceedings*, it is argued that sports arbitration can be examined by analyzing different rules pertaining to commercial arbitration and other more typical rules of dispute resolution. The logical question is whether this "mandatory arbitration" in sports matters fulfils the prerequisites necessary for limiting the right of access to Court as enshrined in Article 6 of the ECHR, namely whether it pursues a legitimate aim that stands in a reasonable relationship of proportionality with the means employed.<sup>14</sup>

The Supreme Court has referred to the European Human Rights Convention in *Waite and Kennedy v. Germany*, 18 February 1999, Application no 26083/94 where the European Court of Human Rights 1 rejected attempts to question the compatibility with human rights obligations upon the absolute immunity enjoyed by most international institutions from jurisdiction under their constituent instruments or municipal law. The litigation was in the German Labour Courts initiated by the applicants against the European Space Agency (ESA) the Court held that Germany did not violate Article 6 (1) of the ECHR by granting waiver to the ESA from lawsuit.

It reaffirmed the related case law holding that the right of access by the courts is not absolute, but may be subject to limitations. The Court rejected the immunity from lawsuit granted for the purpose of ensuring the proper functioning international organizations as serving a legitimate objective and found that the mutual limitation of the applicants rights of access to court was not so disproportionate as to impair the essence of the right to a court because they did not have the alternative means of redress.

Voser and Leimbacher contend that the reasoning employed by the Swiss Supreme Court turns on the "peculiarities of sports arbitration extend to the approach to non-signatories to the arbitration clause. In a 'typical' commercial arbitration, this would raise a question of jurisdiction; whereas in sports arbitration it is characterised as a procedural question of standing.

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This decision also confirms the Supreme Court's consistent case law with respect to the restricted nature of challenges to decisions on the suspension of arbitral proceedings under Article 186(1) PILA. It is, however, worth noting that the Supreme Court referred to the differing opinion expressed by some authors who advocate the total exclusion of any such challenge".

In another significant judgment by the Swiss Supreme Court this year the boundaries of sports arbitration have been defined. In *Francelino da Silva Matuzalem / FIFA: Vereinsstrafe verletzt (2012) 4A\_558/2011*, an international arbitral award was annulled for breach of substantive public policy. This decision is a landmark in terms of its effect in cancelling an international arbitral award for breach of substantive public policy.

The facts concern FIFA and a Brazilian footballer *Matuzalem*, represents the Italian club Lazio of Rome. The player entered into an employment contract with the Ukrainian football club Shakhtar Donetsk in 2004 but terminated his contract without notice in July 2007, going to Real Saragossa, a Spanish club, which undertook to not make him liable for any possible damage claim for damage that could arise from the early termination of the contract with Shakhtar Donetsk.

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The facts concern FIFA and a Brazilian footballer Matuzalem, represents the Italian club Lazio of Rome. The player entered into an employment contract with the Ukrainian football club Shakhtar Donetsk in 2004 but terminated his contract without notice in July 2007.

However, FIFA ordered the payment of compensation. An appeal was made to the Court of Arbitration for Sport ("CAS") and in there was an award made to Shakhtar Donetsk of €11,858,934 with interest at 5% from July 2007 dated 19 May 2009. There was an appeal to the Swiss Supreme Court but that was rejected on 2 June, 2010. However, a month later the Disciplinary Committee of FIFA opened disciplinary proceedings because Shakhtar Donetsk had not been compensated and Real Saragossa advised the Committee that it was practically insolvent and would probably go bankrupt.

Based on this consideration the FIFA held both Matuzalem and Real Saragossa guilty of breaching their obligations under the CAS award of 2009. This exposed to the risk of being banned from any activity in connection with football under the FIFA regulations. This decision of the FIFA was again appealed to the CAS but it was rejected on June 29, 2011. It prompted the litigation by the same claimants in the Supreme Court.

The decision of the Court was to the effect that the award was void. This was the first time since 1989, that an international arbitral award was annulled for infringing substantive public policy.<sup>15</sup> The reason was grounded on procedural irregularity. The Court ruled that there was a distinction between substantive and procedural public policy and that included the breach of the principle of "excessive commitment" under Article 27 of the Swiss Civil Code. The unlimited ban imposed on Matuzalem to which he had "consented" by contracting into the FIFA system as a professional player, constituted an excessive commitment under the legal code.

In an article *Landmark Matuzama ruling has major consequences for FIFA regulations* by L Valloni and T Pachman the view is expressed that this a ground breaking case with implications for sporting bodies that implies that there must be no imposition of a lifetime ban on economic and personal freedom. The authors state:

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The Code of Sports-Related Arbitration has been made possible by the CAS Code that governs the process of arbitration and the grant of awards in these cases.

*The worldwide ban on a football player is against public policy. Whether the fine of Sfr30,000 is also against public policy, or whether it is at least contrary to mandatory Swiss law, has yet to be decided. Based on the Supreme Court's decision, there are serious reasons why such regulations are, if not contrary to public policy, at least illegal, as they are not really suitable to enforce a fine of several million euros.<sup>16</sup>*

The provision would protect a sportsman who would contract or agree to surrender his autonomy in a manner that would place him under complete control by another individual or organization. The Court ruled that the found that banning a professional player for an indefinite time worldwide because he could not pay substantial damages awarded to his former club was a breach of substantive public policy. This would not assist in compliance and will have the effect of making the payment impossible by making the player unable to earn enough to compensate the former club.

This would make it illicit under Article 27 of the Swiss Civil Code which when interpreted would define this obligation that was against public policy. It is a ruling that although a landmark in terms of annulling an award achieved through arbitration is a cancellation of FIFA's regulation which provides for such a sanction by default and it does not necessarily a reflection of the CAS process which could not act otherwise but enforce the FIFA regulation.

### Conclusion

The CAS arbitration mechanism has developed into an 'international supreme court' for sports disputes. It has provided greater predictability between legal decisions in the sports world and has created a body of jurisprudence - the *lex sportiva* - upon which dispute resolution can be conducted. The CAS process is an important regulatory body for the World Anti Doping Agency and the majority of its case load concerns the referrals from WADA.

The Code of Sports-Related Arbitration has been made possible by the CAS Code that governs the process of arbitration and the grant of awards in these cases. The most important matter in this procedure is the referral process which is governed by a reference process to CAS when the dispute is between the sports men and the national sports federation. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958 plays an important role in excluding the jurisdiction of state courts to hear actions on the merits where there is a CAS arbitration agreement.

The process is mandatory in the case of sports bodies and the sportsmen and does not resemble a commercial arbitration agreement. It means that the rules that govern the process is different and there is a duty of confidentiality, in the reporting of the CAS arbitration jurisprudence. The CAS process has established a consistent legal precedent in sports matters, upon which reliance may be placed by the sports body and the individuals who have are in dispute with the national federation. While sports arbitration awards are not binding legal precedents, previous awards are regarded as being of highly persuasive value and, as such, arbitral tribunals that make new precedent from an existing rule are generally expected to provide reasons.

The anticipation of the sports community, has been increased by the incrementally with the case files of CAS, This is at times comes into conflict with the national-level sports dispute resolution bodies, as well as some of the international 'arbitral' bodies that have been created by international federations. The case involving the FIFA and their ruling that the Brazilian player Matuzalem had to pay a fine was overruled by the Supreme Court. This has set a legal precedent that CAS will not be able to ignore in future proceedings.

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The most significant aspect of the CAS process is the issue of consent and that has gone to the very basis of the agreement between the parties. Under Article 190 of the PILA, CAS awards are final upon communication to the parties and can only be challenged on very limited grounds before the Swiss Supreme Court. This has been determined to be based on Article 27 that sets out the legal personality, excessive burden and illicit conduct as grounds upon which it can invalidate the decisions of the CAS.

The *Mutazulem* decision has shown that the Supreme Court will not always give more weight to the interests of sports federations than to those of the athletes. The FIFA has been restricted in terms of the jurisdiction it has over players who are deemed to be violating the rules but are in fact abiding by their sanctions but exercising their rights to contract bilaterally. They cannot be banned by their federation because they have not paid their penalty when they sign with a new club.

The developing case law is significant and there are case law precedents that govern the Supreme Court's ability to strike out the awards made by CAS. However, CAS still retains its original powers and there is an increasing resort to the arbitration tribunals that comprise the CAS process. There must be checks and balances with the Swiss Supreme Court as a mechanism where the agreement is contingent with the guarantee of due process in the arbitration proceedings. **BASL**

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# REVIEWS AND REPORTS



# NATIONAL FOCUS – GERMANY

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## **THE GERMAN LEGAL SYSTEM**

German law is based on the codified law tradition. It needs to be borne in mind that Germany as a unified state dates from as recently as 1871, prior to which each independent entity had its own legal system. Although it was mainly the Zollverein (customs union project) which over much of the 19th century was the main stimulus for the unification of Germany (alongside strong cultural links, not to mention Bismarck's wars!) the emerging German legal tradition also played its part. Inspired largely by the Roman law tradition, Bavaria (1756) and Prussia (1794) had already introduced private law codes before the most renowned of all codifications, that which took place in France under Napoleon in the first decade of the 19th Century, started to wield its world-wide influence.

As the impetus towards a unified state grew, the notion of all-German codification also took root. The most significant date in this regard is 1900, when the Civil Code (Bürgerliches Gesetzbuch) entered into force throughout the land. It has served as a codification model for other countries – and not only in the Germanic language sphere. When Turkey carried out its fundamental reforms of Turkish society under Kemal Ataturk in the 1920s, it turned to the more recent German code, rather than its Napoleonic equivalent, for its legal reform. The legal systems of Japan, the Republic of Korea, United States of America and the People's Republic of China are also based on German law to a certain extent.

Essentially, German law has the same fundamental divide as that which exists in all European states, to wit that between the public law (öffentliches Recht), which regulates the relations between the citizen and the state,

and the private law (Privatrecht) which regulates the relations between private persons (both natural and corporate) among themselves.

## **Public law**

The most significant aspects of its public law are (a) the Constitution, (b) administrative law and (c) criminal law.

## **Constitutional law**

The constitution (Verfassung) is contained in the 1949 Grundgesetz, i.e. the Basic Law – so called because it was intended as a provisional set of rules, to be replaced by the constitution of a united Germany as and when this would come about. Like most European constitutions, it contains not only the rules governing the institutions of state and the relationships between them, but also a Bill of Rights (Grundrechtskatalog), which sets out a list of fundamental rights and freedoms which can be pleaded by the citizen before the courts. The most significant characteristic of the German state is its federal nature, with power being divided between the federal authority (Bundesgewalt) and the federated states (Länder), although it is the federal authority which predominates. Also, similarly to the constitutions of most other nations, the German state is based on the principle of the separation of powers between:

- (i) the Legislature – this consists of the State Parliament (Parlament) formed by the directly-elected national assembly (Bundestag) and the indirectly elected Second House (Bundesrat), as well as the state legislatures

- (ii) the Executive, consisting of the Head of State (Bundespräsident) and the Government (Regierung – with the Chancellor (Bundeskanzler) having status and powers equivalent to those of the Prime Minister in other countries)
- (iii) the Judiciary, i.e. the courts, divided, as is the case in France, between the ordinary courts (ordentliche Gerichtsbarkeit) and the administrative courts (Verwaltungsgerichtsbarkeit) (of which more below).

The entire constitutional system is based on the principle of the rule of law (Rechtsstaat), which means that the state must at all times submit to and act within the law. The highest judicial authority is the Constitutional Court (Bundesverfassungsgericht), which is the "watchdog" over the constitution and may, if necessary, strike down regulations and even legislation if they fail to conform to basic constitutional principles, more particularly the aforementioned Bill of Rights.

#### Administrative law

The administrative law is the law of the Executive. It covers most types of legal relations between the state and the citizens, but also between various organs and levels of government (except for the constitutional law). If a dispute arises in regard to those relations, it will be brought before the administrative courts (Verwaltungsgerichte). However, other legal relations – e.g. contractual – are governed by and adjudicated under the ordinary legal system (this is not the case in France). The highest administrative court is the Bundesverwaltungsgericht (Federal Administrative Court). There are federal courts with special jurisdiction in the fields of social security and employment law (Bundessozialgericht) and fiscal law (Bundesfinanzhof).

#### Criminal law

The criminal law (Strafrecht) in the narrow sense of the term is governed by the federal (i.e. central) law. Its principal source is the Criminal Code (Strafgesetzbuch). No person under 14 years old can be held criminally liable before the courts, and minors under the age of 18 and (in the case of those lacking "maturity", under the age of 21) there are special courts as well as some adjustments to the criminal law. Before the court the Public Prosecutor (Staatsanwalt) (comparable to the English Crown Prosecution Service) brings the case for the prosecution, and the defendant may, and in many cases must, appoint a lawyer to defend him. The Public Prosecutor's Office (Staatsanwaltschaft), together with the police, handle the inquiries in the case at hand, yet they are no party of it. The judgement is issued by a judge or, in the higher courts, by a panel of judges, of which for several courts two are ordinary citizens (Schöffen).

German criminal law does not have a jury system. Sentences range from fines to life imprisonment, which is usually subject to appeal after 15 or more years on constitutional grounds. The death penalty is expressly excluded by the Constitution. Highly dangerous individuals may be committed for psychiatric treatment or to jail for as long as necessary (even for the remainder of their lifetime-Sicherungsverwahrung).

#### Private law

The private law governs the relations between private persons (physical or corporate), although in some cases it may also involve public bodies (see above under administrative law). Disputes are brought before the District Court (Amtsgericht) for small claims, and before the General Court (Landesgericht) for more serious claims, with each court having a civil criminal and commercial chamber. At the appeal level there are the Oberlandesgericht (Court of Appeal) and the Bundesgerichtshof (Supreme Court – distinct from the Constitutional Court, comparable to the Cour de Cassation in France).

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The civil law (Bürgerliches Recht) determines the relationships among natural and corporate persons, unless their relations are governed by the Commercial Code (see below). The most important reference of this area is the Civil Code (Bürgerliches Gesetzbuch, BGB), which consists of 5 major parts: (a) the common/general part, (b) the law of obligations (contracts and torts), (c) property law, (d) family law and (e) the law of succession. Apart from the Civil Code, there is also a separate Commercial Code (Handelsgesetzbuch) which deals with disputes between traders. (Unlike France, however, Germany does not have specialised commercial courts.)

**SPORT IN GERMANY**

Sport is an important element in German culture and society. There are currently almost 1 million sports clubs in the country, totalling some 30 million members. With a total of 26,000 clubs and 178,000 teams the German Football Association (Deutscher Fussballbund – DFB) is the largest individual body attached to the German Olympic Committee. Sporting excellence in the country is based on a long-standing tradition. A key figure in this respect is Friedrich Ludwig Jahn (1778-1852), who played a major part in the history of developing physical education in Germany and Europe. He is considered to be the German “father of gymnastics” who founded the Turnverein (gymnastics club) movement in Germany. As a patriot, he believed that physical education was a cornerstone of national health and strength and a major element in strengthening character and national identity. Germany has hosted the Summer Olympic Games twice, in Berlin in 1936 and in Munich in 1972. (It is an unfortunate fact that these were perhaps the most controversial Olympics in history). It hosted the Winter Olympic Games in 1936 when they were staged in the Bavarian twin towns of Garmisch and Partenkirchen. It claimed the most gold medals and the largest haul of medals during the 2006 Winter Olympics in Turin.

**Football**

As is the case in most European countries, football is Germany's No. 1 sport. Its top professional league, the Bundesliga, has one of the highest average attendances of any professional sporting competitions in the world. As

from the 2010–11 season, the Bundesliga has been placed third in UEFA rankings, which are based on the performance of clubs in the UEFA Champions League and the UEFA Europa League. The football clubs of Borussia Dortmund and FC Schalke 04 both attract an average over 60,000 fans per home game in the German Bundesliga. In third place, in terms of attendance, is Germany's most successful club as regards national and international titles – FC Bayern München. Bayern have won the German championship more than anyone else (17 times) and have also won the European Cup/Champions League four times, most recently in 2001 (at the time of writing a fifth title looked likely). However, there are also literally thousands of smaller football clubs throughout the land. With more than 6.3 million members, the German Football Federation (Deutscher Fußballbund – DFB) has the largest membership of any sports organisation in Germany. Germany has won the World Cup three times (1954, 1974, 1990) and has been runners-up on a further four occasions (1966, 1982, 1986, 2002). Footballing heroes such as Uwe Seeler, Franz Beckenbauer, Lothar Matthäus and Jürgen Klinsmann have proved excellent sporting ambassadors for the nation abroad.

Finishing runners-up at the 2002 World Cup in Japan and Korea was a sensational achievement for the team managed by popular ex-international Rudi Völler. Despite having won the European Championships in 1996, the German national squad had been widely perceived to be in decline. With insufficient gifted players coming through the ranks, the DFB launched programmes aimed at identifying and developing young German talent. Former international striker Jürgen Klinsmann urged German youngsters to start playing street football again in their spare time as he had done as a boy. In spite of the historic 1-5 defeat at the hands of England, German football rose again once it qualified for the finals, and grew in confidence as the tournament progressed. An 8-0 victory over Saudi Arabia, in which Miroslav Klose scored a hat-trick, laid the foundation for Germany to head a difficult first-round group which also included Cameroon and Ireland. It was then the turn of defenders such as Sebastian Kehl to shine, as successive 1-0 victories over Paraguay, USA and hosts South Korea took the Nationalelf through to a clash in the finals with Brazil. Although an unfortunate error by goalkeeper Oliver Kahn

ultimately handed Brazil victory, he was subsequently voted the player of the tournament by international journalists. And Mr. Kahn was cheered louder than anyone when the German team were given a heroes' welcome on their return to Frankfurt on July 1, 2002. This was followed by very creditable performances at the 2006 World Cup and the 2008 European Championships (in which Germany reached the final only to be narrowly beaten by the all-conquering Spanish team).

### Other Sports

The German sporting landscape is quite different from that in Britain. Cricket and rugby have very little support in Germany, although rugby union is gradually establishing a presence in some towns and cities. Darts and snooker also enjoy a very limited media presence in the country.

Winter sports on the other hand enjoy a much greater popularity in the Federal Republic than is the case in Britain. The opportunities for alpine and cross-country skiing, snowboarding and tobogganing make Germany's mountainous regions a favourite destination for tourists. Both speed skating, and in particular ice hockey, are major spectator sports in Germany, with an average of 4,765 fans attending matches in the German ice-hockey league. In fact, Germany topped the medals table at the 2002 Winter Olympics in Salt Lake City, carrying off twelve gold, sixteen silver and seven bronze medals. The speed skaters Claudia Pechstein and Anni Friesinger were in record-breaking form. Switzerland finished tenth in the medals table, and Austria finished twelfth.

Alongside basketball, volleyball and – increasingly – American football, handball is a good example of a sport that is much more popular in Germany than it is in Britain. More than five thousand handball clubs with 838,000 members belong to the German handball association Deutscher Handball-Bund (DHB). (It is worth noting that it is the German handball league which gave rise to a major decision by the Court of Justice of the EU which has had major repercussions on the availability of foreign nationals in sports teams – to wit the Kolpak decision!) In addition, Germany's cycling boom has developed steadily throughout the 1990s, triggered by the

reunification of the country which brought East Germany's highly successful amateur cyclists into the professional fold. Deutsche Telekom, Europe's largest telecommunications and internet service provider, sponsors a cycling team which won the Tour de France two years in succession, in the shape of the Dane Bjarne Riis in 1996 and subsequently by Jan Ullrich in 1997, who has also finished runner-up in the race four times. Another German cyclist, Erik Zabel, succeeded in winning the Tour de France points jersey for Team Telekom six successive years (1996–2001). It is testimony to the popularity of cycling in Germany that both Ullrich and Zabel regularly triumph in annual national sporting polls.

Other German sports have similarly benefited from the success of individual athletes. The highly successful – if also highly controversial – Ferrari driver Michael Schumacher has carried off the Formula 1 championship four times, and is joined on the start grid by his brother Ralf as well as compatriots Heinz-Harald Frentzen and Nick Heidfeld. The tennis boom initiated by the Wimbledon victories of Boris Becker, Steffi Graf and Michael Stich lasted for much of the 1990s, although in recent times the pool of German tennis talent seems to have diminished. In golf, Bernhard Langer's victories in the US Masters in 1985 and 1993 appears to have triggered off an interest in golf. Thus the number of golf clubs in the Federal Republic increased by 70 per cent in the 1990s to its current figure of over 500. Yet these are primarily private clubs with high membership fees, targeted at the business community, the wealthy and overseas tourists. The absence of public municipal golf courses will possibly prove as detrimental to developing the sport as the paucity of public courts has been to tennis.

### SPORTING ORGANISATION IN GERMANY

At the top of sporting organisation in Germany is the national Olympic Committee (Deutscher Olympischer Sportbund). It has its headquarters in Frankfurt-am-Main. Its current president is Thomas Bach. It was set up on 20 May 2006 through a merger of the Deutscher Sportbund (DSB), and the Nationales Olympisches Komitee für Deutschland (NOK) which dates back to 1895, the year in which it was founded and recognized as

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NOC by the International Olympic Committee (IOC). It represents 89,000 clubs and 27,000,000 members, i.e. approximately one-third of the population of Germany.

As has been mentioned earlier, the current DOSB-President is IOC vice president Thomas Bach (who is also an IOC Vice-President). As one of the first countries to do so, Germany founded a national Olympic committee (NOC) in 1895, appropriately named Komitee für die Beteiligung Deutschlands an den Olympischen Spielen zu Athen ("Committee for the participation of Germany in the Athens Olympic Games). It was recognized by the IOC, and Germany took part for the first time in the Games in 1896. The temporary name NOC subsequently changed to reflect the following host cities, before it became permanent after 1904.

The 1916 Summer Olympics had been awarded to Berlin, but were cancelled because of World War I, with Germany and other Central Powers suffering exclusion from the Olympic family which was dominated by the Entente Powers. Thus, in 1917, the "Deutscher Reichsausschuss für Olympische Spiele" (DRA, DRAFOS "German Imperial Commission for Olympic Games") was renamed Deutscher Reichsausschuss für Leibübungen (DRL, "German Imperial Commission for Physical Exercise") in order to reflect on, and protest against, this exclusion.

As an alternative to the Olympic Games of 1920, to which Germany and its allies had not been invited, Deutsche Kampfspiele (German Sporting Championships) were organized, both for the summer and for the winter games. It is interesting to note that the 1922 winter edition predated the first Olympic Winter Games by two years. It is hardly surprising to learn that Berlin, having been prepared for the 1916 that never were, had been designed as first choice for the summer event: Unlike other nations, Germany remained uninvited for the 1924 event. In 1925, the DRL split in order to focus on sport in Germany, whereas the NOC section became the Deutscher Olympischer Ausschuss (German Olympic Commission) focusing on international relations and on promoting the notion of the Games returning to Germany. This bid was successful 1928, with Germany taking part in both games. The organisations remained separate, even though Nazi Germany assumed power

from 1933 onwards. In 1931, the IOC had decided to give both 1936 Olympic Games to Germany about which the least said the better.

Following World War II, Germany was occupied and partitioned. In 1946, the DOA was dissolved. Soon, in June 1947, Adolf Friedrich zu Mecklenburg founded a new provisional German Olympic Committee (Deutscher Olympischer Ausschuss), which was not recognized by IOC as it did not as yet represent any recognized state. On 23/5/1949, the Federal Republic of Germany established itself on the territory of the Western occupied zones. Five months later, the Nationales Olympisches Komitee für Deutschland (National Olympic Committee for Germany) was established in Bonn, as a successor to the DOA. In October 1949, under Soviet occupation, the so-called German Democratic Republic (GDR) was founded, which on 22 April 1951 created a separate Nationales Olympisches Komitee für Ostdeutschland (National Olympic Committee for East Germany), which in 1965 changed its name to Nationales Olympisches Komitee der DDR (National Olympic Committee for the GDR). It was not until 1968 that it was recognized by IOC as a fully independent member.

The third German "state", under French occupation, was the Saar Protectorate (1947–1956), which also created sporting organisations aimed at participation in international competitions such as football and the Olympics. The Nationales Olympisches Komitee des Saarlandes (National Olympic Committee) was set up in 1950 and recognized by the IOC. Following the criticism which resulted from the lack of medal haul in 2004 at Athens, DSB) and the NOK decided to merge in 2005.

The current National Olympic Committee has a membership broken down as follows: 16 State-level member organisations and 60 individual sport-based member organisations (33 Olympic sports as well as 27 non-Olympic sports and 19 special member organisations (sports medicine, sports coaches, safety in skiing, etc.).

## BASIC PRINCIPLES OF GERMAN SPORTS LAW

The "Ein-Verbandsprinzip" (One-Association principle)

As is the case in virtually every country, this is one of the key concepts underlying German sports organisation, and holds that any international or national sporting association may only form one body per state (Land) or per region (Region). In fact, the International Olympic Committee only allows sports covered by this principle to feature in the Games. It presents the advantage that it enables uniform sets of rules to govern every sport, and a single championship to be organised for each sport. It is this uniformity which enables a comparative approach towards sporting performance, which is one of the essential aspects of sport. On the other hand, this principle does create a monopoly situation in sporting governance.

It is a fact that any sporting performer can only reach top levels of performance in the context of a single governing body, which necessarily gives the bodies and officials in question a great deal of authority. It is generally recognised that these bodies are entirely subject to German legislation on competition and monopolies, and that the rulings of the German courts on monopolies should be applied to them. This means that the sporting bodies are subject to the "compulsory admission" rule (Aufnahmepflicht), meaning that they must admit an applicant where refusal to admit could not be objectively justified and constitute a discriminatory practice for the applicant. It also means that any abuse of their market dominance may be prohibited by the Competition Authority (Bundeskartellamt) (Article 22(5) of the Law on Competition Distortion – GWB), and that, under certain circumstances, such as an infringement of a Competition Authority decision, the victim thereof may claim damages from the body in question.

### Sport and public law in Germany

The relationship between the state and sport in Germany is governed, from a political viewpoint, by the partnership and subsidiarity principles, whereas in legal terms this relationship is subject to the aforementioned fundamental rights and freedoms (Grundrechte) laid down in the

Constitution and to the power structures laid down in the Constitution insofar as they apply to sport. Until now, the state has refrained from the systematic regulation of sport, even though there are some traces of this in the field of doping control. As such, sports law does not fall within the field of public law in the strict sense of the term. It is the sport in question which creates its legal order through its internal rules, constitutions, and its contractual arrangements.

The fundamental rights and freedoms (which are featured not only in the 1949 Constitution, but also in the constitutions of the Länder) play an important role in sport. It is true that German constitutional law does not confer a "fundamental right to sport" in the sense of a constitutional entitlement to sport by the citizen (even though some Länder constitutions mention sport as a public objective). In constitutional terms, sport is, like any other social activity, protected by the general right to freedom of action (allgemeine Handlungsfreiheit – Article 2(1) of the Constitution). This fundamental right governs sport regardless of its popularity, the level reached by the performer or the extent of the effort that goes into the performance. There are, however, some individual sports, such as forest horseriding, which are excluded from this right. Therefore, any restrictions imposed on individual sporting activity by the state must be justified by a public interest which is of greater importance than the individual's interest in sporting activity. Such restrictions must also be appropriate, necessary and proportionate in order to meet the relevant constitutional principles. These requirements are significant where, for example, the state, invoking its constitutional obligation to protect the life and health of the citizen, imposes, by legislation, restrictions on high-risk sports, or where it restricts sporting activity in public spaces, for example because of its effects on the environment.

Another fundamental right is the freedom to exercise professional and commercial activity (Article 12(1) Constitution), which is obviously of relevance to sporting professionals. Article 12(1) also covers those involved commercially in sport, such as travel agencies and, especially, the operators of fitness studios. As for the sports governing bodies and federations, it is the fundamental right to freedom of assembly (Vereinigungsfreiheit – Article 9(1) of the Constitution) which provides the most

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significant constitutional guarantee. It means that organised sport in Germany has the right to establish and discontinue, in principle free from any state intervention, legally recognised associations for sporting purposes, to determine their objectives, their name, their organisation as well as the ways and means of achieving the aims which they set themselves. This fundamental freedom also includes the right to form specific sporting values through the relevant sporting bodies. This applies not only to the narrow issue of the specific rules of the sport as played, but also to the field of the relevant sporting ethics. An understanding of that which is "sporting" and "fair" – i.e. the unwritten code (*Selbstverständnis*) of the sport – is also protected by Article 9(1) and can be invoked against the state authorities. The fundamental right to freedom of assembly also includes the freedom not to belong to an association. This aspect of that right can also be relevant to sport (see Decision of the Administrative Court (*Verwaltungsgericht*) of Köln of 9/3/1976).

The freedoms cited above (Articles 2(1), 9(1) and 12(1)) are above all rights which can be relied upon against the state. This guarantees in the most effective way possible the essential freedom of those involved in sporting activity. However, these provisions also determine the limits to those freedoms, in the sense that they do not confer any rights which can be invoked against the State to promote and fund sport. To a large extent it can be said that these fundamental rights are defensive ones, aimed at the protection of sporting freedom. Anything more positive, such as trying to derive from these fundamental freedoms the right to use public utilities, e.g. municipal sporting centres or the public highway for sporting purposes (for marathons, cycling races, motor vehicle sport, etc.) is fraught with all manner of legal difficulty. Also, the commercial and professional freedoms conferred by Article 9(1) do not confer on sporting associations or federations any legal protection against competition from other sporting providers, whether these are supported by public funds (such as adult education institutions) or by other organisations (firms, churches, charities, tourist enterprise, etc.).

However, it has recently become increasingly accepted that the fundamental rights guaranteed by the Constitution have legal relevance only for the relations between the citizen and the state. The notion has grown

that these freedoms create a "system of values" and as such should apply to all the areas of the law (Decision of the Constitutional Court of 15/1/1958). Accordingly they also have relevance for the relations between sporting bodies and sporting performers which are governed by the private law. This has been referred to as the "spreading effect" (*Ausstrahlungswirkung*) of the fundamental freedoms to penetrate the field of private law, which can be applied to individual cases by interpreting the various provisions of the private law in the light of the constitution. However, these fundamental freedoms may be restricted by contract or by the internal rules of the federations or associations. This is capable of influencing the legal position of player transfers between clubs, freedom of expression by team coaches as regards the operation of the sport, etc. However, all such private law arrangements which restrict the constitutional freedoms must be based on objective grounds and may only limit these freedoms to the extent that this is necessary. This will also apply, for example to suspensions or expulsions based on doping infringements.

The fundamental right to human dignity, guaranteed by Article 1(1) of the Constitution, can pose a number of problems for sport. This is a right which is generally regarded as one that not only limits state power and authority, but also forms a standard to be observed in all areas governed by the legal relations envisaged by the Constitution. No-one has the legally-protected right to pledge, undertake or agree to anything which infringes the right to human dignity. The state is bound to protect human dignity in all areas of life and society. This right is understood to include the constitutional prohibition of anything that reduces human beings to a mere object of the interests of a third party, i.e. the state, a sporting club, sponsors, coaches, etc. What we are dealing with here is the human right to decency and respect in society. Some aspects of top sporting activity which have raised concerns from the point of view of human dignity are player transfers in professional football, doping controls, children's sport, the exhaustion which can result from demanding sporting performance, and sport-related advertising. It is far from easy to make an assessment of the constitutional lawfulness of such practices from the point of view of the protection of human dignity.

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The aforementioned right to freedom of action (Article 2(1) Constitution) also covers the right of the citizen to engage in high-risk sporting activity. The state does not have a general duty to prohibit human beings from putting their health or life at risk, as would for example be the case with motor sport exercised on private tracks. This principle applies even though the Constitutional Court (Bundesverfassungsgericht) has ruled that the state has a constitutional duty to protect the life and health of its citizens against danger. However, this duty concerns in the first instance dangers emanating from third parties. The highest courts in the land have ruled that Article 2(1) guarantees freedom of action in general and recognised the individual's right to self-determination of his own physical and moral integrity, thus protecting the right to risk-taking activity, including that which involves sport.

#### Sport and the criminal law

Federal criminal law applies to sport in Germany to the fullest extent. Particularly important in this respect are the offences of negligent bodily harm (*fahrlässige Körperverletzung*) (Article 223 et seq. and 230 of the Criminal Code) and manslaughter (Article 212, 222 of the Criminal Code), whereas document crime (*Urkundsdelikte*) can also play a part here (forgery of player's licence, etc.) as does fraud (e.g. in relation to betting offences).

As regards the criminal liability for personal injury, both the criminal and the civil law make a distinction between physical contact sports (boxing, football, rugby, etc.) and non-physical contact sport (running, tennis, skiing, etc.). As regards the former, there is general agreement that negligently caused injury, even if it is serious, and even negligent manslaughter will not be punishable where they came about even though the rules of the sport had been observed on the occasion of the incident concerned. There is also a consensus that even a minor infringement of the rules which is common in the sport and which leads to personal injury or even death will not be punishable. What does give rise to debate, however, is where exactly the boundary must be drawn and the legal basis for any resulting liability. Where there has occurred a serious breach of the rules which involved a considerable risk for the life and the health of the other party, the perpetrator's criminal liability is in principle engaged.

However, he/she may escape liability in individual cases where the resulting injury could not have been foreseen by the author of the injury.

As regards non-physical contact sports, more particularly in relation to skiing, personal injury will engage criminal liability where the perpetrator has injured that person in a manner for which he/she can be subjectively blamed, i.e. at least with negligence, especially where in so doing he/she had infringed the relevant rules (e.g. those laid down by the world governing body FIS).

In most cases, it will be a fact that sporting injury results from engaging in sporting competition. Any criminal assessment of such incidents will be made in the light of Article 223 et seq. of the Criminal Code. This defines physical injury as the abuse of the body or damage caused to one's health. The detailed assessment of criminal liability for sporting injury has been the subject-matter of considerable controversy. To a certain extent, it is accepted that any injury perpetrated in full observance of the rules of the game will not be classified as personal injury in the criminal sense. Conversely, where the sporting performer infringes the rules, it is accepted that his criminal liability will be engaged. Also, the consent of the injured sporting performer can also serve to exclude criminal liability on the basis of Article 226 Criminal Code. The courts have tended towards the following line: the voluntary participation in a sporting competition constitutes consent to the physical dangers which such a competition normally involves. However, where there has been a serious infringement of the rules, more particularly a deliberate breach of the rules of the game, this consent will not be capable of having any justifying effect (Bavarian Court of Appeal, Decision of 3/8/1961). The leading authors of criminal law, on the other hand, tend towards excluding criminal liability where an action causing injury arises as an extension of a "lawful risk" in competition. Where a sporting injury occurs which falls within the legal definition of criminal physical injury and which is unlawful, the question whether or not there is criminal liability or not should be assessed in the light of the specific nature of the sporting competition. It is also accepted that, where an incident falls within the criminal notion of physical injury, this should not necessarily lead to criminal prosecution by the state authorities. This is because the prosecution of criminal

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physical injury depends exclusively on the initiative of the injured party (Article 232(1) in conjunction with Article 77(1) Criminal Code), unless the prosecuting authority considers it necessary to intervene on its own accord because of an overriding public interest (Article 232(1) Criminal Code). The opportunity to start a criminal investigation exists on the basis of Articles 153 and 153a of the Criminal Code of Procedure, whether or not to use this procedure is very much conditioned by the notion that the prosecution of physical injury in sport should normally be left to the relevant sporting governing bodies. In addition, the injured party may him/herself bring the criminal action instead of the public prosecutor's office (Article 374(1) Code of Criminal Procedure).

What is the legal status of the sporting association/club?

In principle, sporting associations/clubs are "registered associations" (eingetragene Vereine) within the meaning of Article 21 et seq. of the Civil Code (BGB). This is a requirement made of the German sporting associations/clubs in order to be recognised as such. Private associations are governed by Articles 21 et seq. and 54 et seq. of the German Civil Code, whereas public associations are regulated by the Law on Associations (Vereinsgesetz) of 1964. The latter concerns itself above all with the supervision and discontinuation of an association by the relevant authorities and hardly has any significance for sporting clubs and associations. It is the Civil Code (BGB) which regulates the establishment, organisation and legal capacity of a club or association. It is defined as a long-term fellowship of several persons brought together for a common purpose, and its status is independent of any changes in its membership. It acquires legal capacity by being entered in the Register of Associations (Vereinsregister) kept by the relevant District Court (Amtsgericht). This register is exclusively for associations which have no commercial object (Article 21 BGB).

The establishment of an association requires in the first place the formulation of its constitution by its founders. Corporate persons may also be founder members – which is normally the case with the creation of sporting federations. The application for registration with the District Court, which is necessary in order to acquire legal personality, will be carried out by the Board of Directors

(Vorstand), which will at the same time submit the constitution as signed by seven members as well as a copy of its founding deed (Bestellungsurkunde (Article 59 BGB). Where the conditions for registration have been met, the District Court will register the association thus giving it legal personality. In addition, the establishment of an association must be notified to the tax office (Finanzamt) within one month of the day on which it was founded.

The association's constitution must contain its fundamental rules, although it is generally agreed that it must not include its entire organisational scheme. However, the constitution must definitely include that association's objectives, the name and address of the association, as well as the fact that the association needs to be registered (Article 57(1) BGB). It must also contain the provisions on the admission and resignation of members, the membership fees, as well as the association's organs – the minimum requirement here being the Board of Directors and the General Meeting of Members (Article 58 BGB). Where the association seeks acceptance as a charitable organisation within the meaning of Article 51 et seq. of the Taxation Code (Abgabenordnung – AO), as is normally the case for all sporting associations and federations, the charitable nature of the association must emerge from its constitution. The Supreme Court (Bundesgerichtshof) has also stipulated that the most important decisions taken by the association's authorities be also included in the constitution – thus enabling every member to know from the outset what is involved by acquiring membership of the association. In order to meet this strict requirement set by the courts, the decisions of the association organs are deemed to be part of the constitution, which does create a difficulty in the sense that they can only be changed or dropped in the same way as the constitution itself.

The General Meeting of Members (Mitgliederversammlung) is the supreme policy-making organ of the association (Article 32 BGB). It must decide on all matters affecting the association, as long as these are not attributed to other association organs in the constitution. The Meeting is called by the Board of Directors and, according to the recent case law of the Supreme Court, decides by a majority of submitted votes rather than by a

majority of those present voting, as was the case under the previous case law – unless the Constitution states otherwise. The Board of Directors (Vorstand) is appointed by a decision of the General Meeting (Article 26(1) BGB). The appointed Board, as well as any changes in the Board, must be submitted for entry in the Register (Articles 64 and 67 BGB). It directs the everyday business of the association and represents it towards the outside world. Where it consists of more than one person, decisions will be taken by a majority vote. However, the constitution may lay down a different system – as it can in relation to other issues, such as the powers of representation of the Board. Any such restriction of powers must be entered in the Registry of Associations (Articles 70 and 68 BGB). The association shall in principle be liable for all the actions of the Board, more particularly for breach of contract and tort liability incurred by the director in the performance of his/her duties.

The tort liability of the sporting association can be potentially engaged especially in relation to the sporting events organised by the association. The principle of subjective liability applies, in the sense that the association will only be liable where it has committed a fault. For the faults committed by a director or a special representative within the meaning of Article 30 BGB the association will at all times be liable. Where the action in question was committed by an employee or a member acting on an unpaid basis, the association will be at all times liable where the action involved breach of contract, but in the case of tort liability it will only be liable where it was unable to prove that it exercised the necessary degree of care and supervision (Article 831 BGB).

## **SPORTS LAW WHO'S WHO IN GERMANY**

There are several journals on sports law, the most important being:

- Zeitschrift für Sportrecht (Editor: J. Fritzweiler)
- Cause Sport (Editor: Urs Scherrer)

Sports law is also well represented in academia, more particularly at

- The University of Bayreuth, which has a Chair in Civil Law devoted to sports law
- The Legal Internet Project at the University of Saarbrücken
- The Federal Institute for Sports Science

In the private sphere, the following are the top sports law practitioners:

- Dr. Rainer Cherkeh
- Dr. Jochen Fritzweiler
- Dr. Claus D. Rade
- Dr. Michael Witteler
- Law firm Arnecke und Siebold (Dr. Joachim Wichert)

Sports law practitioners have also associated themselves in the Arbeitsgemeinschaft Sportrecht des Deutschen Anwaltsvereins (Sports Law Working Group in the German Lawyers' Association). **BASL**

# CORRUPTION WATCH

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Corruption Watch is a 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 16 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.

## CYCLING

### **Lance Armstrong affair continues to have repercussions for UCI**

Recent revelations that the sevenfold Tour de France winner from Texas was assisted by the consumption of banned substances undoubtedly come squarely within the scope of anti-doping law. However, as we have stated before in these columns, they also have an element of potential corruption about them in the shape of suspicions that the authorities entrusted with the task of overseeing the sport, and more particularly its world governing body, might to greater or lesser degree have been complicit in hiding this malpractice from the public view. These suspicions reached such a pitch that, towards the end of 2012, the world organ in question, to wit the Union Cycliste Internationale (UCI) decided to set up a commission whose terms of reference were to examine these allegations. This project, however, hit a major setback almost from its inception when it was learned that the World Anti-Doping Agency (WADA), amongst others, had decided to boycott it, even though it had been invited to participate by lawyers acting on

behalf of the independent commission in question. The WADA President, John Fahey, said that his organisation had "some significant concerns" about the terms of reference governing the Commission, and that it had alerted the lawyers in question of its concerns (*The Guardian of 14/12/2012, p. 48*).

The following month, fresh claims emerged about the manner in which the disgraced champion had succeeded in avoiding failing drugs tests. Travis Tygart, the head of the United States Anti-Doping Agency (USADA), whose tireless efforts played no small part in the Armstrong revelations, alleged that the director of the drug-testing laboratory in Lausanne, Switzerland, had informed him that he provided Armstrong and his team manager, Johan Bruyneel, with information on the way to avoid positive tests for the blood-boosting agent EPO. The meeting between Messrs. Armstrong, Bruyneel and Martial Saugy, the director of a laboratory in Switzerland, was arranged at the invitation of the UCI. The latter has claimed that the meeting was arranged by way of deterrent in order to show riders that it was taking a stringent line on doping, and not to show them how to beat the testers.

Mr. Tygart, for his part, informed a television programme in the US that the meeting occurred the year after Armstrong had provided a suspect sample during the Tour of Switzerland, which had been tested in Lausanne. He added:

*“Saigy sat beside me and said ‘Travis, this is a sample from Lance Armstrong that indicates Lance Armstrong took EPO. Saigy also told us that he had been ordered by the UCI to meet Lance Armstrong and Johan Bruyneel to explain the method of detecting EPO, something that was unusual for him. So I asked him: ‘did you give Lance Armstrong and Johan Bruyneel the keys to beating EPO tests?’ And he nodded to say “yes”, he explained to them, just the tow of them. As far as I know, it’s unprecedented. It’s completely wrong to meet an athlete with a suspect result and explain to him how the test works” (The Daily Telegraph of 11/1/2013, p. S4).*

Mr. Saigy has, it appears, admitted in the past having met Armstrong and Bruyneel in order to discuss how the EPO test operated. In defence of Mr. Saigy and the laboratory in question, Richard Chassot, the Swiss cycling president, said that in many cases, more particularly the affair surrounding the equally disgraced US rider Floyd Landis, they had placed themselves in danger, and described Saigy as a “good and serious guy”

who had frequently taken up a strong stance against doping. As to the samples tested, he commented that they were merely “numbers on a tube”, which made it impossible to link any of them specifically to Armstrong. “If something happened” he concluded “it is at UCI level”. However, Mr. Tygart also claimed that six of Armstrong’s samples, taken during the 1999 Tour de France (his first victory), eventually tested positive when retested in 2005 (*Ibid*).

Further allegations made by USADA in its report were the former UCI president, Hein Verbruggen, was paid \$500,000 to bury the 1999 positive test referred to above, and that Armstrong made donations totalling \$125,000 to the UCI in 2002 by way of hush money following the Tour of Switzerland positive test. Mr. Armstrong was urged by some – including British Cycling president Brian Cookson, to include this among the revelations he was expected to make during his much-awaited broadcast session with television hostess Oprah Winfrey (*The Daily Telegraph of 14/1/2013, p. S24*). In fact, there were reports in the US that the Texan was ready to testify against senior figures in the UCI. This appeared to be grist to the mill of former WADA president Dick Pound, a long-standing critic of the cycling body, who advocated that cycling be dropped from the Olympic Games if evidence of a corrupt cover-up emerged. He expressed his belief that it was “not

credible” that the world cycling authority could not have known that was happening (*The Daily Telegraph of 16/1/2013, p. S14*).

There was more bad news for the independent commission in question the next day as arguments raged over its proposal to the UCI to include a “truth and reconciliation” process in order to help expose cycling’s doping secrets – a suggestion which was flatly rejected by the UCI. Clearly, the commission felt that it was only by offering an amnesty that witnesses would come forward with information – including possible Mr. Armstrong himself. By dismissing this proposal, the UCI left itself open to the risk of losing the services of the Commission members, which consisted of three highly respected figures – Sir Philip Otten, a former Appeal Court judge, distinguished athlete Baroness Grey-Thompson, and Australian lawyer Malcolm Holmes QC. It also emerged that, in addition to WADA, the pressure group Cycling Now, which includes former Tour de France winner Greg LeMond (US), had also withdrawn their co-operation from the commission citing “serious concerns” over the latter’s neutrality, after learning that the panel’s powers would not be increased and that its final report would be sent to the UCI first. Both WADA and USADA had offered to fund the proposed Truth and Conciliation hearing (*The Daily Telegraph of 17/1/2013, p. S15*).

Came the day of the long-awaited Winfrey interview, which almost predictably was greeted and derided by many as the dampest of squibs. On the question whether the UCI assisted the suppression of the Tour of Switzerland positive dope test in return for a \$10,000 donation, the former cyclist denied that the money in question constituted an exchange for any cover-up. As he was not a fan of the UCI, he claimed, he would have had every incentive to fall in with the accusations of bribery levelled against them. He also denied that there had been a positive test and claimed that there was no secret meeting with the laboratory director. This ran counter to the USADA finding, which was that Armstrong had informed Tyler Hamilton and Floyd Landis that he had in fact tested positive, and had stated or implied that he had been able to spirit away the EPO test. In effect, this amounted to accusing Hamilton and Landis of lying, both having been very specific in their statements as to how Armstrong had allegedly concluded a financial arrangement with the UCI to that effect (*The Daily Telegraph of 19/1/2013, p. S7*).

A few days later, it emerged that evidence discovered by the leading French newspaper *Le Monde* suggested that the UCI had accepted Armstrong's backdated and fake prescription for cortisone in 1999 but failed to apply its own rules which would have resulted in a ban for the former champion. The latter had in fact confirmed that he had arranged to have a cortisone prescription backdated in order to cover up a dope test result in the course of the 1999 Tour de France. This came as

the former UCI head, Hein Verbruggen, admitted that the world authority used to warn riders, including Armstrong, if their blood test results contained suspect values. He informed the Dutch periodical *Vrij Nederland* that cyclists and team managers were invited to UCI headquarters in Switzerland for a presentation by Dr Mario Zorzoli aimed at dissuading them from taking drugs. Thus Armstrong was warned in 2001 about his suspicious blood values (*The Daily Telegraph of 23/1/2013, p. S15*). Naturally, this in itself does not in any way prove that bribery and corruption took place; however, it does suggest an unnecessarily close relationship between the authority and the riders which is vulnerable to abuse.

In the end, the UCI did announce that it intended to set up a Truth and Reconciliation Committee (TRC). However, this failed to impress the investigating commission, which criticised the timing of the announcement, saying that the ensuing delay in creating such a committee would be "an excuse to kick the USADA allegations (referred to above) into the long grass". The Commission members further complained that no documents concerning the USADA case had been provided during the previous three months (although some reports claimed that more than a dozen large files had been handed over the previous evening). However, with the first draft of the newly-proposed TRC planned for the following few days, the independent commission, which had been due to open full hearings in April 2013, appeared to have been bypassed by the same

organisation which created it (*The Independent of 26/1/2013, p. 67*).

The full extent of the strained relationship between the UCI and the Commission was starkly revealed a few days later, when the world governing body dramatically disbanded the latter. The decision, made by the UCI President Pat McQuaid, was reported to have astounded the three-member commission and left the body without any formal mechanism of inquiry into the bribery allegations. The UCI explained its decision by claiming that the commission was in danger of "lacking credibility" because, as was mentioned earlier, WADA, USADA and Cycling Now had refused to take part unless the commission was given wider terms of reference and a guarantee that their findings would be made public. This added fuel to the suspicion that this move represented a stalling tactic by Pat McQuaid to ensure that any negative findings would only be adumbrated after the elections to the UCI presidency the following September (with McQuaid bidding for his own succession – see below). The normal expectation for such a Truth and Reconciliation Committee to be set up, let alone successfully operational, is two years. In his defence, Mr. McQuaid made the following statement:

*"This is too important for rushed discussions or hasty decisions. It is completely unrealistic to expect that we and WADA can sort through all details of setting up a truth and reconciliation committee in just a couple of days, based on an arbitrary deadline set*

*by the Independent Commission...". There is still a huge amount to discuss before we can finalise a detailed legal framework, including how (sic) such a TRC, which is completely unprecedented in sport, should be funded now that WADA, contrary to earlier indications, refuses to contribute financially. This is something that will be discussed fully at the management committee meeting..." (The Daily Telegraph of 29/1/2013, p. S12).*

Naturally, this was not without reaction by the slighted bodies in question – more particularly WADA, who described the decision to disband the Commission as “deceitful and arrogant”, whilst at the same time announcing their intention never to join in any venture with the UCI whilst this type of attitude persisted (*The Independent of 30/1/2013, p. 63*).

So there the matter rests at the time of writing – your correspondent pledging, as ever, to follow this saga to its ultimate conclusion for the benefit of this organ’s faithful readership. However, it is worth recording that, in the meantime, some personalities with the good name of the sport at heart have made considerable efforts to give it a new complexion. One such striver is none other than Mr. Armstrong’s compatriot Greg LeMond, three-times winner of Le Tour and, as is mentioned above, a leading light in the Change Cycling campaign group. In December 2012 he announced his readiness to stand for the presidency of the UCI in order to “restore public confidence and sponsors” to the sport

(*The Independent of 4/12/2013*). One of the main platforms on which Change Cycling has campaigned is an independent investigation into the UCI and its senior management; it has also been highly critical of the work and functioning of the aforementioned official UCI commission of inquiry and its probing of the allegations of corruption involving Armstrong “hush money”. At the time of writing, it is unclear whether Mr. LeMond will succeed in his bid for the stewardship of the unhappy organisation. What is clear is that, with even Mr. McQuaid’s own national (Irish) cycling union being reported to harbour doubts about the latter’s continued suitability for this lofty position (*see www.bbc.co.uk/sport/0/cycling of 27/4/2013*), a (welcome?) change may well be in the offing.

### **Did the Spanish Government cover up evidence in Operation Puerto affair?**

Yet another issue which, in principle, belongs to the legal domain of doping legislation, but also has potential overtones of corruption, is the long-running Operation Puerto saga – also frequently reported on earlier in these columns. It concerns the dubious practices of one Dr Eufemiano Fuentes, who, ever since Spanish detectives started raiding his offices in 2006, has been revealed as the operator of one of the most extensive drug rings in Europe. Although Dr Fuentes has admitted to supplying unlawful substances to professional footballers and tennis players as well, his trial, based on

charges of public health offences, when it started in Madrid in late January 2013, only covered his activities in the world of cycling. This restriction has infuriated the World Anti-Doping Agency and inevitably prompted accusations of a cover-up (*The Daily Telegraph of 22/1/2013, p. S13*). The timing was particularly unfortunate, coming as it did barely days after the Armstrong confessions on the Oprah Winfrey show, extensively covered above.

It will be recalled from earlier issues of this organ that, when police officers sifted through the evidence at the doctor’s premises, they discovered refrigerators filled with bags of blood and labelled with code names such as Bella, Son of Ryan and Zapatero, as well as extensive written records. The doping ring implicated 54 cyclists, and top riders such as Tyler Hamilton, Ivan Basso and Jan Ullrich were eventually suspended, but many others were cleared. He has admitted working with football teams in the Spanish first and second divisions, as well as with tennis and handball players. Spanish police are said to have discovered evidence in his vast database revealing names of his clients, but these have never been made public. One of the major difficulties in this case is the fact that, at the time, doping was not illegal in Spain, which made it something of a safe haven for doping cheats – which is why Fuentes was not being tried for doping offences but for breaches of public health legislation, with the authorities claiming that the relevant transfusions were not performed using the appropriate medical facilities. The UCI has also expressed disappointment that only the world

of cycling has been investigated in this affair (*Ibid*).

WADA was itself a party to the trial, and in course of it continued its clamour for all the evidence in the case should be handed over to the Agency – which had in fact campaigned hard to bring it to court at all. Strongly hinting at a cover-up, its Director-General, David Howman, stated:

*“It’s not just other cases in cycling but in a range of sports [also]. The whole purpose of the exercise, and the reason we’ve been so resolute in pursuing this to court, has been to find out who those athletes are. We need to know what those sports are and who those athletes are so the information can be handed over to agencies who can do something about it. Every possible block has been put in the way. We want people to share that information through Interpol or some other means so that everyone can benefit from it. We were told it wasn’t just one sport. But we’ve never been given the follow-up data. This has so far proved to be a very unfair caricature of one sport where there were others involved”* (*The Guardian of 28/1/2013, p. S12*).

At the time of writing, the outcome of the trial was as yet unknown. However, Dr Fuentes has in the meantime informed a Spanish newspaper that he is prepared to consider a “mutual collaboration” with WADA and the Spanish anti-doping agency and in that process provide a full list of his former clients (*The Times of 21/3/2013, p. 71*). When – if – that happens, we should

be in a better position to judge whether or not an active cover-up had taken place.

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## CRICKET CORRUPTION SCANDAL – AN UPDATE

### **Westfield/Kaneria affair continues to fester (UK/Pakistan)**

Earlier editions of this periodical have extensively covered the sad story of Danish Kaneria and Mervyn Westfield, two Essex players caught in a match-fixing racket. Kaneria received a lifetime ban from the game by the England Cricket Board (ECB) and described as a “danger to cricket” after being named at the Old Bailey as the player who corrupted his teammate Westfield. The latter was eventually jailed for four months in 2012 for accepting cash in return for underperforming in a one-day fixture played three years earlier.

Subsequently, Mr. Kaneria decided to appeal the lifetime ban. This was only concluded just before this organ went to press because the hearing suffered a number of setbacks which have caused its postponement. In mid-December 2012, the hearing was adjourned for several months into the New Year (*The Daily Telegraph of 7/3/2013, p. S19*). With the need for a date becoming increasingly pressing, there were further legal difficulties when, in early March 2013, it appeared that Mr. Westfield, who was to be the star witness at the hearing, had failed to respond to requests to appear at the tribunal – in fact, it appeared as though the player had gone “off the radar” for the previous

few months. This made it increasingly doubtful whether the new date set for the hearing, i.e. 22 April, could be honoured. Mr. Kaneria’s lawyers let it be known that they would appeal to the High Court in order to have a deadline set for the hearing if the April date was moved again. This raised the prospect of Kaneria’s ban being quashed, as Farogh Naseem, Kaneria’s lawyer, explained:

*“At the first disciplinary hearing [at which Kaneria was banned] Westfield was their star witness and was subjected to cross-examination by us. But that testimony will not be available to the ECB unless they are able to produce him at the appeal so we can cross-examine him again. If a witness is not available for cross-examination then his evidence is not admissible and without him they have no case. We have nothing against the ECB but by delaying over the last several months they have put this cricketer’s career in jeopardy”* (*The Daily Telegraph of 7/3/2013, p. S15*).

This turn of events was naturally of considerable concern to the ECB since any reinstatement of Kaneria would mean not only that the man who introduced the “vulnerable and naive” Westfield to the world of illegal bookmakers would escape any disciplinary penalty, but also that the cricket board might face an action for considerable damages from the Pakistani player. It would also tarnish Mr. Westfield’s name, making any attempt at returning to cricket (after his five-year ban had been served) even harder. In addition, it was increasingly felt that the cricketing

authorities now wanted to work with Westfield, with the possible result that, if he did co-operate and give evidence at the Kaneria hearing, attempts to reduce his ban – felt to be somewhat harsh in many quarters – would be considered sympathetically (*Daily Mail of 22/3/2013, p. 95*). In addition, there was a danger that Westfield could be returned to jail if he failed to appear, as this might run the risk of incurring a contempt-of-court charge (The Daily Telegraph of 20/4/2013, p. S16). This followed an application by the ECB to issue Westfield with a formal summons to give evidence at the April 22 hearing (*The Daily Telegraph of 12/4/2013, p. S14*).

In the event, Westfield did appear at the hearing, but not before he had issued, through his lawyers, a stringing statement attacking the Board and the Professional Cricketers Association (PCA) for failing to do more to prevent the match-fixing ring. He also claimed to have been abandoned by cricket since his criminal conviction. He added:

*“I have heard that Essex County Cricket Club, together with the English Cricket Board and the Professional Cricketers Association, were fully aware of the situation I was falling into but stood back until my involvement reached the point of my guilty conviction. No-one wished to protect me at any stage. Where was their duty of care to me as a member of their staff?”* (*The Daily Telegraph of 23/4/2013, p. S4*).

Angus Porter, the chief executive of the PCA, reacted by describing Mr. Westfield as “terribly bitter” and denied that his organisation had any prior knowledge of the match-fixing ring operating at the Essex club. He observed, in his statement, Westfield had “failed to acknowledge the fact he did what he did” and that he needed to take responsibility for those actions. He added that the PCA had attempted to engage with him and give him support in his rehabilitation, but that Westfield had made it clear that he did not want any help from the cricketers’ trade union. The Essex Chairman, Nigel Hilliard, declined to comment (*Ibid.*).

Ultimately, Kaneria’s appeal against the lifetime ban was rejected but the Pakistani leg-spinner did not rule out taking further action, potentially in court. The five-man panel from the cricket discipline commission, headed by the former judge Edward Slinger, dismissed his appeal at the international dispute resolution centre in London but had yet to explain its reasons at the time of writing.. He was found guilty by of pressuring his Westfield into accepting money for trying to concede a specific amount of runs in a single over, following, as is mentioned above, the claim from Westfield during his trial that Kaneria was the middle man behind the fix. The Pakistani player admitted that he was “disappointed” by the decision but his lawyers said there could still be a number of options available to him which they will assess once they receive the written reasons behind the verdict. The panel also stated that Westfield’s appeal against the ban imposed on him would be heard at a

later date (*The Guardian of 27/4/2013, p. S4*).

### **England domestic game targeted for £900m by fixers**

That corruption in English cricket is unlikely to die with the Westfield/Kaneria affair was made clear when, weeks before the Kaneria hearing related above, England’s professional players were warned that the domestic game was being targeted by illegal bookmakers to the tune of nearly £900 million per season. The staggering new figures, discovered by the players’ trade union, are currently being used in pre-season tutorials for their 400 playing members as it redoubles its efforts to protect the county game from the fixers. Particular attention is paid to televised limited-overs games on which as much as £16m is gambled per match, according to the Professional Cricketers’ Association (PCA). Several people were ejected from county grounds during the 2012 season while they attempted to manipulate match odds in India and Dubai, using mobile telephones in order to take advantage of a 15-second broadcasting delay. With the ICC Champions Trophy in England this summer bound to be the subject of a global gambling spree, the figures are a timely reminder of the sheer scale of the threat to the world game.

The PCA’s research has shown that, for simple match odds on who wins and loses, about £1 million was wagered on non-televised domestic limited-overs matches last season. However, that figure rose to £12 million for Twenty20 matches

televised through the ECB's deal with Sky Sports to India and Dubai, and up to £16 million for 40-over matches. With 60 domestic one-day matches being televised this summer, the total figure industry officials estimate is being gambled on English domestic cricket is upwards of £880 million per year. PCA lawyer Ian Smith commented:

*“These figures are quite alarming, with betting on TV games hugely out of proportion to betting on non-TV games and they underline the dangers that still exist. The betting companies have told us that a rise from £1m to about £4m would be normal through ordinary punters watching those games on TV having a bet through legal bookies. But the rest – and it is huge – is primarily in illegal gambling markets in India and Dubai by bookmakers manipulating the odds in their favour. They are being helped by people in the crowds in England taking advantage of the long delay between events happening on the field and when they are actually seen in India and elsewhere – longer than 15 seconds in some cases. In-running odds on a match can swing wildly with just one ball being hit for six or a wicket being taken. If those setting the odds have that information in advance they can set the odds to suits themselves” (The Mail on Sunday of 31/3/2013, p. S18).*

Derbyshire captain Wes Durston commented that, as someone who has never been around the international game, he had only ever seen corruption and match-fixing as

being linked to international cricket or the IPL. English domestic players would therefore have to be “extremely vigilant.” Players have been given confidential helplines to call in order to report anything suspicious or unusual and, as an accompaniment to further tutorials presented by Marcus Trescothick, contact numbers for those facing problems with alcohol, drugs, gambling or depression (*Ibid*).

### ICC investigates 2011 limited overs match

To confirm that the danger of corruption is ever-present even in English professional cricket, in mid-November 2012 Sussex cricket club confirmed that their Clydesdale Bank 40 match against Kent at Hove in August 2011 had been investigated by the International Cricket Council's Anti-Corruption Unit (ACU) after approaches were made to players to fix the match. Allegations that the match, which Kent won by 14 runs, was fixed have been made in a recently published book, *Bookie Gambler Fixer Spy: A Journey to the Corrupt Heart of Cricket's Underworld*, by author Ed Hawkins. He claims that he was informed by an Indian bookmaker that the outcome of the match, which was televised live in India, was fixed and had attracted unusually high levels of interest on online betting sites with £14 million of turnover on on-line betting forum Betfair alone. The author suggests that the individual who was involved in fixing the match has since left the bookmaking industry to work in casinos in the United States after he

was arrested by police in India. Sussex responded to Mr. Hawkins's allegations by admitting that approaches had been made to some of their players and that a full investigation was launched by the ACU after the matter was reported to the Professional Cricketers' Association and the England and Wales Cricket Board. The following statement was issued by the club:

*“The club can confirm approaches were made to players regarding this game. Working with the PCA, the club investigated and reported the issue at the time, passing all the information promptly to the ECB after the match. In conjunction with the ICC, a full investigation was undertaken with nothing untoward coming to light, and the club's prompt action receiving praise. There have been no further reports to the club concerning any Sussex matches. As a club, we are committed to ensuring that the game's integrity is not breached at any time and will continue to take a full and leading role in the ECB's endeavours to protect the game.” (The Daily Telegraph of 17/11/2012, p. S17).*

According to a leading British newspaper, these the ICC investigation confirmed the players' claims but found insufficient evidence to take disciplinary action or instigate criminal proceedings against anyone for match fixing. However, the allegations in Hawkins's book again suggest that low-profile county matches which are screened live on the Indian subcontinent remain a prime target for attempted match-

fixing and spot-fixing (*Ibid*). It should be remembered in this context that it was during a televised CB40 match at Durham in September 2009 that Mervyn Westfield agreed to concede 12 runs in his first over in exchange for £6,000 from spot-fixers, which led to his conviction and ban as detailed above.

### Butt and Asif fail in appeal against spot-fixing suspensions

The informed reader will require no reminding of the spot-fixing scandal involving several Pakistani players which erupted on the occasion of the Test series against England in the course of 2010. The three players, Mohammad Asif, Salman Butt and Mohammad Amir, were found guilty by an International Cricket Council (ICC) tribunal in Doha in January 2010. That was 10 months before they were also convicted, and jailed, following a criminal trial at Southwark Crown Court. Asif's appeal against his conviction and sentence was heard before the Court of Arbitration for Sport (CAS) in Lausanne on 25/4/2013 with Butt appearing the following day. Butt accepted his conviction but appealed against his 10-year suspension. Mohammad Amir, the third Pakistan player found guilty of spot-fixing in 2009, did not appeal against his five-year ban. Asif told the hearing that the no-ball he bowled in the Lord's Test against England was an accident and he was unaware of the spot-fixing plan formulated by the News of the World and orchestrated by Butt and his agent, Mazhar Majeed. It is the story Asif has maintained all

along but was not believed by the jury at his trial. He was jailed for 12 months. However, according to Ravi Sukul, his lawyer:

*"He is saying he never agreed with anyone to bowl that no-ball deliberately. He admits he bowled a no-ball at Lords but he also bowled four no-balls in the previous Test match at the Oval a few days before. In cricketing terms they were not dissimilar to the one he bowled at Lord's. Those four no-balls at the Oval were never questioned by anyone because it would have been accepted that they were bowled unintentionally and in the usual course of the game, yet he bowled them. His foot was only fractionally over the line when he bowled the Lord's no-ball. The case is whether a world-class fast bowler can bowl a deliberate no-ball at will by putting his foot two inches in front of the popping crease." (The Daily Telegraph of 5/2/2013, p. S17).*

Both men appealed to have the length of their bans reduced. Asif had been suspended for five years with a further two years suspended. Butt had a five-year ban, adding up to 10 years with the suspended element taken into account. Mr Sukul added that, compared to what has happened with other sportsmen who have been involved in mischief, the bans were "excessive". He claimed that the ICC, which governs cricket worldwide, "moved mountains" to prosecute these men, but if the CAS ruled that the prosecution procedures were defective or unfair then that would be a "big blow for them" (*Ibid*).

In the event, the appeals were unsuccessful, with the ICC welcoming the decision by the CAS to uphold the penalties imposed (*The Daily Telegraph of 18/4/2013, p. S15*). See transcripts at [www.tas-cas.org/d2wfiles/document/6683/5048/0/Award20236220\\_FINAL\\_.pdf](http://www.tas-cas.org/d2wfiles/document/6683/5048/0/Award20236220_FINAL_.pdf) & [www.tas-cas.org/d2wfiles/document/6686/5048/0/Award2023642020FINAL.pdf](http://www.tas-cas.org/d2wfiles/document/6686/5048/0/Award2023642020FINAL.pdf)

### Other news (all months mentioned refer to 2013 unless specified otherwise)

**Bangladesh.** In mid-March, umpire Nadir Shah was banned for 10 years by the Bangladesh Cricket Board (BCB) following an investigation into corruption. The BCB commenced an investigation after a "sting" operation involving Indian television reporters in a programme screened in October 2012. The inquiry concluded that Mr. Shah, who has umpired in 40 one-day internationals and three Twenty20 internationals, was guilty of the allegations. However, fellow-umpire Sharfuddoula Ibne Shahid Saikat was cleared (*The Daily Telegraph of 19/3/2013, p. S19*).

**Pakistan.** In mid-April, the Pakistan cricket authorities banned two umpires after having found them guilty of willingness to engage in spot-fix. Nadeem Ghauri, who officiated in five Tests, was suspended for four years, whereas domestic first-class umpire Anis Siddiqui received a three-year penalty (*The Sunday Telegraph of 14/4/2013, p. S11*).

## FOOTBALL

### Europol investigation reveals match-fixing on a massive scale

There currently appears to be a common strand and theme running through large-scale corruption in sport. No longer is this a case of the odd player or referee succumbing to the financial blandishments offered by a club desperate to achieve trophy-winning glory or avoid the ignominy and financial hardship of relegation. As was the case with the cricket corruption minutely examined in this organ and elsewhere, it would appear that large and well-organised criminal gangs are the principal culprit in this cancer eating away at our major spectator sports. There now appears to be irrefutable evidence that football has also fallen victim to this disease – in the shape of the findings produced by a major campaign mounted by the European Union's law enforcement agency Europol called Operation Veto. This was the culmination of a collaborative exercise between five European countries attempting to combat what they, and many others, regarded as a growing threat to the integrity of football in Europe and abroad, and at levels from regional leagues in the continent's lesser footballing nations up to the lofty reaches of the European Champions League and other international football tournaments.

One of the leading personalities in this investigation was an obscure police investigator in an equally unobtrusive German town, to wit Friedhelm Althans, chief investigator

of the Bochum police force. The enquiry started at a modest level of the professional game, i.e. the alleged fixing of three German fourth-division games. According to the German authorities, this earned the people who fixed it a profit of £215,000. From there, the inquiry mushroomed: 79 suspect fixtures in Turkey, 70 in Germany, 41 in Switzerland, 20 in Hungary, 19 in Belgium, all the way down to... England. As Rob Wainwright, the head of Europol, himself has highlighted, this merely represents a small percentage of professional matches played in the time frame under investigation – but it is still there, and growing (*The Independent of 5/2/2013, p. 62*).

The task facing Mr. Althans and his colleagues is enormous. As the German investigator explained, one fixed match is capable of involving up to 50 suspects in 10 countries. Police co-ordination is virtually impossible, and it is even more difficult to collect the necessary evidence. In addition, whereas Mr. Althans is restricted by borders and boundaries, the same cannot be said about the fixers – more particularly one syndicate believed to operate out of Singapore and the Far East. Evidence is very difficult to obtain – wire-tapping has proved to be the most productive medium – and even more difficult to transform into a case which is sufficiently robust to enable prosecutors to start court proceedings. Criminal liability rules differ greatly from nation to nation even within the same continent, which makes European corruption as expensive a business to police as it is a profitable one for the match-fixers to

arrange. This is well illustrated by a meeting that took place at Europol's headquarters in The Hague, where Messrs. Althans and Wainwright were joined by police officers from Finland, Slovenia and Hungary – a roll call of Europe's outlying nations which is in itself significant. For this is the ideal terrain for the fixers – i.e. the fringes. Thus, for example, Hungary. In 2011, four referees were arrested, and €320,000 in cash was discovered during related raids. Referees appear to be a relatively easy target, especially in nations where they are paid on a very modest scale. The amounts which the Hungarian officials involved are being offered appear to range from €40,000 to €600,000 in order to fix a match. The highest bribe discovered by the team led by Althans was €140,000, paid in order to fix a match between an Austrian First Division game between Austria Wien and Kapfenburg. The highest profit they found for one fixture was €700,000 – once again, in the Austrian league – quite a healthy return on investment (*The Independent of 5/2/2013, p. 62*).

At the time when these revelations were being made, the Hungarian authorities had in custody one Wilson Raj Perumal – no stranger to these columns – a national of Singapore who has already been convicted by a Finnish court. He is believed to have assisted in the fixing of games via Hungarian organisers, including an under-20 fixture between Argentina and Bolivia which was settled by a dubious penalty awarded in the dying moments of the game. The trail from Perumal leads to someone called Tan Seet Eng, also known as Dan Tan, another citizen of

Singapore. Another arrest warrant has been issued for him – he is wanted in Italy and Hungary – but the Singapore authorities have yet to act on this warrant. This highlights one of the major difficulties involved in the prosecution of cross-border corrupt activities – working across borders with the authorities of different countries, each having their own area of jurisdictional sovereignty, especially in criminal matters. In fact, Interpol, the international cross-border policy investigator, has its own match-fixing force. However, it is Operation Veto which has given dramatic fresh impetus to what is regarded world-wide as a deep-seated threat to the sport's integrity. Thus Mr. Althans alleged that there was evidence available to show that Tan was involved in attempts to fix an English Premier League match as far back as 1999 (*Ibid*).

However, the fanciful notion that the sport was merely being corrupted at the fringes of European football was well and truly debunked when it was learned that the very showpiece of European football, to wit the Champions League – more particularly the game between Liverpool and Hungarian side Debrecen in 2009. There was no suggestion of any wrongdoing by the Merseyside club – in fact, club officials confirmed that they had not been contacted by Europol or by the European governing body UEFA regarding this matter. The source for this allegation was a report in the Danish newspaper Ekstra Bladet which claimed that Europol sources had confirmed that this was the match involved, alleging further that this fixture had already been

highlighted in a Dutch book concerning match-fixing. German police had already established that the Hungarian club's games during that Champions' League campaign, i.e. the 4-3 defeat at the hands of Italian side Fiorentina, had been subject to an attempt at match-fixing by a Croatian-led criminal gang. The goalkeeper playing for the Hungarian team that night, Vukasin Poleksic, was banned by UEFA for two years for failing to report an approach from match-fixers prior to the Fiorentina game. He protested his innocence and took the matter to the Court of Arbitration for Sport (CAS), which upheld the ban. Liverpool won the match played at Anfield, with a goal from Dirk Kuyt after Poleksic had parried a shot from Fernando Torres (*The Daily Telegraph of 5/2/2013, p. S2*).

The report in the Danish newspaper also alleged that the fixers wished to distort the betting market for total number of goals in the course of a game, but failed – the fixers wanted to ensure that at least three goals were scored in the match and that, according to court papers, they texted each other to express frustration at Liverpool's failure to score more. Evidence relating to this fixture is reported to have come to light when the aforementioned police force of Bochum were investigating the Croatian fixer Ante Sapina, who, as readers may recall from an earlier edition, was sentenced to five years' imprisonment in 2011 for fixing at least 20 games across Europe (*Ibid*). Europol, however, came under criticism for failing to liaise more closely with the English Football Association and the Premier League,

providing details on the way in which this problem could be avoided in England. The Premier League employs specialist agencies in order to track any betting concerns. It is also lobbying the British government for a sport betting right – essentially a formal commercial relationship with the gambling industry which would allow it to levy fees which could then be invested in appropriate monitoring services. It could also insist that certain bets, particularly first throw-in and first corner, be removed from the market as being particularly vulnerable to corruption (*The Daily Telegraph of 5/2/2013, p. S4*).

The world governing body FIFA reacted by calling for longer prison sentences for those involved in match-fixing. Ralf Mutschke, the organisation's head of security and himself a former Interpol official, said that for people not subject to the penalties of the sporting authorities the custodial sentences were "too weak" and offered little to deter people from becoming involved in match-fixing (*The Guardian of 5/2/2013, p. S1*). It too called for stronger co-operation between sporting bodies and law enforcement agencies. As for the hapless net-tender involved, Mr. Poleksic, he strenuously rejected any suggestions that he was part of the failed plot pointing out that he made many saves, including a "one-to-one" against striker Albert Riera. He described the Liverpool fixture as "the biggest match" of his career, although he admitted that he greatest mistake was failing to call the police (*The Guardian of 6/2/2013, p. 34*).

The scale of the problem was also highlighted a few days later by FIFA's former head of security, Chris Eaton, who claimed that organised crime rings were making hundreds of millions of pounds per year on the outcome of fixed football games. Mr. Eaton, who left the world governing body in 2011, claims that the Asian betting market has become so sophisticated – and government regulation there so ineffective – that it is attractive for those wishing to manipulate matches for profit. (It is significant that the Europol revelations concerned a Singapore-based syndicate.) Mr. Eaton said that the sums mentioned in the Europol investigation were “infinitesimal” compared with the amounts made on the Asian market. He even claimed that the operation was

*“bigger than Coca-Cola, which is a trillion a year. This is a global economy, a growing global economy, and it needs to be regulated and supervised, and governments aren't doing this. It's all done with algorithms and machines, almost like any commodity house in the US or London. The three largest (gambling) houses each transact \$2 billion a week” (Daily Mail of 7/2/2013, p. 73).*

He added that the three largest gambling houses in Asia – IBCBET, SBOBET and 188BET – were open to exploitation by organised crime syndicates and that investigating betting, rather than focusing on the sport itself, was the key to eliminating this corruption. He believes that 70 per cent of gambling on sport in Italy is unregistered and

frequently channelled through South-East Asia, where there is “under-regulated gambling where the regulators are not really serious, transparency rules are not to best practice and government oversight is almost non-existent” (*Ibid*).

In the immediate wake of the Europol report, FIFA have been keen to be seen taking decisive action. Thus three weeks later, it extended on a worldwide basis match-fixing bans for 74 players and officials from Italy and South Korea. The world governing body stated that 70 bans from the Italian Football Federation, including 11 lifetime ones, had been extended after players and officials were penalised for match-fixing in various hearings. It said that this involved either a “direct involvement or omission to report match-fixing, illegal betting or corrupt organisation” FIFA added that bans had also been extended to four South Koreans (*The Guardian of 28/2/2013, p. 42*).

.....  
**FIFA-related corruption (real and alleged)**

Mohamed Bin Hammam/  
Jack Warner  
The world governing body of the “beautiful game” has in recent years been the subject of many allegations of corruption – at least some of which have led to disciplinary action and/or resignations. One such case was that of former Asian football chief Mohamed Bin Hammam who, together with Caribbean football supremo Jack Warner, were identified in a FIFA-commissioned report as

having bribed Caribbean officials in order to back a bid by Bin Hammam to become FIFA President. As was reported in earlier editions of this organ, Mr. Bin Hammam was banned for life, only to have this ban overturned by the Court of Arbitration for Sport (CAS) in July 2012. Jack Warner, for his part, resigned his positions with both FIFA and Concacaf as a result of the report. It now emerges that Bin Hammam has had a new lifetime ban visited upon him – by FIFA's new adjudicatory chamber of its ethics committee – for “conflicts of interest” while president of the Asian Football Confederation (*The Guardian of 18/12/2013, p. 44*).

Jack Warner, for his part, now appears to be the subject-matter of even more serious business in the shape of the (US) Federal Bureau of Investigation (FBI) inquiry into alleged corruption, which was stepped up after investigators persuaded Warner's son Daryan to be a co-operating witness. The issues under scrutiny are two previously reported allegations involving Warner Sr. who, although he had resigned from his footballing positions, was still the national security minister in his native Trinidad and Tobago. It emerged that, since at least the summer of 2011, the FBI had been examining payments totalling more than \$500,000 made by the Caribbean Football Union (CFU) over the past 20 years to an offshore company headed by top US football official Chuck Blazer (who commissioned the report which caused Warner's previous downfall). That was the period in which Mr. Warner was also head of the CFU, a

position he held from the early 1980s until 2011. The US Internal Revenue Service has also joined the investigation, which is examining potential breaches of US fiscal law and anti-fraud legislation, including laws prohibiting wire and mail fraud. At the time of writing, Mr. Warner Sr. had not been charged with any offence (*The Daily Telegraph of 28/3/2013 p. S6*). The present writer will continue to monitor this investigation for the benefit of the reader.

#### Adviser resigns over FIFA “culture change” failures

In late April 2013, it was learned that a leading FIFA anti-corruption advisor had resigned, stating that the world governing body had failed to change its culture following the bribery scandals reported in this and other organs. Alexandra Wrage, who is President of the international compliance expert Trace, left an advisory panel chaired by Swiss law professor Mark Pieth which had been asked to guide the reforms pledged by FIFA President Sepp Blatter. She complained that FIFA remained “a closed society that fuelled its problems to begin with” (*The Daily Telegraph of 23/4/2013, p. S11*). She had previously spoken out about the FIFA Board’s rejection of certain modernising proposals, including women candidates for high-profile appointments and greater transparency about salaries and bonuses paid to Mr. Blatter and other senior officials. On a day when the Twitter accounts of Mr. Blatter and FIFA were hacked, Wrage’s group added that the advisory panel had made recommendations which

amounted to “nothing more than common sense textbook corporate governance and best practices in compliance”, but that even those were never considered by the governing body (*Daily Mail of 23/4/2013, p. 72*).

#### Qatar World Cup award continues to attract suspicions of corruption

It is no secret that the decision by FIFA to award the 2022 World Cup to the Gulf state in December 2010 raised quite a few eyebrows worldwide. Allegations that the Qatar bid team had bribed officials for their votes were even aired in the UK Parliament at the time. Naturally, Qatar denied the allegations. However, this has not prevented Michael Garcia, who presides over FIFA’s Ethics Committee, from calling on anyone who could produce evidence of conduct that infringed FIFA’s rules to come forward, adding that they would be guaranteed anonymity. He told a leading French football magazine:

*“It’s all open. The time has come for people who have information to come to me, I haven’t got any preconceived ideas on what happened. Well, if you truly believe it, the moment has come to show yourself. There are things that we can do, under the parameters of the Code, that will protect your anonymity. I will work with them under this report. (...) people have talked, written articles, but it’s important people tell me what they’ve got”* (*The Daily Telegraph of 13/3/2013, p. S11*).

This news arrived at a time when it is increasingly clear that a summer World Cup in Qatar is a virtual impossibility – adding to the consternation as to why Qatar won the bid in the first place.

#### South African officials suspended over World Cup run-up corruption claims

For some time now, there has been some unease in official sporting circles that, however successful a tournament it turned out to be, some aspects of the 2010 World Cup, more particularly its run-up, were not free from corruption – to the extent that world governing body FIFA commenced an investigation into these allegations. The outcome of this inquiry, delivered to the South African Football Association (SAFA) in mid-December 2012, is that there was “compelling evidence” that friendly internationals held during the run-up to the tournament had been fixed by Far East betting syndicates. At the heart of the claims of corruptions was, yet again, the shadowy figure of Wilson Raj Perumal of Singapore (see above). South Africa’s 5-0 win over Guatemala and their 2-0 victory against Colombia had long been under suspicion, and the report is understood to have detailed events surrounding these matches. It makes no allegations of wrongdoing against the teams, but focuses instead on the recruitment of referees by a company controlled by Perumal and called Football 4U. SAFA has admitted that it had worked with Perumal and his company.

As a result, SAFA President Kirsten Nemantandani was asked to “take a voluntary leave of absence from his position”, and four officials have been suspended. SAFA said in a statement:

*“The (association’s) committee resolved to write to FIFA and acknowledge that, through the actions of members of its staff during the warm-up matches prior to the FIFA 2010 World Cup, there is a prima facie breach of FIFA statute 13/1(g), which prohibits the control of its affairs by an outside party, in this case Football 4U International controlled by Singaporean Wilson Perumal Raj and his criminal syndicate. The Committee also noted that the appointment of Football 4U International was never brought to the attention of the SAFA NEC” (The Daily Telegraph of 18/12/2012, p. S8).*

No further details were available at the time of writing.

### **Charges of sexual corruption against Lebanese match officials**

In early April 2013, anti-corruption officials in Singapore accused three Lebanese match officials of receiving free sexual favours for agreeing to fix a game in an international football tournament. A referee and two assistants appeared before a court charged with offences under the country’s anti-corruption legislation. A spokesman for Singapore’s Corrupt Practices Investigation Bureau stated that they had been detained before a match in the Asian Football

Confederation Cup between Tampines Rovers and East Bengal (*The Independent of 5/4/2013, p. 55*).

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

### **RACING**

#### **Ipswich Town striker guilty of corruption and banned (UK)**

In late January 2013, it was learned that Michael Chopra and James Coppinger, professional footballers with Ipswich Town and Doncaster Rovers respectively, were “warned off” from racing for 10 and three years respectively for their roles in a conspiracy to stop horses and corrupt the sport. The central figure in the plot was Andrew Heffernan, a jockey, who was banned from racing for 15 years for stopping three horses in races at Lingfield and Kempton Park in January and February 2011. The nine individuals found to have been involved in the conspiracy were banned from racing for a total of 70 years and six months. They included Yogesh Joshee, a football agent who formerly represented Chopra, who was banned for five years, Mark Wilson, who was playing for Doncaster Rovers at the time of the offences, who was banned for 10 years, and Kelly Inglis, a former girlfriend of Heffernan, banned for four years.

The most serious charges in the case involved three horses ridden by Heffernan: Wanchai Whisper (9-2) at Lingfield on 28 January, Gallantry (11-1) at Kempton on 2 February and Silver Guest (6-1) at Lingfield on

9 February. All three were the subject of substantial lay bets in the place market on the Betfair and, in the case of Silver Guest, Betdaq betting exchanges. Wanchai Whisper finished second, which cost the conspirators £1,600, but both Gallantry and Silver Guest finished unplaced, winning £9,500 and £8,600 for those who “laid” them, against potential liabilities of £21,500 and £16,300. In the case of Silver Guest the money from accounts connected to Heffernan and his co-conspirators comprised approximately 70 per cent of Betfair’s entire market on the race. Heffernan appeared at the recent inquiry into the case, to give evidence, but was not present at the British Horserace Authority (BHA) to hear the result or attend the subsequent hearing to decide on the penalties. Messrs. Chopra and Coppinger both declined to take any part in the proceedings (*The Guardian of 26/1/2013, p. S13*).

Mr. Chopra had declared earlier that month that he would welcome any ban as he attempts to confront a gambling problem. He added that he saw any such sanctions as “a useful mechanism” in helping him to address these problems. In a statement to the Press Association, Steve Pearce, Ipswich Town’s press officer, described the affair as “a private matter between Michael and the British Horseracing Authority”. Both the Football Association and the Gambling Commission – which has the power to refer the case to the police – have been kept closely informed of the progress of the investigation, however, and could still decide to take action of their own (*Ibid*).

The other individuals involved in the case were Paul Garner, a registered stable lad at Alan McCabe's yard at the time of the offences, who was found to have placed a "lay" bet on a horse from the stable where he was employed; Pravin Shingadia, a friend of Joshee; and Douglas Shelley, a businessman. They received bans from racing of 12 and a half years, three years and eight years respectively. Adam Brickell, the BHA's director of integrity, legal and risk, said after the panel's findings had been published that his department's investigation had been extremely complex and that an elaborate network of corruption had been identified and successfully prosecuted. He added:

*"While we remain confident that the overwhelming majority of races which take place in Britain are free of any suspicion, this case highlights that we can never be complacent in our efforts to maintain the integrity of British racing and to educate those involved with the sport, including the betting public, about the misuse of information."* (*Ibid*)

Heffernan rode out his apprentice's claim in August 2011, after which he moved to Australia to continue a riding career which will be all but impossible to resurrect if he accepts his 15-year ban. The panel's reasons for imposing its penalties will be published at a later date, after which all those found in breach of the rules will have seven days to lodge an appeal. The panel's detailed reasons for its findings, which were also published, offer a clear and compelling picture of a series of

attempts to corrupt racing and betting, and also of the deliberate, and at times almost comically inventive, attempts of those involved to escape punishment. Mr. Heffernan, for example, is described as a "thoroughly unconvincing" and "generally untruthful witness", who included "many improbabilities and absurdities in his version of events".

When asked for evidence that one of his mobile phone numbers had been suspended during the period under investigation, his brother Christopher eventually supplied what was described as "crude scissors and paste job", prompting the panel to note that his reliance upon it in evidence and refusal to confront its plain absurdities was "still further reason to treat him as a wholly unreliable witness" (*Ibid*).

Heffernan also denied using Ms. Inglis's phone to contact Chopra, although text messages on the phone made it plain that he had, and maintained that frequent phone calls from Chopra to his mobile phone were evidence that the footballer was conducting an affair with Inglis. This, the panel decided, demonstrated the "ridiculous lengths" to which he was driven to continue to maintain the myth that he did not know of or speak with Chopra – if he was having such an affair, why on earth would he be phoning the man she was living with (*Ibid*).

### **Charged: Eddie Ahern and.... yet another professional footballer...**

In mid-December 2012, a top Flat jockey, Eddie Ahern, and former West Bromwich Albion stalwart footballer Neil Clement found themselves among six men charged with corruption by the British Horseracing Authority (BHA). In terms of talent, if never quite of fulfilment, Ahern is one of the most prominent names to have been dragged into the regulators' painful attempts to complete a culture change in the way professionals treat the putative privileges of "inside information". On the other hand, Mr. Clement, who made over 300 appearances for Albion until forced into retirement by injury nearly three years ago, renews focus on a troubled margin in the relationship between football and the Turf. The likes of Michael Owen, Wayne Rooney and Harry Redknapp have reiterated and reciprocated the glamour of racing – but, as is outlined above, the Michael Chopra affair casts a less pleasant pall over this relationship.

It had been clear that trouble was brewing for Ahern, rider of 1,020 winners in Britain since 1998, when the Bangalore Jockey Club declined his application to ride in India this past winter – and disclosed that the BHA had drawn attention to a serious disciplinary matter in the offing. In mid-December 2012 details duly emerged, linking Ahern with Clement and four other men, including a professional punter and the son of a Newmarket trainer, in connection with bets on five minor races between September 2010 and

February 2011. Failure to establish his innocence has the potential to ruin Mr. Ahern's career, above all regarding an inquiry into his performance on Judgethemoment at Lingfield in January 2011. Blinkered first time, the horse opened up a clear lead before ultimately finishing tailed off – the fourth time in five starts that Judgethemoment had come last. The BHA will probe whether Ahern is guilty of “intentionally failing to ensure that the horse was run on its merits”, an offence that can result in a rider being “warned off” for many years (*The Independent of 20/12/2012, p. 59*).

In other instances Mr. Ahern has been charged with passing “inside information” for reward. The allegations against Clement include one that he laid a horse in his ownership, while James Clutterbuck – assistant to his father, Ken – is accused of passing inside information concerning a horse ridden by Adam Kirby. (Neither Kirby nor Clutterbuck Sr is implicated.) The BHA drew attention to the fact that its case is based on alleged misuse not only of betting exchanges, but also of fixed odds and spread-betting opportunities. Otherwise there is a depressing familiarity to the alleged scandal. A hearing was scheduled for the end of April 2013 (*Ibid*).

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

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### **Trainer Chapple-Hyam faces ban from racing (UK)**

In late February 2013, it was learned that Peter Chapple-Hyam a leading trainer on the Flat for two decades with two Derby winners to his name, could be banned from the sport for three years after he was charged with serious breaches of the Rules of Racing by the British Horseracing Authority.

Chapple-Hyam is charged with deliberately misleading, or endeavouring to mislead, one of the BHA's investigations officers, both by falsifying his telephone records, and also by falsely claiming to have been in France with a runner on 12/7/2012. He is also charged with failing to supply his full and true telephone billings to BHA investigators within a reasonable time of the request being made.

The “entry point” penalty for failing to produce telephone records – the likely penalty when there are no mitigating or aggravating factors to consider – is disqualification from racing for 18 months, while the maximum penalty is a three-year ban. Tampering with phone records carries an entry point penalty of a nine-month ban, while the entry point for misleading an investigating officer is a fine of £2,000, the withdrawal or suspension of the trainer's licence for three months, or being stopped from making any entries for the same period (*The Guardian of 26/1/2013, p. 45*).

Mr. Chapple-Hyam succeeded Barry Hills as the licence holder at the late Robert Sangster's Manton estate in

1991, when he was just 28 years old. He saddled a Group One winner in his first season when Dr Devious took the Dewhurst Stakes, then sent out Rodrigo De Triano to win the 2,000 Guineas the following spring with Lester Piggott in the saddle, a month before Dr Devious gave him his first Derby victory. Chapple-Hyam was also responsible for Frankie Dettori's only Derby winner when Authorized took the Epsom Classic by five lengths in 2007, took the Champion Stakes at Newmarket with both Rodrigo De Triano and Spectrum, and sent out three winners of the Irish 2,000 Guineas. He left Manton to train in Hong Kong between 1999 and 2003, then returned to Newmarket to take over the historic St Gatien Stables in the heart of the town for the last decade. But Chapple-Hyam's career has hit fallow periods too, and he has failed to saddle more than 30 winners in any of the last three seasons. However, he was recently asked to train Hydrogen, a half-brother to Authorized and the most expensive yearling sold at auction in Europe in 2012, for Sheikh Hamad al Thani of Qatar (*Ibid*).

The outcome of this case was as yet unknown at the time of writing.

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### **BHA reassures punters over racing integrity**

The wave of suspensions and accusations detailed above naturally has the potential to deter even the most faithful of followers of the sport, and its ruling body has moved accordingly to reassure punters and racegoers about the sport's integrity

following the lengthy bans in question. Nevertheless, representatives of major bookmakers have warned the regulator against complacency.

Robin Mounsey, a spokesman for the BHA, said that the suspensions in question underlined the governing authority's capability and commitment to detecting and removing corruptive elements from the sport. He added:

*"The links developed with betting organisations and the advances made in our sharing of data and intelligence mean that we are now equipped better than ever to pinpoint corruption across the entire racing spectrum. Our evidence shows that there is no endemic problem and punters can have faith that the overwhelming majority of races run in Britain are free of suspicion. Having said that, there is no room for complacency" (The Guardian of 29/1/2013, p. 37).*

David Williams, representing Ladbrokes, was happy to acknowledge the BHA's success in "cleaning up" the sport but added that perception was still king and that, until punters had the perception that the sport is totally free of corruption, nobody can rest on any laurels. That view was echoed by Kate Miller of William Hill in the following terms:

*"The reality is that [tackling corruption] is an ongoing task, there will always be people who want to try and take advantage of the system but, as long as those people are caught and given life*

*bans or long bans of the kind we saw being given out on Friday, that will send a message to those who might want to cheat. On the all-weather there have been incidents that have concerned us and also, not just on the all-weather, there have been cases involving quite high-profile individuals where the rules have definitely been skirted around at the very least (Ibid).*

Paul Struthers, the chief executive of the Professional Jockeys Association, condemned Mr. Heffernan's behaviour, described earlier in these columns, as "gravely below that expected from anyone involved in racing", adding that the bottom line was that such behaviour was rare, but one could say that "until you're blue in the face to some people and it will do little to alter their view" Mr. Struther added that the authority "don't always get it right", in reference to the two-year ban given in 2011 to Kirsty Milczarek, who then cleared her name on appeal. However, he assured the racing world that it had a long track record of detecting wrongdoing. He added that the lowest levels of British racing will always be at risk from potential corrupters, given the paltry rewards and, with over 1,000 licensed jockeys and trainers, it is impossible to say that there will not be a tiny minority of individuals that will attempt to break the rules. However, with the penalties that had now been handed down, combined with the education system that the BHA have in place, the risk massively outweighed the potential rewards (*Ibid*).

Rupert Arnold, the chief executive of

the National Trainers' Federation, attempted to put the Heffernan/Chopra case in context. He said that the fact remained that these cases involve a tiny fraction of all races run and we all feel that racing was "pretty well policed and there isn't a huge cause for public concern" He had frequented the BHA's integrity department and consulted the investigators and I would be quite confident of what the BHA was able to detect (*Ibid*).

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## RUGBY UNION

### **RFU to give officials additional powers to fight corruption threat (UK)**

In mid-February 2013, it was learned that the remit of the citing commissioners working for Rugby Football Union (RFU) could be widened in order to protect the sport against the threat of corruption. It is understood that citing commissioners have already been encouraged to report any suspicious incidents during (English) Aviva Premiership matches following informal discussions held at a meeting in December. The move comes after all RFU staff were warned the previous month that they would no longer be allowed to place a bet of any kind "on any rugby in the world" following the introduction of a new International Rugby Board anti-corruption regulation. While there are no formal discussions about broadening the role of the citing commissioners, it appears the issue could to come under review as part of a proactive bid to avoid the kind of spot-fixing and match-fixing scandals that have

blighted other professional sports – as is abundantly adumbrated in this and many earlier issues of this Journal. (*The Daily Telegraph* of 22/2/2013, p. S10).

It should be said immediately that the Sports Betting Integrity Unit within the Gambling Commission has never had a case involving rugby union come to them since it was created three years ago, but there is a widespread desire within the game's governing body to avoid any sense of complacency. In the words of an RFU spokesman:

*“There is no suggestion that the integrity of any match is in doubt but it is important that everyone involved in the game is vigilant. In partnership with Premiership Rugby and the Rugby Players Association we are developing long-term strategies in this area and we already have integrated education and preventative programmes in place.” (Ibid)*

The RPA has been engaged in a player education programme for the past three years, and this season have introduced new module and test for every registered professional player.

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## SNOOKER

### Stephen Lee accused of match-fixing (UK)

The world of snooker is not entirely impervious to the threat of corruption and match-fixing, as previous issues of this organ can attest. Nevertheless, it came as a huge shock to the world of the baize green

table when it was learned that leading player Stephen Lee had been charged with breaches of betting rules in the sport's biggest ever “fixing” case. One of the games under scrutiny came in the 2009 World Championship when Lee was beaten 10-4 by Ryan Day in the first round.

Lee had been under investigation by the West Midlands Police and the Gambling Commission until last October. The Crown Prosecution Service (CPS) announced at the time that it would not be proceeding with criminal charges against the former world No 5, from Trowbridge in Wiltshire. However, the disciplinary arm of the World Professional Billiards and Snooker Association (WPBSA) swiftly launched their own investigation and Lee was suspended pending the outcome. The governing body then charged Lee with offences at four tournaments. Meanwhile, a further probe into a Premier League match last year continued (*Daily Mail* of 15/2/2013, p. 76).

In the spotlight are two matches at the 2008 UK Championship, four at the Malta Cup in the same year, and one each in 2009 at the Crucible and the China Open. The charges are understood to relate to both correct-score fixing in matches, and individual frame-fixing. Mr. Lee lost three of four group stage matches at the 2008 Malta Cup. At the UK Championship later in the year, he beat Stephen Hendry in the first round and Mark King in round two before losing to Shaun Murphy in the quarter-finals. He was beaten 5-1 by Mark Selby in the first round of the 2009 China Open, and lost 10-4 to Day in his World Championship

opener at the Crucible.

Snooker's disciplinary body have decided not to deal with the charges in-house and the independent Sport Resolutions is expected to hold a tribunal within the next few weeks. Lee remains suspended until the conclusion of any hearing, which had not yet been fully completed at the time of writing (see below). The suspension came at a time when Lee has successfully resurrected a career that previously looked to be in decline. This is the highest-profile “fixing” case since the John Higgins affair three years ago, fully related in these columns, when he was alleged by a newspaper to have agreed to lose frames for money. It will be recalled that, at his tribunal, Higgins was found guilty of breaching minor betting rules, banned for six months and fined £75,000, but he was cleared of all match-fixing charges (*Ibid*).

Nigel Mawer, a former Metropolitan Police Detective Chief Superintendent and the chairman of the WPBSA disciplinary committee, led the investigation into Lee's alleged practices. He commented:

*“Where the case is sufficiently serious, and a player's livelihood is at stake, the WPBSA can use an independent body to hear the case. As the man having undertaken the investigation, I also would have ruled myself out from sitting on the panel had we conducted this in-house” (Ibid).*

A statement from Mr. Lee's solicitors said that he denied all the allegations brought against him by the WPBSA. It added that he was 'gravely

disappointed that a decision has been taken to bring proceedings against him' and was determined to clear his name. Since then, Mr. Lee has attempted to enter the World Championships held in April, but was unsuccessful in his attempt. His hope that the case could be resolved before 31/3/2013, the deadline set by the organisers, could not be realised (*The Times of 21/3/2013, p. 53*).

It was subsequently learned that the investigation into one of the fixtures under investigation – ironically enough one which pitted Lee against John Higgins – has now been discontinued. However, the inquiry into the other matches continues ([www.bbc.sport/0/snooker](http://www.bbc.sport/0/snooker))

Your correspondent obviously await the outcome of this case with keen anticipation.

the Tour. He had won the post despite having featured as a central figure in an investigation mounted by BBC2's current affairs programme Newsnight into claims of secret payments amounting to at least \$9 million to manipulate the Olympic boxing tournament so that two Azeri boxers would win gold. The new Chief Executive has described the allegations as "absolute lie", whilst a report by the International Boxing Association found that they were "groundless and not supported by any credible evidence" (*The Daily Telegraph of 8/12/2012, p. S15*).

There were no further developments to report at the time of writing. **IBSL**

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## GOLF/BOXING

### **Ladies' Tour chief embroiled in boxing match-fixing allegations**

The recently-appointed Chief Executive of the Ladies' European Tour is Ivan Khodakakhsh, from Azerbaijan. He has suffered an unhappy start to his career by being embroiled in allegations of attempting to fix gold-medal boxing bouts at the London Olympics. Mr. Kodakakhsh was the unanimous choice of the Tour's board from over 100 applicants. Karen Lunn, the Chair of the Ladies' Tour, stated her belief that his "vision, commercial expertise and experience in a number of sports" would be a huge asset to

# SPORT AND LAW

## JOURNAL REPORTS

### (2013) SLJR1

Data protection – Disclosure – Norwich  
Pharmaceutical orders – Proportionality

#### RUGBY FOOTBALL UNION v CONSOLIDATED INFORMATION SERVICES LIMITED (FORMERLY VIAGOGO LIMITED) (IN LIQUIDATION)

**Supreme Court, Lord Kerr; Lord Phillips; Lady Hale;  
Lord Clarke; Lord Reed, 21 November 2012**

##### Facts:

The appellant (V) appealed against a decision of the Court of Appeal (*Rugby Football Union v Viagogo Ltd* [2011] EWCA Civ 1585, [2012] 2 C.M.L.R. 3) (also reported in (2011) SLJR 1), upholding the granting of a Norwich Pharmaceutical order in favour of the respondent (R). R was the governing body for rugby union in England and issued tickets for matches played at the Twickenham stadium. Pursuant to its policy of developing the sport, it distributed tickets to certain approved bodies and placed restrictions on their onward sale. In particular, it stipulated that the resale of a ticket at more than face value would constitute a breach of contract. V operated a website on which tickets for various events, including rugby matches at Twickenham, were offered for sale. Sellers anonymously registered tickets for sale on the site and V received a percentage of the price paid. When R discovered that the site had been used to advertise thousands of Twickenham tickets at prices far in excess of their face value, it obtained a Norwich Pharmaceutical order requiring V to disclose the identities of those involved in the sale and purchase of the tickets. V appealed, arguing that the order was a disproportionate interference with the rights of potential wrongdoers under the Charter of Fundamental Rights of the European Union art.8. The Court of Appeal found that any such interference was proportionate in light of R's legitimate aim of obtaining redress for the arguable wrongs. V submitted that in assessing whether the order was proportionate, the court had to ask itself whether obtaining information about a particular person who had sold a ticket at more than face

value would benefit R to an extent that outweighed that individual's right to have his personal data protected from disclosure.

##### Held (Appeal dismissed).

(1) Many of the factors to be considered in the making of a Norwich Pharmaceutical order were also relevant to the question of whether such an order was proportionate under art.8 of the Charter. Although the Charter bound Member States only when they were implementing EU law, that phrase was to be interpreted broadly, and R accepted that in the instant case, the court making the order had been implementing EU law. When dealing with an application for disclosure of personal data, the court had to weigh the potential value to the party seeking disclosure against the interests of the data subject, *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU (C-275/06)* [2008] All E.R. (EC) 809 considered. However, V's argument went further, suggesting that the court had to assess only the potential benefit to R of obtaining information about particular individuals, and that it was not to consider the value of that information in its broader context. On that argument, the fact that obtaining the information might deter others from selling or buying overpriced tickets could not be taken into account. That approach was somewhat artificial, and it was unrealistic to disregard R's overall aim of discouraging people from selling tickets at prices in excess of their face value. There was nothing in *Promusicae* to support the restriction contended for by V, and nor did *Bonnier Audio AB v Perfect Communication Sweden AB (C-461/10)* [2012] 2 C.M.L.R. 42 support its argument, *Bonnier* considered. Clearly, the court had to consider the facts of each case, but that did not mean ignoring their possible impact on issues going beyond their significance to the individual whose data was sought. There was no reason to disregard the wider context. R's desire to prevent the sale of tickets at inflated prices was intimately connected to its Norwich Pharmaceutical application, and the ability to demonstrate that those selling or buying overpriced tickets could be detected was a legitimate aspiration justifying disclosure. While Arnold J had, in

*Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 (Ch), [2013] E.M.L.R. 1, correctly stated the proper approach to proportionality, its application to the instant case did not, as V suggested, lead to the conclusion that the order should be refused. An “intense focus” on the rights claimed in individual cases did not mean that the individuals affected by the granting of the order would have been unfairly or oppressively treated. All that would be revealed was the identity of those who sold and bought tickets in breach of R’s terms, *Goldeneye* considered. R’s entirely worthy motive in seeking to maintain the price of tickets at a reasonable level was in the interests of everybody who wanted to watch international rugby matches, and the only possible outcome of the weighing exercise was the granting of the order sought. The Court of Appeal might, in the instant case, be said to have somewhat overstated the position when it suggested that it would “generally be proportionate” to make an order where there was arguable wrongdoing and no other means of identifying the wrongdoers. However, it had not expressed that to be a presumption in favour of the grant of an order. The particular circumstances affecting the individual whose personal data would be revealed would always call for close consideration and might, in some limited instances, displace the interests of the applicant even where there was no immediately feasible alternative way for him to obtain the information. In the instant case, though, the impact on the individuals could not possibly offset R’s interests (see paras 18, 28, 32, 36-37, 40, 45-46 of judgment).

**Comment:**

The decision of the Supreme Court in the RFU case provides a welcome re-statement of the factors to be taken into account when deciding whether disclosure is necessary and proportionate. It is now clear that the key question is whether disclosure is necessary and proportionate in all the circumstances.

Going forward, because of the ability to look at the broader context, the decision may mean that it is easier for a wronged party to obtain *Norwich Pharmacal* relief.

Had the argument put forward by Viagogo that the court should not take the broader context into account succeeded, this would almost certainly have meant that Norwich Pharmacal orders were limited to only the most serious of cases. On the contrary, Lord Kerr stated in his judgment that the interests of the alleged wrongdoer might only “... in some limited instances, displace the interests of the applicant for the disclosure of the information even where there is no immediately feasible alternative way in which the necessary information can be obtained” (see paragraph 46, my emphasis).

As mentioned above, it is also clear from the judgment that any form of redress will suffice as grounds for an application for a *Norwich Pharmacal* order. The principle may therefore apply in a broad range of contexts, including arbitrations, compensation schemes and disciplining employees.

But the court did not address the further potential reaches of *Norwich Pharmacal* relief. In at least one case, *P v T Ltd* [1997] 1 W.L.R. 1309, a *Norwich Pharmacal* order was granted where the claimant was unable to prove wrongdoing at all. Also in *Ashworth v MGN* [2002] 1 W.L.R. 2033, the House of Lords saw no reason why a *Norwich Pharmacal* order could not be granted to identify the perpetrator of a crime to the victim. The legitimacy of these extensions of the Norwich Pharmacal regime thus remains somewhat uncertain.

Also, interestingly, following certain phone hacking cases (for example the claim brought by Hugh Grant and Jemima Khan) in which the court ordered disclosure against the Metropolitan Police even though they were not mixed up in the wrongdoing, the Supreme Court did not tackle this issue. This was probably because Viagogo was by comparison with other situations, significantly mixed up. Indeed, it was not disputed that the sale of tickets in the manner facilitated by Viagogo itself arguably constituted an actionable wrong. The Supreme Court did however quote the requirement from the original Norwich Pharmacal case seemingly approvingly. This is

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arguably therefore still a requirement, although it is submitted that this factor may be superfluous, the more pertinent consideration being whether the third party is in possession of the information in question.

As far as the international context, in *Case C-275/06 Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008] 2 C.M.L.R. 465, the Court of Justice of the European Union held that European data protection laws neither required or prohibited disclosure in the form of Norwich Pharmacal orders. In particular, the absence of such disclosure orders in Spain was held not to be contrary to European law. That means that there is a significant potential litigation advantage to claimants in relevant cases to bring cases in England and Wales over jurisdictions where such orders are not available.

This case shows that that advantage remains pretty much fully in force unabated by any implicit dilution by means of Article 8 of the Charter or any other provision.

**Reporter: Louise Lambert, Senior Associate, Olswang Solicitors**

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**(2013) SLJR2**

Actual authority - Admissions - Fixed-term contracts of employment - Football clubs - Penalty clauses - Usual authority

**BERG v BLACKBURN ROVERS FOOTBALL CLUB & ATHLETIC PLC**

**Chancery Division District Registry (Manchester),  
Judge Pelling Q.C., 29 April 2013**

**Facts:**

The applicant football club (B) applied to withdraw an admission of liability to pay £2.25 million claimed by the respondent former club manager (H). H had negotiated a service agreement with B's managing director (S) to last for a fixed period of approximately three years. It was common ground that S was actually authorised to negotiate and conclude a contract with H, but B contended that the negotiations had been on the basis

that the owners' approval was necessary before completion. A clause in H's service agreement stated that his employment was to continue subject to the remaining terms of the agreement. Subsequent clauses provided that B was entitled to terminate the agreement with immediate effect, provided that it paid the unexpired balance of the fixed period. B terminated the agreement six months after it began but did not pay the £2.25 million allegedly due. B filed a formal admission of liability to pay but then sought to withdraw it, invoking the court's discretion under CPR r.14.1(5). It was B's case that H ought to have known the owners had to authorise the contract. Evidence was led that it was proper for a manager to accept that a managing director had authority to offer the terms they were offering. The issue was whether B would have a realistically arguable defence if it were allowed to withdraw its admission. B submitted that (1) the clause was arguably a penalty and was unenforceable beyond the sum representing H's actual loss; (2) S did not have authority to enter into a contract other than on the basis set by the owners, which was allegedly that it was terminable on 12 months' notice and that compensation for early termination was capped at 12 months' salary.

**Held (Application refused).**

(1) It was not realistically arguable that the clause was a penalty. A sum of money payable under a contract on the occurrence of an event other than a breach of a contractual duty owed by the paying to the receiving party was not a penalty, *Bridge v Campbell Discount Co Ltd* [1961] 1 Q.B. 445 and *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 1 W.L.R. 399 considered. The clauses meant that termination of H's employment prior to the expiry of the fixed term did not constitute a breach of contract and so the law relating to penalty clauses was entirely immaterial. Given the effect of the express terms, it was not arguable that the clause should be construed as being a disguised or hidden penalty clause (see paras 33-34 of judgment). (2) There was no evidence that H was ever aware that S's authority was restricted in the manner suggested. By appointing S to be the managing director, he had been held out as having the usual authority of someone holding that office. It was unarguable to suggest that B's managing director did not have implied or usual authority to sign employment contracts (paras 37-39).

**Comment:**

The case was decided on the matter of it not being realistically arguable that a clause requiring a football club to pay a dismissed manager the unexpired balance of the fixed period of a contract of employment upon termination was a penalty clause where that sum of money was payable on an event that was not a breach of contract, namely a termination clause that was within the service agreement.

Directors of a company, here a football club, will generally be held to have some form of authority to enter into a commercial contract with a party (whether this is actual, apparent or usual authority), even if they don't have the express consent of the relevant decision-makers in the matter. This supports the commercial flexibility and decision-making of businesses but company directors should be careful not to over-extend themselves when making important and potentially costly commercial decisions.

This case also provides some useful guidance as to the impact of the amendments aimed at streamlining the civil litigation process and keeping costs in proportion. The major impetus for these changes has been the review of civil costs conducted by Lord Justice Jackson. The amendments in the CPR with Rule 1.1, provides that the overriding objective is supplemented to make it clear that not only must cases be dealt with justly, but also 'at proportionate cost'. This is likely to have a significant impact on the approach taken by the court in applications for permission to withdraw from admissions which will now be approached by courts much more rigorously than perhaps has been the practice in the past, particularly where formal admissions are made on behalf of parties represented by experienced and specialist professional advisors.

In this case, HH Judge Pelling QC refused the defendant application for permission to withdraw an Admission dated 1st March 2013 by which it has admitted liability to pay £2.25 million claimed by the Claimant ("Mr. Berg") to be due to him under the terms of his contract of employment with Blackburn. This was primarily on the grounds that the asserted defences were not realistically arguable, and therefore no useful purpose was served by permitting the Admission to be withdrawn. However he noted:

"On 1st April 2013, the Overriding Objective was radically amended. It now places emphasis not merely on the need to deal with cases justly but to do so at proportionate cost, expeditiously, to enforce compliance with the Rules and orders and to allot to each case an appropriate share of the Court's resources. This amendment of the overriding objective is likely to have a significant impact on the approach to be adopted to applications of this kind, which will now be approached by courts much more rigorously than perhaps has been the practice in the past, particularly where formal admissions are made on behalf of parties represented by experienced and specialist professional advisors. (Paragraph 29)

**Reporter: SG**

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**(2013) SLJR 3**

Football matches - Special police services - Stadiums

**LEEDS UNITED FOOTBALL CLUB LTD v  
CHIEF CONSTABLE OF WEST YORKSHIRE**

**Court of Appeal (Civil Division), The Master of the  
Rolls; Lord Justice Moore-Bick; Lord Justice  
McCombe, 07 March 2013**

**Facts:**

The appellant police appealed against a decision that they were not entitled to charge the respondent football club (L) the costs of policing and crowd control carried out before and after football matches on land which was in the immediate vicinity of L but which was not owned by it. L had requested that the police provide policing services within its stadium and in the areas immediately outside the stadium that were owned or controlled by it and had also requested police services for certain identified streets and public areas beyond the stadium and the areas owned or controlled by L, which were known as the extended footprint. L had always accepted that the police services provided within its stadium and in areas immediately outside the stadium that it controlled were special police services within the Police Act 1996 Pt I s.25. The issue was whether the police services provided in the

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extended footprint, which included public highways, a number of residential streets and other public areas such as car parks, were also special police services under the Act. The judge found that the services provided in the extended footprint were not special police services, but were police services provided in discharge of their ordinary public duty to prevent crime and protect life and property for which they were not entitled to charge L.

**Held (Appeal dismissed).**

The West Yorkshire Police were not entitled to charge Leeds United Football Club for the cost of public order policing and crowd control outside the immediate vicinity of the club premises on land that was neither owned nor controlled by the club as the services provided were not special police services within the Police Act 1996 Pt I s.25. The instant case was concerned with the provision of police services to maintain law and order at and in the vicinity of a football stadium owned by a club whose supporters had a poor record for football-related violence. No doubt most of their supporters were law abiding and they did not lose their status as members of the public when they came to a match at L's stadium. The police had a duty to maintain law and order and to protect them and their property when they approached and left the stadium. In *Harris v Sheffield United Football Club Ltd [1988] Q.B. 77* the instant court held on the facts that the duty did not extend to providing the police protection within the land owned and controlled by the club. But it did not follow from that decision that the public duty imposed on the police did not extend to providing protection on public land in the vicinity of the land owned and controlled by L. Their most important duty was to maintain law and order and protect life and property. If the police considered that the discharge of that duty required the provision of policing in a public place, it was difficult to see why that was not the end of the enquiry. The provision of other policing services in public places raised different considerations. Although the provision of police protection in the extended footprint was predominantly for the benefit of L and its customers, the benefit test was of limited value and it had never been suggested in previous case law that the benefit test was conclusive. The policing of the extended footprint on match days was provided in order to maintain law and order and protect life and property in a public place and that was not different in principle from the law and order

services that the police provided in any other public place, *Glasbrook Bros Ltd v Glamorgan CC [1925] A.C. 270* and Harris considered (see paras 42-45 of judgment).

**Comment:**

This case is of wider importance in that it is applicable to other football clubs (who have been watching the case develop eagerly), other sporting events where there is a police presence (such as horseracing and cricket) and potentially other large public events such as festivals for which the police currently charge or have aspirations to charge. Another likelihood is that those entities previously charged on a "footprint" basis will be entitled to a rebate.

It restores the position as understood between the parties before the decision of Mann J in *Greater Manchester Police v Wigan (2007)* – see SLJR \*\*\*\*\*. It provides a fair balance between what Clubs have to pay for and what are the legitimate commands on the public purse bearing in mind that football is a public activity. It curtails the land grab (and indeed cash grab) that constabularies engaged in post Wigan. Finally, it provides much needed clarity to help govern the relations between football clubs and police forces going forward. ■ **BASL**

**Reporters: Mark Gay and Chris Davies**

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