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Survey

SURVEY: A GLOBAL PERSPECTIVE ON THE MOST IMPORTANT CASES AFFECTING THE SPORTS INDUSTRY*

HAYDEN OPIE**

I. INTRODUCTION

This article recounts some of the most important foreign cases

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affecting the sports industry from 2006 to early 2007.¹ Its scope is necessarily broad. While hundreds, perhaps thousands, of court cases each year touch on sports, only a small number directly impact the industry in an adverse or constructive manner. Cases may be important because they:

1. Create new legal rules or clarify the meaning of existing rules;
2. Resolve disputes, which have wide repercussions either administratively or commercially, between influential organizations or individuals;
3. Have major legal significance in a local jurisdiction but little sports industry relevance elsewhere; or,
4. Involve celebrity clients extensively covered by the news media.

Due to the sheer number of sport-related cases originating from countries all over the world and varied legal standards between these jurisdictions, it is not possible to address every country that has issued an important sports decision.² This article reflects on selected themes and issues rather than listing decisions by particular sports or countries, including corruption, criminal law aspects of doping, liability for physical injury, employment disputes, anti-competition violations, commercial arrangements and alternative dispute resolution methods. In the past twelve to eighteen months, several fraudulent incidents have confronted international courts.

II. CORRUPTION, BRIBERY, MATCH-FIXING AND GAMBLING
Betting on Soccer in Vietnam³

During the 2005 South East Asian Games in the Philippines, the heavily favored Vietnamese U/23 football team defeated Myanmar 1-0. After the deciding goal in the second half, the pace of

¹ “Cases” refers to decisions and judgments of courts of law, although other forms of legal regulation and relief such as arbitration, mediation and administrative direction are referenced. Developments in the USA were reported in a separate paper delivered to the SportAccord conference by Professor Gary R. Roberts, then of Tulane University Law School and now Dean of Indiana University School of Law, Indianapolis.

² Unlike common law countries (e.g., Canada, India, U.K., USA) that have traditions of stare decis and extensive publication of judicial opinions, civil law systems place less reliance on judicial precedent and report their judgments in a limited manner. For example, the People’s Republic of China’s preferred method of resolving legal disputes is administrative action rather than criminal or civil judicial proceedings.

the game noticeably dropped. Subsequent investigations revealed that one player, Le Quoc Vuong, had conspired with a bookmaker and other team players on the team to orchestrate a one-goal victory in return for payments to Mr. Le and the other players ranging from one to two thousand dollars. On January 26, 2007, the Criminal Court of Vietnam sentenced Mr. Le to six years imprisonment. The six other players involved each received probationary sentences of between two to two-and-a-half years imprisonment because they were regarded as less culpable. Additionally, the Court confiscated all illegal payments to the players and imposed fines. The conspiring players saw nothing wrong with the scheme as long as their team won. This behavior is not uncommon, as the Vietnamese police have uncovered many instances where referees and team players have been bribed to induce a specific outcome. Nevertheless, those caught have faced conviction and imprisonment.

Betting on Soccer in Singapore

Another soccer bribery case occurred on April 10, 2007 in Singapore’s S-League, the professional soccer league. Chow Kwai Lam, a coach in the S-League, and the retired coach of the Malaysian national football team, was prosecuted by the government for bribing his S-League goalkeeper. The prosecution accused Mr. Chow of bribing his former goalkeeper to allow the opposition to score two or three goals. The court rejected Mr. Chow’s defense that his actions were only a test of the goalkeeper’s susceptibility to bribes and found him guilty. While Mr. Chow was fortunate to avoid a lengthy sentence, he was fined in excess of thirty three thousand dollars.

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Horseracing in Hong Kong

A Hong Kong District Court sentenced Australian horseracing jockey, Chris Munce, to thirty months imprisonment for supplying tips in exchange for $500,000. No facts alleged or established that Mr. Munce sought to fix the results of races.

Italian Soccer Scandal

In Italy, there have been extensive reports on the "calciopoli" incident. Series A soccer clubs Juventus, Fiorentina, Lazio and AC Milan were punished for attempting to influence the appointment of referees. Juventus was stripped of the championship for 2004-2005 and 2005-2006 and relegated to Serie B. The other clubs suffered a deduction of points. Additionally, the prominent and influential former general manager of Juventus, Luciano Moggi, was banned for five years. As of the writing of this article, criminal investigations are ongoing.

German Soccer Scandal

In Germany, Robert Hoyzer, a second division referee, was convicted in November 2005 of various offences related to match fixing and betting. The court sentenced him to two years and five months imprisonment. Accomplices received various punishments ranging from imprisonment to suspended sentences. The Court rejected Hoyzer's appeal on December 15, 2006.

The foregoing selection of incidents of improper behavior in a number of countries signals the essential need for forward-thinking in order to identify threats to the integrity of match results. In particular, the author makes two suggestions. The first observation echoes a statement by Michele Platini, President of the Union of


7. See Bribed Referee Sent to Prison, INT'L HERALD TRIB., Nov. 17, 2005, http://www.iht.com/articles/2005/11/17/sports/REF.php (highlighting Hoyzer's offenses and punishment); see also Richard Milne, Referee Makes Watchdogs' Hearts Flutter, FIN. TIMES, Jan. 28, 2005, http://www.ft.com/cms/s/06f47d0c-716111d9a5d600000e2511c8.html (explaining how Germany was so embarrassed by Hoyzer's actions that it changed its referee rules to try to prevent gambling; German referees will now know what games they referee only two days before match).
European Football Associations ("UEFA"), in March 2007 calling for a special international police force to deal with sports-related crowd violence.\(^8\) Perhaps it is time for sport to also explore the creation of special task groups (either within sport or in government) to investigate alleged incidents of match-fixing and improper gambling. Second, there has long been the potential for unscrupulous people to interfere with food and drink supplied to athletes with intent that athletes are disqualified for breach of anti-doping rules. More needs to be done to protect the innocent from such sabotage.

III. RELATIONSHIP BETWEEN SPORT AND THE STATE

FIFA Suspensions\(^9\)

Certain sporting disputes involving the state are not easily or appropriately resolved by a court of law. An international federation may have the upper hand over a national government. Over the past year, the Fédération International de Football Association ("FIFA") temporarily suspended a number of its affiliated national members for contravention of article 17 of the FIFA Statutes because their independence had been compromised by government action. The suspended affiliated members include Greece, Iran and Kenya. The Greek Parliament quickly passed legislation granting the Hellenic Football Federation ("HFF") wide powers of self-regulation regarding "all the subjects of functioning and organization of the sport [of football]," whereupon FIFA lifted the suspension. Notably, the Greek Parliament's response went further than necessary for compliance with the FIFA framework.


Indonesian Tennis Federation

National governments often have greater authority when disputes arise between governments and national sporting bodies. In 2006, the Indonesian government instructed the Indonesian Tennis Federation not to participate in a Federation Cup match against Israel. This instruction was allegedly in protest of Israel's heighten ed military actions in the Gaza Strip. In March 2007, the International Tennis Federation fined the Indonesian body $29,100 for its withdrawal. The Indonesian Tennis Federation requested that the Indonesian government pay the fine but the Indonesian government resisted. After intense international pressure, the Indonesian government finally agreed to pay the costs.

Australian Cricket Authority

In 2007, the Australian government pressured Cricket Australia, the national governing body for cricket in Australia, to cancel the Australian national team's tour of Zimbabwe, following the team's World Cup victory. Nonetheless, Cricket Australia seemed prepared to honor their contractual obligations to tour, as a voluntary withdrawal would require payment of two million US dollars in liquidated damages under the International Cricket Council's Members' Agreement regarding scheduling of matches. The Australian government then ordered the Cricket Australia to cancel the tour. Under the Members' Agreement, the government directive constituted force majeure and relieved the Cricket Australian of liability to pay compensation.


IV. DOPING

Spanish Cycling

With the successful implementation of the World Anti-Doping Agency ("WADA") Code, the testing of athletes and the imposition of sporting disciplinary sanctions have become routine, if not mundane, in all but a small number of cases. Criminal justice systems are becoming more concerned with doping, increasing scrutiny on suppliers of prohibited substances and other complicit individuals. In Spain, Operación Puerto (Operation Mountain Pass) led to the police seizure of substantial quantities of frozen blood and doping substances linked to the sport of cycling. More than fifty elite professional cyclists, some Spanish doctors and others were suspected of engaging in blood doping, resulting the dismissal of some riders from their teams and the loss of individual sponsorships.

The Spanish authorities decidedly public investigations have impacted several riders. Despite his personal belief that blood doping had taken place, Judge Antonio Serrano ended the investigation because Spanish anti-doping criminal laws under which it was proposed to lay charges had not come into force at the time. Although other laws concerning endangering public health were applicable, the judge concluded there was insufficient evidence of any serious risk. The prosecutors have appealed the decision. The International Cycling Union and WADA have investigated and may use court file material to instigate sporting disciplinary proceedings. WADA will appeal the decision to cease the investigation.

Doping in Italian Soccer\textsuperscript{13}

In November 2004, a Juventus team physician, Dr. Riccardo Agricola, was convicted of administering the prohibited substance, EPO, to Juventus players in the late 1990s and was given a twenty-two month suspended sentence. A Turin appeal court revered the decision in December 2005. A further appeal by prosecutors to Italy’s Court of Cassation, was dismissed in March 2007 with the judges ruling that the statute of limitations for the charges had expired.

Frank Vandenbroucke’s Doping Charges\textsuperscript{14}

Athletes who tested positive for illicit substances such as heroin, cocaine, amphetamines and marijuana face different criminal issues. Under the criminal laws of many countries the possession or use of these substances is unlawful.

In July 2002, Belgian cyclist Frank Vandenbroucke received a six-month suspension from cycling by a disciplinary commission established under a public decree in the Flemish region of Belgium, which prohibits doping activities in all sports. This proceeding arose from a police raid on his home, in Flanders, that uncovered the doping substances morphine, clenbuterol and EPO. Subsequently, Mr. Vandenbroucke was charged under a national criminal law against drug possession. The latter case has had a long journey through the Belgian courts.

In 2004, the Dendermonde Correctional Court ordered that Mr. Vandenbroucke provide two hundred hours of community service. In June 2005, the Ghent Court of Appeal varied the punishment to a fine of two hundred and fifty thousand Euros, but in


February, the Hof van Cassatie quashed the conviction and remanded the case to a second Court of Appeal. In March 2007, the acquittal was affirmed. The Court of Appeal ruled that because Mr. Vandenbroucke had been punished under the regional Flemish decree, he could not be punished again for the same offence under the national general law relating to drug possession as a result of the prohibition against double jeopardy. Problematically, the Flemish anti-doping decree imposed a lighter sentence (suspension from sport) than the national law (potential imprisonment). Consequently, there is concern that in states using public laws to specifically punish sports doping by athletes (to be distinguished from the private anti-doping rules made by sports organizations), the punishment for sports doping may be lighter than the general criminal law for drug possession or use applying to all citizens.

This relatively lenient sanction might be viewed as undesirable, and thus, further harmonization is needed. At the very least, there should be greater awareness of the issue when devising public anti-doping laws. The problem is whether athletes should be categorized as separate from general citizens in illegal drug crimes.

_Australian Football League v. The Age Company Ltd._15

The leading professional league in the popular sport of football is the Australian Football League ("AFL"), which also acts as its governing body. It has considerable independence because, as a purely Australian organization, it is not subject to the jurisdiction of international sporting authorities. The AFL’s course of dealing with players who tested positive for illicit drugs was confidential medical treatment on the first two occasions, but public exposure and suspension on the third. Some commentators favor this approach because it seeks a solution through rehabilitation and that addicted persons are not deterred by punishment. Others see the response as insufficient.

This approach did not comply with the WADA Code that prohibits use of illicit drugs during competition, but not outside. Under pressure from the national government the AFL complied with the WADA Code, but it persisted with its preferred approach in its out-of-competition testing. This issue remains prevalent in the media and the identity of three players who tested positive twice was leaked. The League and the players union successfully obtained a court injunction restraining further publication on the ba-

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sis of confidentiality. The court also ruled that a positive analytical test alone was insufficient proof of illegal possession or use as to create a public interest in having the information revealed.

Sun Yingjie’s Doping Lawsuit

The WADA Code imposes liability for the presence of any prohibited substance in an athlete’s bodily specimen taken for testing. In a small but significant number of cases, the blame can be placed at least in part on someone other than the athlete. Nevertheless, an athlete in these circumstances faces disqualification of results if the specimen is taken during competition. The athlete also faces the limited prospect of obtaining a reduced period of ineligibility. The consequential losses for the athlete may be severe. Accordingly, civil proceedings against the person at fault to recover the losses might be considered.

Chinese long-distance runner Sun Yingjie tested positive to androsterone at the Tenth National Games and was made ineligible for an “indefinite” period. In civil proceedings in Dalian within Liaoning Province, a court found that another athlete had laced Sun Yingjie’s drink the day before with androsterone. The other athlete claimed to be “helping” her. Sun Yingjie won the lawsuit and was entitled to a public apology, compensation of $3,750 and legal costs.

V. Injuries

Criminal Liability

While law enforcement authorities in most countries are content to leave incidents of on-field violent conduct to the disciplinary processes of sport, occasionally cases come before the criminal courts. In South Africa, two rugby players, Ben Zimri and Wayne Matthee, are facing murder charges arising from the death of an opponent who was the victim of a ‘stiff-arm tackle’ and a kick to the


head. The case has sensitive racial overtones because the victim was from a predominantly white club, and the accused was from a predominantly non-white club. Also, in England, James Cotterill was sentenced to four months' imprisonment for striking an opponent and breaking his jaw behind the play during a Football Association Challenge Cup ("FA Cup") match.

Civil Liability

The number of cases concerning liability for injuries to sports participants continues to grow. New areas of responsibility have emerged. Some concern unsafe facilities and bad coaching with liability placed on schools,18 activity organizers and venue operators.19 These developments were followed by cases involving claims between players.20 Objection was taken to deliberate foul play and exceptional carelessness.21 Current players are less willing to accept serious injury as part of the game. These changes in attitude stem largely from monetary losses incurred from injury in professional sports and the realization that through the imposition of vicarious liability for employee players, and even the employee medical staff,22 the clubs (or their insurers) are required to pay compensation.

More recently courts have allowed increasingly exotic claims. One such example is the liability of the referee.23 Also, there have


even been attempts to hold the governing bodies of sports liable for not amending the rules of their games to remove unnecessary risks.\textsuperscript{24}

In \textit{Resurface Corp. v. Hanke},\textsuperscript{25} the operator of an ice-resurfacing machine (\textit{e.g.}, a "Zamboni") at an Edmonton ice-rink was severely burned by an explosion of vaporized gasoline. Hanke mistakenly placed hot water into the machine’s fuel tank rather than its water tank, but he alleged that the two tanks were located close together and easily confused. The Supreme Court of Canada, however, rejected his claim against the machine’s manufacturer and its distributor and upheld the trial judge’s ruling that; in essence, the explosion was caused by Hanke’s own carelessness.

Professional clubs have increased their efforts to shift the risks of injury to secondary liable parties. This is primarily accomplished through insurance and litigation, but commercial arrangements are also relevant. It is now commonplace for professional sports player unions and agents to secure promises from clubs that injured players will continue to receive payment while injured and that their medical expenses will also be paid. The level and duration of such payments can vary widely depending on the circumstances. The consequence is that to greater or lesser degree the clubs and leagues bear the financial cost of player injury. Added to this cost is the effect of deprivation of a player’s services which may not be fully replaceable and, in the event of long-term injury, the loss of capital value of the unused portion of the player’s contract if it could have been traded.

\textbf{Martin Dahlin and Blackburn Rovers Football}\textsuperscript{26}

Two recent cases concerning English Premier League clubs illustrate the importance and complexity of risk sports injury cases. An insurance claim by Blackburn Rovers concerning an injury to a very successful Swedish international striker, Martin Dahlin, has had a long journey through the English Courts. Mr. Dahlin, signed by Blackburn Rovers a few months earlier, was chasing a ball in a

\textsuperscript{24} See, \textit{e.g.}, Agar \textit{v.} Hyde (2000) 201 C.L.R. 552 (Austl.) (International Rugby Football Board did not owe a duty of care to participants to amend rules of play to remove unnecessary risks of injury); Watson \textit{v.} British Boxing Bd. of Control Ltd. [2001] Q.B. 1134 (U.K.) (BBC liable in negligence for not ensuring that its rules for the conduct of boxing matches required boxing match promoters to have resuscitation equipment at ringside).

\textsuperscript{25} [2007] 1 S.C.R. 333, 2007 SCC 7 (Can.).

practice match. He suffered injury during a legal tackle, which resulted in Mr. Dahlin falling awkwardly and sustaining a back injury. His ability to play never recovered. One witness said that he ran as if he had an "ironing board pushed down his pants." He retired about a year after the accident.

Avon Insurance had agreed to indemnify Blackburn Rovers against losses the club might incur as a result of disabling bodily injury to Mr. Dahlin. However, under the terms of the insurance policy, a sporting accident had to be the sole and independent cause of that bodily injury. After three court judgments, Mr. Dahlin's claim failed. On retrial, the court found that Mr. Dahlin's pre-existing back condition (perhaps due to a genetic predisposition and not an earlier football injury) precluded the fall from being the sole and independent cause of his disability. With professional clubs turning increasingly to insurance to guard against losses occasioned by injuries to key players, the need to ensure that insurance policy wordings cover appropriate risks is high. The outcome in this case would most likely have differed if the policy covered accidents that were a material or predominant cause of bodily injury.

West Bromwich Albion Football Club Ltd. v. El-Safty

In another case, West Bromwich Albion player Michael Appleton injured his knee. The club referred him to a surgeon who was the team's preferred medical practitioner for that type of injury. Surgery was recommended, but the procedure proved unsuccessful and the player had to retire. The surgeon admitted to giving negligent advice and that the prescribed treatment should have been rest and physiotherapy.

The club, presumably under an obligation to make payments to Appleton, sued the surgeon. The surgeon successfully defended the club's claim by arguing that absence of a contract with the club and a duty of care precluded a claim in tort or contract. His defense turned on his patient being the player, and thus, his obligations were to the player instead of the club. The surgeon prevailed, even though the Club paid the surgeon, and the club's physiotherapist both arranged the appointment and accompanied Mr. Appleton to see the surgeon. The latter circumstance was explained as a convenient method for fulfilling the club's obligation to pay the

player's medical expenses. The Court of Appeals upheld this ruling. It is important that the surgeon was an independent medical practitioner, and not the official team doctor. The court considered that, as a matter of policy, clubs can insure against the risks better than doctors. In the meantime, Appleton won a suit against the surgeon for damages in excess of payments received from the club, such as the mid to long-term effects of the injury.

VI. PLAYER EMPLOYMENT CASES

Ai Dongmei

In China, Ai Dongmei, a champion marathon runner forced to retire through injury, is suing her former coach, Wang Dexian, alleging misappropriation of her earnings. The case has drawn attention to the legal athlete-coach relationship and to claims that the education and welfare of many athletes have been neglected. Ms. Ai has been forced to sell her athletic medals because her sports earnings are not enough and she cannot find another job.

SA Rugby (PTY) Ltd. v. Commission for Conciliation, Mediation & Arbitration

A recent South African case considered the conflicting demands of fair employment laws and team selection. A member of the national rugby team was employed on a fixed term contract. After the appointment of a new national coach, the player's contract was not renewed. South African labor law provides a legal remedy for unfair dismissal if an employer refuses to renew an employment contract where there is a reasonable expectation of renewal. The player had played regularly during the past season and, although not a star, had performed consistently well. The former coach gave no indication that his performance was unsatisfactory. Although the new coach desired to take the team in a different direction, the court held that the player had been unfairly dismissed when his contract was not renewed. The outcome of this case is dependent on unique provisions of South African law, but this case illustrates the importance of local laws' impact on increasingly mobile international athletes employment contracts.


Iban Zubiaurre, Real Sociedad and Athletic Bilbao

The movement of professional players between clubs remains a source of disputes despite intense legal and regulatory scrutiny on transfer rules in recent years. In 2006, a case from Spain demonstrated what can happen when one club without the necessary approval engages a player contracted to another club. Iban Zubiaurre, a twenty two year old football player with Primera Liga club Real Sociedad had made fourteen appearances for the club in the Primera Liga, as well as the Second Division B team in other matches, for only €10,000 in the past season. With one year remaining on his contract with Real Sociedad, rival club Athletic Bilbao announced at a media conference that Mr. Zubiaurre would be one of its players for the next six years commencing immediately. Mr. Zubiaurre’s contract with Real Sociedad provided for his release upon payment of €30 million.

In response to Athletic Bilbao’s announcement, Real Sociedad accepted Mr. Zubiaurre’s termination of his contract in accordance with the term of the early release provision and commenced court proceedings against Mr. Zubiaurre and Athletic Bilbao for €30 million. Athletic Bilbao denied liability, claiming that it did not sign a contract with Mr. Zubiaurre regardless of its announcement, and therefore was not liable for breach of contract or for interference with Mr. Zubiaurre’s employment contract with Real Sociedad. After negotiation, Real Sociedad was offered €1.2 million by Athletic Bilbao and an additional €500,000 by Mr. Zubiaurre to buy out the contract. On March 9, 2006, the court ruled that Mr. Zubiaurre and Athletic Bilbao were liable to Real Sociedad for €5 million, holding that €30 million was a penal amount with respect to the market circumstances pertaining to the player’s age, limited Primera Liga experience, low remuneration and short remaining life of the contract. Mr. Zubiaurre and Athletic Bilbao appealed with the aim of reducing the €5 million damages award to a nominal amount. Mr. Zubiaurre alleged a prior breach by Real Sociedad when it delayed payments to him and that he was an ordinary player with no special future to justify even a €5 million buy-out fee.

Athletic Bilbao continued to claim that it was not liable because it had not signed a contract with Mr. Zubiaurre. On October 17, 2006, the appellate court affirmed the lower court’s judgment.

30. See STS, 2006 (Case No. 601/05 in Juzgado de lo Social No. 1 of San Sebastian) (Spa.); see also STS], 2006 (Case No. 2058/06 in Tribunal Superior de Justicia del País Vasco) (Spa.) (affirming Athletic Bilbao’s liability to Real Sociedad for €5 million.).
holding that announcing his intent to immediately play for Athletic Bilbao while still under contract to Real Sociedad constituted breach. Additionally, the court held that Athletic Bilbao’s oral promise to Mr. Zubiaurre to offer him a six-year contract renders it liable. In effect, this decision upholds the trading market for contracted players. Real Sociedad achieved a superior financial outcome pursuing the case in court as opposed to the market rate for Mr. Zubiaurre.

VII. Appropriation and Sponsorship

Liu Xiang31

In China, the hugely popular Liu Xiang, winner of the men’s 110m hurdles at the Athens Olympic Games, brought suit against several parties for the appropriation of his image. Article 100 of China’s Civil Law provides that citizens shall enjoy the rights to their own image or portrait and that the use of a citizen’s portrait for profit without his consent shall be prohibited. On October 21, 2004, Mr. Liu’s image, an altered photograph of Mr. Liu leaping over a hurdle at the Olympic games, appeared on the front cover of a popular lifestyle magazine. Although the image was altered to place the Chinese national flag behind him and remove Olympic and trademark symbols on his clothing, Mr. Liu was clearly identified as an Olympic competitor by the competitor number on his singlet.

Mr. Liu sued the newspaper, the agency that uploaded the newspaper onto the Internet and an advertiser who advertised for a shopping festival on the same page as the picture. Mr. Liu also objected to the use of a photograph of him on page eighteen running with the national flag following his victory, used in connection with a story about important events in China in 2004. In May 2005, the Peoples’ Court in Beijing denied Mr. Liu’s claim for an injunction, an apology and monetary damages of around US$180,000, holding that as a public figure, Mr. Liu’s right to his portrait was limited. He was not entitled to object to his portrait’s use by the publisher of the magazine and the internet agency because on both occasions the portrait appeared as a news item. The claim against the adver-

tiser was also dismissed, as the advertiser did not know about the appropriation when submitting its advertisement and evidence did not suggest any link between the athlete and the advertiser’s shopping festival. With the support of the athletics authorities, Mr. Liu filed an appeal, arguing that the magazine publisher was not a public news agency licensed to report the news and therefore was not entitled to rely on the usual protection afforded the publication of images of notable personalities like Liu Xiang.

On December 15, 2005, the Beijing No. 1 Intermediate People’s Court overturned the lower court and ordered that the magazine publisher make a formal apology and pay Mr. Liu approximately US$3,000. The publisher refused to honor the ruling and Mr. Liu sought enforcement of the judgment in proceedings with the Haidian District People’s Court of Beijing, which proceeded to carry out the judgment. This case is an important ruling concerning the protection of an athlete’s personality rights and is consistent with the position commonly found in other jurisdictions prohibiting appropriation.

VIII. Competition, Anticompetition and Restrictive Trade Practices Law

Meca-Medina v. Commission of the European Communities

One of the most important recent cases is Meca-Medina v. Commission of the European Communities. It made two significant rulings. First, it upheld stringent doping penalties in the face of allegations by two professional long-distance swimmers that such policies infringed upon athletes’ economic freedoms guaranteed under Article 49 of the European Community Treaty (“EC Treaty”) and were anti-competitive in contravention of Articles 81 and 82. Second, it departed from previous rulings on the so-called “sporting exception” rulings that distinguished between economic activities and sporting activities and held that only the former were subject to the identified Articles, notwithstanding that sporting activities may have economic consequences. In making this departure, the European Court of Justice (“ECJ”) opened a path for future legal challenges to certain rules of sport, which were previously considered immune from challenge under these important Articles.

In this case, Meca-Medina and Majcen challenged their two-year suspensions under the pre-WADA Code anti-doping rules of the Fédération Internationale de Natation ("FINA") arising from analytical positives for nandrolone. In opposition to the challenge, European Commission claimed that anti-doping rules were concerned with the health of athletes and the preservation of fair play. They were, accordingly, purely sporting in nature and outside the scope of the relevant articles of the European Union Treaty ("EU Treaty"). The consequence that professional athletes may suffer financial loss was an insufficient basis for intervention. In a twist that has probably taken most commentators by surprise, the ECJ held that there was no automatic exemption for sporting activities which must still be examined against the requirements of Articles 81 and 82 in particular.

The ECJ made it clear that anti-doping rules are amenable to successful challenge under the EU Treaty:

(47) It must be acknowledged that the penal nature of the anti-doping rules at issue and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition because they could, if penalties were ultimately to prove unjustified, result in an athlete’s unwarranted exclusion from sporting events, and thus in impairment of the conditions under which the activity at issue is engaged in. It follows that, in order not to be covered by the prohibition laid down in Article 81(1) EC, the restrictions thus imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport . . . .

(48) Rules of that kind could indeed prove excessive by virtue of, first, the conditions laid down for establishing the dividing line between circumstances which amount to doping in respect of which penalties may be imposed and those which do not, and second, the severity of those penalties.

Anti-doping rules must still be examined against the requirements of the Articles. Even so, it might be expected that if a rule or action has little economic consequence, it will be unlikely to attract the adverse attention of the EC Treaty.

The ECJ has made it clear that anti-doping rules are amenable to a successful challenge under the EC Treaty. Before the ECJ, it was undisputed that nandrolone can be produced endogenously.
To avoid a positive test in such circumstances the rules established a level which had to be exceeded before an analytical positive could be returned. The athletes alleged that the level set was not scientifically well-founded. Although this argument fell within the scope of the first limb of paragraph 48, the athletes were unable to prove the alleged scientific inadequacy. As to whether the penalty of two years’ suspension was excessive, the athletes did not make any such allegation.

**Adidas-Salomon AG v. Draper**

Another case, decided only weeks before *Meca-Medina*, also had the potential to explore the role of the “sporting exception.” This English case arose in connection with the 2006 Wimbledon Tennis Championships but was part of the wider and long-running dispute over the display of Adidas’s famous three stripes on competition sportswear. Adidas sought an injunction against the four Grand Slam tennis tournaments and the International Tennis Federation to prevent implementation of new dress codes.

Adidas alleged that new the dress codes contravened Articles 81 and 82 of the EC Treaty because they were discriminatory against Adidas vis-à-vis its competitors and constituted an abuse of dominant market position. The three stripes appear as part of Adidas’ three standard logos: the trefoil, globe, and trapezoid. Also, the stripes are, in the words of Adidas, incorporated into sportswear as “distinctive design elements.” Adidas alleged that the new dress codes would preclude it from using its established distinctive design elements whereas other manufacturers would not face the same limitation in relation to design elements they use now or might use in the future.

The defendants sought to have the court strike out Adidas’s action on the basis that there was no reasonable ground for bringing it. The defendants raised a number of objections to the claim, one of which was that the dress codes were a “sporting activity,” not an economic activity. Adidas responded by arguing, “dress codes are not indispensable to individual games of tennis in the way that, for instance, rules as to the height of the net are.” The case was a pre-trial proceeding and the judge was required to decide only

whether Adidas' claim had a "real" prospect of success even though the prospect might be small. The decision favored Adidas and it was granted an injunction.

Before the case proceeded to trial, the defendants announced in October 2006 that an agreement had been reached with Adidas, Nike, and Puma upon a common standard for the use of manufacturer's identification on tennis apparel and the court action by Adidas was discontinued. The judgment of the court is still of interest because it contains a useful summary of the relevant court rulings on the European sporting exception, even though it was given before the final ruling in the *Meca-Medina* case. The judge also hinted at a preference for arguments raised by Adidas about the sporting nature of the dress code.

*Sporting Charleroi v. FIFA* 34

Another case initiated before the decision in *Meca-Medina* raises questions associated with the sporting or economic nature of sport rules and has been referred to European courts by a court in Belgium. The claim in *Sporting Charleroi v. FIFA* concerns the loss to the Belgian football club of the services of Abdelmajid Oulmers who was out of the game for eight months because of an injury sustained while representing Morocco against Burkina Faso in November 2004.

Sporting Charleroi is supported in its action by the G-14 group representing 18 of the top European clubs. The group objects to the FIFA rules and playing schedule that require the compulsory release of players to national teams without compensation and expose players to the risk of injury. It is the clubs that have to carry the insurance, which Sporting Charleroi did not have in Oulmers's case. The rule structure is challenged under EU Treaty law as unfair competition and an abuse of dominant position, with various types of declaration and compensation sought.

In a judgment delivered on May 15, 2006, the Belgian Commercial Court first determined that it had authority over the case.

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and then looked at the substance of FIFA's rule-making power. In order to have a uniform, transnational determination on the Treaty issues, the court referred the question of infringement of the EC Treaty to the European Court of Justice for a "pre-judiciary ruling" on questions, including whether the FIFA rules are purely "sporting" or have economic aspects. Aside from arguing in favor of the former, FIFA has pointed out that national associations receive most of the proceeds of international fixtures and if compensation and insurance coverage are to be provided it should be their responsibility to do so.

**New Zealand Commerce Commission**

The New Zealand Commerce Commission has authorized the New Zealand Rugby Football Union ("NZRFU") to engage in anti-competitive activity for a period of six years because a public benefit is expected. The NZRFU wished to impose a cap on clubs' spending on players' remuneration in its third tier domestic provincial competition, a semi-professional league. The first tier competition is between the national team, the All Blacks, and other countries and the second tier is the Super 14 competition between regional teams from Australia, New Zealand, and South Africa. Both the first and second tiers are fully professional.

The Commission considered that the salary cap would diminish competition in the market for player services because financially stronger clubs would be constrained in their ability to bid for players of superior quality. Nevertheless, the Commission also considered that a salary cap would spread good players more evenly between teams, leading to increased uncertainty of match and competition outcomes. Accepting a body of opinion drawn from professional team sport economics, the Commission concluded that a salary cap would result in public benefits in the form of spectator pleasure and financial support for the sports competition that outweighed the anti-competitive effects. The Commission, however, recognized weaknesses in the economic evidence and in the possible implementation of the salary cap. Therefore, among other conditions, it limited the authorization to a period of six years and insisted upon the establishment of strong regulations to enforce the cap.

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IX. COMMERCIAL CASES

Marksman Marketing Services Ltd. v. Bharti Tele-Ventures Ltd.\(^\text{36}\)

In India in February 2006, there was an interesting case concerning mobile telephone rights. In *Marksman Marketing Services Ltd. v. Bharti Tele-Ventures Ltd.*, the purported rights holder for Short Message Service ("SMS") updates for a cricket series between India and Pakistan obtained an interim injunction to restrain other mobile telephony companies from transmitting scores, alerts and updates to their subscribers. Upon an application to vacate the interim injunction, the Chennai High Court regarded the unauthorized transmissions as "pirating information" and infringing a "quasi-property right." In coming to this conclusion, the court referred to American legal authority, although it appears to have been prepared to go further in protecting the rights holder than the American courts. In any event, the interim injunction was vacated because the plaintiff was unable to prove that it was the rights holder as claimed. The case is continuing to trial, but without urgency because the cricket matches have concluded.

Indian law provides for the mandatory sharing of nationally important sports event broadcasts with the public broadcaster, Prasar Bharati. Specifically, commercial rights holders must provide a clean feed, with revenue from advertisements on the public broadcaster’s transmissions to be shared with the commercial rights holder. Not unsurprisingly, this has important ramifications for the value of rights to sports events. The validity of the law has been challenged by Nimbus Communications, which holds the rights to telecast cricket matches in India. The Delhi High Court has refused to restrain the implementation of the law for the time being and proceedings are continuing.

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X. Income Taxation

Agassi v. Robinson

In May 2006, Andre Agassi lost a significant income taxation dispute in the United Kingdom. This decision of the House of Lords means that non-resident athletes who participate in sports events in the United Kingdom may incur tax liability with respect to endorsement and sponsorship income paid outside the United Kingdom by non-resident corporations. Agassi fought a ruling that he pay tax on endorsement income received by Agassi Enterprises Inc. which he owned and controlled. The payments came from Nike Inc. for apparel and Head Sport AG for tennis racquets. Nike and Head Sport were not residents of the United Kingdom and did not carry on business there. Payments were also made outside the jurisdiction. In the taxation year in question, Agassi played tournaments in the United Kingdom during which he wore Nike’s apparel and used Head Sport’s racquets as required by the endorsement contracts.

The claimed justification for these laws is that when Agassi and athletes in the same position play in the United Kingdom they are working in the country for at least some portion of their endorsement income by using and displaying their sponsors’ products. This decision is specific to United Kingdom law, but it will add to the complexity of the tax affairs of highly mobile international athletes. The case has interesting implications for taxation policy. The dissenting opinion pointed out that foreign corporations with no connection to the United Kingdom are obligated to deduct taxation from athletes’ endorsement payments and forward it to the United Kingdom authorities merely because the non-resident athlete has played briefly in the United Kingdom. This can occur even though the athlete is unknown in the United Kingdom and the endorsement contract originates largely from local fame in a foreign country.

XI. Arbitration, Mediation and Other Dispute Resolution Mechanisms

_Sri Lanka Cricket v. World Sport Nimbus Ltd._

Occasionally, arbitrated disputes come before the courts. This is usually done to enforce or challenge the awards of the arbitrators. In _Sri Lanka Cricket v. World Sport Nimbus Ltd._, the Malaysian Court of Appeal overruled the decision of a lower court enforcing an arbitral award made in Singapore against Sri Lanka Cricket. This case arose from a dispute over a master rights agreement for broadcast, signage, advertising, sponsorship and merchandising between the cricket authorities in Sri Lanka and World Sport Nimbus and was part of litigation in a number of countries. The case exposed a gap in Malaysian law relating to the enforcement of arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention. This gap has since been filled and the underlying commercial dispute was subsequently settled. This litigation serves to illustrate the proposition that commercially significant and legally complex court cases are increasingly found in sport all around the world.

_Cañas v. ATP Tour_

In a very recent and potentially important development, the Swiss Federal Tribunal has overturned a ruling of the Court of Arbitration for Sport ("CAS") in _Cañas v. ATP Tour_. It appears that the Tribunal held that Cañas had been denied a full hearing of his case and ordered that the CAS decide the case again. The Tribunal also ruled that it would look carefully at any agreements that exclude a right of appeal to the Tribunal from the court’s decisions. It noted that athletes are usually not in an equal bargaining position with sports bodies and must accept limits on appeal rights on a “take-ornot-leave-it-basis.” Circumstances may differ in exceptional cases if an athlete voluntarily gives a specific waiver. In this case the Tribunal decided that it had jurisdiction to consider an appeal from the court notwithstanding that the ATP Tour rules sought generally to deny any right of appeal.
