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SPORTS LAW

Sports Law in an Olympic Year: Citius, Altius, Fortius?

Abstract: In 2012 London becomes the first city to host an Olympics for the third time. The contrast between the Games of 2012 and those of 1908 and 1948 could not be starker and form a background to some of the matters discussed in this short piece. Central to the discussion is the contention that the development of the body of law now known as sports law is related to the accelerated commercialisation of sport during the past century. In short, the business of modern sport is exactly that – a business; indeed, sport is now a global industry and the commodification of sport will be seen to an exaggerated effect in London throughout the summer of 2012. Accordingly, this article by Jack Anderson begins by giving an outline of the financial robustness of modern sport, epitomised by the Olympics, before presenting a brief history of the evolution of sports law. Thereafter various issues in contemporary sports law are identified and discussed. The conclusion attempts to bring all of these themes together in order to give an overview of the area as a discrete, vibrant, if still emerging, discipline of law.
Keywords: sports law; Olympic Games

INTRODUCTION

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The barest statistic surrounding the London 2012 Olympic and Paralympics Games is that respectively they will take place from 27 July to 12 August and from 29 August to 9 September. During these periods the Games will involve nearly 15,000 athletes from over 200 countries. Thirty four venues will support the 26 Olympic sports and the 20 Paralympic sports will take place at 21 venues. The Department for Culture Media and Sport (DCMS) has been tasked with overseeing the entire London 2012 project. In this, DCMS has supervised the nearly £9.5 billion of public sector funding directed towards underwriting the Games. Much of the money has gone towards the building of new sports venues and accompanying transport infrastructure, as administered by a public sector body called the Olympic Delivery Authority (ODA) and as supported by public agencies within London.

The public "face", in terms of who is responsible for the preparation and staging of the Games, lies with a private sector company called the London Organising Committee of the Olympic Games and Paralymic Games (LOCOG). Again, the figures surrounding LOCOG are staggering: according to its website the Games have required a workforce of around 200,000 and made up of 6,000 paid staff, 100,000 contractor roles and the remainder as volunteers.[1] LOCOG has a £2 billion budget and up to the beginning of the Games will continue to procure £700 million worth of Olympic-related contracts. The LOCOG's budget has been raised principally from the private sector and through, for instance, sources such as official corporate sponsorships (these sponsors are now called "partners"), broadcasting rights and the selling of merchandise.

The most important "partner" is, of course, the International Olympic Committee (IOC) and the manner in which the IOC's various iconic brands – such as the five Olympic rings – and the London 2012 logo are exploited commercially is central to the financial success of the Games. The intellectual property surrounding these brands is fiercely protected in law as epitomised by the complexity of the London Olympic Games and Paralympic Games Act 2006. That 2006 Act gave effect to the commitments made by the UK government as part of London's bid to host the 2012 Games. Apart from setting out the statutory remit of bodies such as the ODA, the Act also laid down strict marketing and merchandising controls in connection with the Games,

including the protection of Olympic intellectual property; restrictions on commercial association with the Games; the prohibition of street trading and outdoor advertising in the vicinity of Olympic venues; and the prohibition of ticket touting in connection with Olympic events.

The above paragraphs demonstrate that, although the playing rules surrounding the principal sports at the Olympics have changed little since the beginning of the twentieth century, the social, economic and political dimensions to hosting a modern sports event are such that in reality, little meaningful comparison can be made between the scale of, and preparations for, London 2012 and previous London Games in 1908 and 1948. The 1948 Games are, for example, known as the "Austerity Games" given that the demands of the immediate post-War recovery meant that no new facilities could be built for the events or to accommodate the athletes.[2] In contrast, the £11 billion or so of public and private investment in the 2012 Olympiad is justified on the grounds that the "legacy" of the Games (sporting, infrastructure, urban regeneration, tourism etc) will last long after the summer of 2012.

A similar stark contrast to 2012 can be seen in the rather languid "gentleman-amateur" preparations of the organising committee for the 1908 Games. As late as November 1906, less than a year and a half from the start of the Games, the then Chairman of the British Olympic Association, Lord Desborough, was rather airily proclaiming that "a proposal is under consideration whereby the necessary buildings, tracks, enclosures, and an arena to seat 100,000 spectators will be provided free of expense to the Olympic Association."[3] As it happened, ground was broken on what become known as White City Stadium in London in the following year and the 68,000 capacity venue was completed within a remarkable 10 months at an estimated cost, borne by the government, of £60,000.[4] The BOA's official budget for the 1908 was a rather quaint £15,000, of which about a third (£5,271) was spent on "entertainment expenses"! In fact, the organisers, thanks mainly to donations (from private and royal sources), claimed to have made a profit of £6,377 and in total the cost of hosting the 1908 Olympics has been estimated at in or around £81,000.[5]

The commercialising process that the Olympic Games underwent in the twentieth century is not, of course, unique to that event and many other sports, notably professional football, are now significant industries in of themselves. Where money on such a scale is generated by an industry; where sponsors, TV companies, individual club owners and sports leagues have invested significantly in a sport; and where participants have become full-time professionals with a livelihood dependent on their sport then inevitably, law and lawyers follow, as those parties come into dispute or seek to protect and exploit their investments and interests to maximum capacity. Sports law's origins can be found here and in particular the "juridification" of such disputes whereby that concept is taken to include the manner in which individual players or clubs, aggrieved at the impact a disciplinary decision by a sports body might have on their right to earn a livelihood or trade, have on occasion sought to challenge that decision outside of the sport's internal regulatory structures and by way of litigation.

LITIGATING SPORTS DISPUTES

The 1908 Olympics were originally scheduled to be held in Rome. Unhelpfully, in April 1906 Mount Vesuvius erupted. One hundred were killed, adjacent villages buried and the city of Naples partially destroyed. Funding was needed for the restoration and the Games went to London. It appears that London was chosen because, apart from having the financial and infrastructural capacity to host the Games at relatively short notice, it also had the world's most established sports administrative network, or, as the aforementioned Lord Desborough put it in a letter seeking to instigate preparations for the 1908 Games, "as this country has been the cradle of so many forms of athletic sport, it is absolutely essential that the Olympic Games, if they are held in England, should be carried out in a manner worthy of a great athletic nation."[6]

On this point, there is no doubt that advancements in the Britain of the mid- to late nineteenth century left an indelible mark on modern sport. Dedicated leisure time and increased disposable income, allied to developments in communication and transport meant that not only were most sections of Victorian society in a position to read about sports events more or less as they happened but some could also easily travel to and cheaply attend these events. This rise in the popularity and accessibility of sport meant that some sports could sustain a professional code, augmenting basic revenue from gate receipts by attracting commercial sponsorships and thus in turn leading to the beginning of the mass "consumption" of sport.[7] It is during this period that sport's first meaningful wave of "start-up" regulatory bodies can be identified, including the establishment of the Football Association in 1863; the Rugby Football Union (1871); the Yacht Racing Association (1875); the Amateur Athletics Association (1880); the Amateur Rowing Association (1882); the Amateur Swimming Association (1886); the Hockey Association (1886); the Lawn Tennis Association (1888); the Badminton Association (1893); and the Northern Rugby (League) Football Union (1895).[8]

From a more law-oriented perspective, these newly emerging sports governing bodies of the mid- to late nineteenth century were determinedly private and self-regulatory in nature and remit, largely operating beyond the reach (or curiosity) of the ordinary courts. That regulatory autonomy has been cherished and forcefully protected ever since by sporting organisations and supplemented by a belief, somewhat justified, that they were (and are) doing a good and efficient job of governing a socially beneficial activity that would otherwise have to

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be supported directly by government agencies. Unsurprisingly therefore, when challenged in the courts, the reaction of such bodies to individual litigants was (and remains) somewhat sharp and defensive. More importantly however, there was (and remains) a clear understanding from the courts that the litigation of sporting disputes should be very much a last resort. For instance, more than a century subsequent to the establishment of the Football Association, traces of the general law's respect for the self-regulatory authority and expertise of that sports organisation can be identified clearly in all three judgments in *Enderby Town Football Club v the FA*,[9] where the Court of Appeal held that a rule made by the FA (prohibiting legal representation at its domestic tribunal) was not necessarily contrary to the rules of natural justice.

Aspects of Cairns LJ's brief judgment go beyond the point at issue and reflect a respect for the autonomy of sport and circumspection about the role of law in sport that many contemporary sports administrators still adhere to:

> "It is in the interest of justice and not only of administrative convenience that a decision should be arrived at quickly and cheaply. Where the tribunal is composed of intelligent laymen who have a great knowledge of the sport or business concerned, I think that the employment of lawyers is likely to lengthen proceedings and certainly greatly to increase the expense of them *without any certainty of bringing about a fairer decision*."[10]

The principles outlined in *Enderby Town Football Club v the FA* are enduring and the ordinary courts in England and elsewhere remain generally reluctant to interfere with the decision-making competencies of private associations such as sports organisations. For good social policy reasons, it is recognised that sports governing bodies are in a better position than the ordinary courts to determine how their affairs are to be run or, to paraphrase Lord Denning MR, justice in a domestic sports tribunal can "often be done better by a good layman than a bad lawyer."[11]

Nevertheless, and as Lord Denning's remarks continued, where, for example, a sports organisation has acted contrary to natural justice and without due process, the ordinary courts can, and should, intervene and particularly where the individual's livelihood is at stake. In fact, during the latter half of the twentieth century (and much earlier in the United States) governing bodies, such as the FA, were, due to the deepening professionalisation of sport, increasingly involved in disputes of a contractual, employment and commercial law nature thus bringing sports organisation back into more frequent contact with the ordinary courts and the general law.[12]

To reiterate, it is this fault line – the interface of sport's historical regulatory and administrative freedom and sport's various "economic effects" – that is crucial to an understanding of the theoretical and practical expression of modern sports law.

Finally, and drawing generally on the case law that has emerged on this issue (challenging decisions of the sports governing bodies[13]) the general principle remains that the English courts, and those around the common law world, remain reluctant to review disciplinary decisions of non-statutory sports bodies save in instance of egregious breaches of procedural fairness and natural justice. Even where they do agree to entertain such claims, the guiding principle of intervention for the courts is very much of a "light touch" nature and asks principally whether the decision ultimately arrived at by that tribunal was "fair"". In short, were the internal proceedings of the sports body designed to produce, and did they in fact produce "what in the end is a fair decision?"[14] It is argued that this "fair go" principle is a good and sound guideline for the courts because challenges of this nature often present them with an awkward set of technical and emotive circumstances. They are frequently made by way of interim, injunctive relief with the sports-applicant pleading to the court to be given the opportunity to participate in an imminent event or competition around which, it is often claimed, much of their career has been built and most of their future earnings and even livelihood, depends.[15]

Nevertheless, the reality for sports bodies is that as individual sports participants have become more aware of their commercial interests, they have also become more litigious and inevitably challenges to the disciplinary-making competency of sports bodies have increased in frequency and deepened in sophistication. In this, the English courts have suggested that, although their strong preference is that sports disputes are dealt with "in house", sports bodies should also be careful that by, in effect, replacing the courts as a means of dispute resolution, they should only do so by utilising and giving easy access to well thought-out and quasi-independent, arbitral-based, disciplinary mechanisms. Accordingly over recent years there has been a marked increase in sports bodies examining alternative means of dispute resolution (ADR) including arbitration, mediation and conciliation. In fact, sport, both domestically in the UK and internationally, has enthusiastically embraced ADR and indeed sports provide a good example of the benefits of ADR over judicial proceedings. It is to the role of arbitration as a dispute-resolving facility for sport that we now turn.

ARBITRATING SPORTS DISPUTES

To reiterate, sport provides a good example of the benefits of alternative dispute resolution (ADR) over judicial proceedings. The advantages of ADR (arbitration, mediation and conciliation) over litigation include its consensual basis, whereby the parties voluntarily agree to enter into the ADR process and be bound by the decision of the independent, third-party adjudicator of their choice; privacy; speed and flexibility of procedure; the

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ability to use adjudicators who are experts in the field of dispute; and cost effectiveness.[16] In the UK, for example, most leading sports organisations now make use of Sport Resolutions, an independent organisation established by the UK's principal sports bodies to provide a specialised dispute resolution service for sport in Britain.[17] Nevertheless, for many, the first thing that will come to mind when one speaks of ADR in sport is probably the Court of Arbitration for Sport (CAS) based in Lausanne.

CAS's jurisdiction, its evolving authority and credibility, its jurisprudence, and its place at the apex of a now complex pyramid of national and international arbitral bodies has been well-documented elsewhere.[18] For now, and briefly, CAS is an institution independent of any sports organisation, including the IOC, and which provides ADR-type services in order to facilitate the settlement of a broad range of sports-related disputes from commercial type disputes (such as those involving corporate sponsorship or general contractual arrangements with individual players) to disputes of a disciplinary nature (and including selection or player eligibility issues) to, most recently, cases involving corruption (such as the bribery of referees in order to facilitate the "fixing" of matches).[19] CAS has evolved rapidly from its relatively low-key beginnings in the mid-1980s to a highly influential role in contemporary sport whereby the regulations of virtually every leading international sports body provide reference to its competency. CAS now has over 300 registered arbitrators drawn from nearly 90 countries who are chosen for the specialist knowledge of arbitration, law and sport. Around 300 cases are filed with CAS each year. The cases which attract most attention are invariably those involving athletes suspended for doping infractions and in this CAS awards on doping-related matters have very much set the agenda on how far international sports bodies can go in pursing and prosecuting drug "cheats".[20]

Finally, a matter of specific relevance to London 2012 is that CAS has for a number of years established non-permanent, ad hoc tribunals to hear disputes that might arise during the period of an Olympic Games or other similar major sporting event. A "CAS Ad Hoc tribunal" will sit and be "on call" for the duration of the London Games in 2012 and a review of this ad hoc body and the type of disputes it has heard at past Games, and might hear at the London Olympics, is of interest because it gives a snapshot into the issues, legalities and practicalities of resolving modern sports disputes more generally.

CAS Ad Hoc: origins

The CAS Ad Hoc facility began in 1996 when it was established with the objective of settling finally, and within a 24-hour time-limit, any disputes arising during the summer Olympics in Atlanta. To ensure easy access to CAS Ad Hoc for all those taking part at the Olympics (athletes, officials, coaches, federations etc), a special ad hoc procedure or code was created for the occasion, which has more or less stayed in place ever since.[21] Since 1996, CAS Ad Hoc divisions, based on amended versions of the original procedure, have been created for each edition of the Olympics (summer and winter) and adapted ad hoc divisions have also been a presence at every Commonwealth Games since 1998, at every UEFA European Championships since 2000 and every FIFA World Cup since 2006.

The founding and fundamental rationale of CAS Ad Hoc's dispute resolution service remains twofold in nature: to provide a CAS Ad Hoc jurisdiction and remit which is easily accessible for *all* those taking part in the Olympics or at the sporting event in question (jurisdiction); and to provide a dispute resolution service that is simple, flexible and free of charge in operation (rationale). A quick review of the most recent, Olympic-related, ad hoc rules and cases illustrates the above principles in action.

CAS Ad Hoc: jurisdiction

On the wider jurisdictional point, the first point of reference is to Rule 59 of the Olympic Charter which states succinctly that "any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to CAS, in accordance with the Code of Sports-Related Arbitration." Article 1 of the current ad hoc rules reiterates this jurisdictional point insofar as such disputes "arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games."

Typically in a CAS Ad Hoc hearing, the jurisdictional issue is raised by the respondent in an effort to strike out the applicant's claim. Pursuant to Article 15(a) of the ad hoc rules, any defence of lack of jurisdiction must be raised at the start of the proceedings or, at the latest, at the commencement of the hearing. The jurisdictional remit is extremely and deliberately broad and the jurisdictional point usually succeeds only where, in the case of a request for arbitration, the claimant has not, before filing such request, exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned. Even then, Article 1 of the ad hoc rules provides that if "the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective," the ad hoc division retains a discretionary power to allow matters proceed.

A relatively recent case of interest here was that involving the German speed skater Claudia Pechstien who attempted to use the ad hoc division of CAS at the Vancouver Winter Olympics of 2010 to, in effect, force her way onto the German team in spite of the fact that she was serving a drugs bans, which had itself survived "blood profiling" scrutiny at CAS.[22] The thrust of Pechstein's appeal was "new evidence" placing doubt, she alleged, about the integrity of the testing procedure used previously in her case. The CAS panel in question,

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dismissed her appeal holding that there was no Vancouver Olympics-related decision to which they had jurisdiction and even if they had jurisdiction, they did not have the power to overturn Pechstein's doping ban.[23]

An even more recent case, which would certainly have tested the jurisdictional remit of CAS Ad Hoc at the London Games, concerned the interpretation of Rule 45 of the Olympic Charter. Rule 45, described in the Olympic Charter as a regulation regarding participation in the Olympic Games, was enacted by the IOC in 2008 and mandated that, as a condition of eligibility to compete in an Olympic Games, athletes, who had been suspended for more than six months for an anti-doping violation, would be prohibited from participating in the next Olympic Games following the expiration of their suspension. The most celebrated "victim" of Rule 45 was the American sprinter, LaShawn Merritt, the 2008 Olympic champion in Beijing in the men's 400 meters but who in 2010 was given a 21-month doping ban and thus, pursuant to Rule 45, would not have been eligible to defend his title at the London Olympics of 2012.

As it transpires, rather than leave its ad hoc division open to an "ambush" appeal by disgruntled athletes (such as Merritt or other high profile Rule 45 "victims" including US swimmer Jessica Hardy) in the days preceding the London Olympics, CAS wisely decide to hear the claim in 2011 in order to give it time to consider the issue without the pressure of an immediately imminent Games. Ultimately, the CAS panel in CAS 2011/O/2422 *USOC v IOC* held that Rule 45 was invalid and unenforceable and thus Merritt, and the others who have previously served lengthy doping bans, are now, pending qualification and selection, eligible to compete at the London 2012. Moreover, CAS Ad Hoc has avoided what would have been a fraught and difficult hearing in both its jurisdictional and substantive elements and one which would, doubtless, have been accompanied by intense media speculation and hype as well as the potential to disrupt and distract the preparation of the Games' and, most importantly, athletes whose selection might have been affected by the outcome.

Despite the above decision, the British Olympic Association (BOA) declined the World Anti-Doping Agency's request to amend one of the BOA's bye-laws, holding that those found guilty of a doping infraction can never be considered for selection on a British Olympic team. Subsequently, a challenge against the disproportionate and "double jeopardy" (a defendant cannot be tried again for the same or similar offence) nature of this bye-law was heard by CAS in March 2012. The BOA's bye-law was struck down and thus athletes such as Dwain Chambers or cyclist David Millar, who have previously served lengthy bans for doping infractions, now become eligible for selection for Team GB at the London Games.[24]

CAS Ad Hoc: rationale

CAS Ad Hoc was established with the purpose of providing a dispute resolution service that is simple, flexible and free of charge in operation. This rationale is demonstrated in three ways. Overall, the approach adopted by CAS Ad Hoc in its rules and in its operation, provides a useful model for any sports body at any level seeking "best practice" in the provision of an effective, internal dispute resolution facility. CAS Ad Hoc also demonstrates that even at the apex of sporting endeavour, the Olympics, the elemental principle of fairness common to all dispute resolution mechanisms does not have to be surrounded by overly complicated procedure and technicalities in order to be "fit for purpose".

First, CAS Ad Hoc's rationale is illustrated by the "applicant-friendly" nature of the typical application process contained within the principles laid down in Article 10 of the Ad Hoc rules. The usual application process necessitates, with admirable conciseness, only a copy of the decision being challenged; a brief statement on the jurisdictional, factual and legal arguments; and an outline of the relief sought. Second, the flexibility of procedure inherent in Article 15 of the Ad Hoc rules strikes a proper balance between due process and the "particular constraints of speed and efficiency specific to the ad hoc procedure." Finally, and pursuant to Article 22, the facilities and services of the CAS Ad Hoc division, including the provision of arbitrators to the parties to a dispute, are free of charge, albeit the parties must pay their own costs of legal representation, experts, witnesses and interpreters.

Given the abridged time frame, Article 8 of the Ad hoc Rules further provides that the parties may be legally represented and it is of interest that the Bar Council (representing barristers in England and Wales), the Law Society (representing solicitors) the British Association for Sport and Law (a professional association representing sports law practitioners, administrators and academics) and Sports Resolutions (the leading independent sports dispute resolution facility in the UK) have combined to establish a London 2012 Pro Bono Legal Advice and Representation Service for the benefit of all those taking part at the Games.[25]

CAS Ad Hoc: in action

Ad Hoc hearings take place in a concentrated period of time and in a pressurised atmosphere. For instance, the general rule pursuant to Articles 18 and 19 is that an ad hoc panel must deliver a full reasoned award within 24 hours of the lodging of an application. Although they have the power to review *de novo* (Article 12), Ad Hoc panels often, and understandably, review applications in a brief but incisive manner and by way of a two-step test. The first step is the consideration of factors such as whether (on what might be called a "balance of convenience" approach) the relief sought is necessary to protect the applicant from irreparable harm; the likelihood of success on the merits of the claim; and whether the applicant's interests outweigh those of the respondent or other members of the Olympic Community. In the second step,

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CAS Ad Hoc panel typically concern themselves with the "lawfulness" of the primary decision-taker's actions i.e., whether the procedure was fair; whether the sanction was proportionate; and whether any exercise of judgment or discretion fell outside or within the reasonable limits open to the primary decision maker under their own regulations.

The pressure on Ad Hoc arbitrators at the Olympics is not, of course, simply internal in nature, it is also external given the significant media presence and scrutiny at any major sporting event. As it happens, the very first ad hoc CAS dispute had a number of characteristics that were to become fairly typical of ad hoc panels. CAS OG 96/001 *US Swimming v FINA* concerned an objection by US Swimming to a decision by FINA, the world swimming authority, permitting an Irish swimmer, Michelle Smith, to modify her entry forms thus allowing her to compete in the 400 metre freestyle event at the Atlanta Games.

The appeal was dismissed and, at first glance, a contemporary reading of the panel's decision appears to reveal that it did little more than apply the *contra preferendum* rule to its reading of the relevant FINA regulations. Nevertheless, the background was such that the case had to be decided, within its limited timeframe, under significant pressure and in the face of intense media coverage. This was because Smith, an unexpected winner of swimming gold at the Atlanta Olympics, was surrounded by the suspicion of doping, and there appeared to be a concerted effort by a number of the larger swimming federations to use technical procedure to disqualify the Irish swimmer from further participation at the Games.

Similarly, and at the next Summer Olympics in Sydney in 2000, a CAS Ad Hoc panel upheld the IOC's order that the Romanian gymnast, Andreea Raducan, return the gold medal awarded for her first place in the Gymnastics (Artistic) Women's Individual All-round competition on the grounds of a drugs violation.[26] Based on the then rigid form of "strict liability" applied under doping regulations, the *Raducan* award was handed down against a backdrop of mounting public and media sympathy for the slight, young gymnast, who had taken a headache tablet on the orders of her coach; not for the purposes of performance enhancing gain, but in order to alleviate stress.[27]

CAS Ad Hoc: on the field of play

In a general sense, awards handed down by the various CAS Ad Hoc divisions, and the topics they have had to deal with, have, in a substantive legal way, been extremely influential and authoritative in the development of a corpus of law specific to sporting disputes globally or what is sometimes, rather grandly, called *lex sportiva*. This point is underpinned and evidenced by a glance at CAS Ad Hoc's contribution to a highly contentious area of dispute in sport: when, if ever, so-called "field of play" decisions by umpires, that significantly alter the final outcome of a contest, can by reviewed or challenged thereafter. CAS Ad Hoc awards have been seminal in establishing the principle that "in play" refereeing decisions are not generally reviewable save in the exceptional circumstances of proof of bad faith by the official or officials in question or in the instance of an egregious misapplication of the rules by the refereeing officials in question. The latter principle worked in Britain's favour at the 2004 Athens Olympics in a case called CAS OG 04/007 *Bettina Hoy*.

That case concerned an incident during the three-day eventing equestrian competition. In the first round of the final event (the show jumping section) Bettina Hoy, representing Germany, completed a clear (no-fault) round and thus Germany won the team gold medal. However the ground jury (in effect the referees or umpires for the day) held that Hoy had mistakenly crossed the starting line twice and thus she should have been penalised an extra 12 points for time faults. Hoy successfully appealed the sanction to an appeals panel of the International Equestrian Federation (FEI). She subsequently took part in the second round of the show jumping section (for individuals only) and ended up winning individual gold as well. The British team (along with the French and the Americans) appealed to CAS Ad Hoc, challenging the FEI appeals body's decision, principally on the grounds that that body had overstepped its jurisdiction in rescinding the time penalties imposed by the referees on the day. As a result Hoy and the German team lost their gold medals, British riders were awarded the individual gold and bronze and the British team also received a silver medal.

The *Bettina Hoy* scenario is consistent with the general thrust of similar CAS awards: "on-field" refereeing decisions, even those which appear unfair, should not generally be susceptible to being overturned on appeal and should be accepted as part of the vicissitudes of sport and life. Otherwise, it is argued, if the finality of a referee's decision is open to question, then the very integrity of sport is threatened. Hopefully it will remain the case at London 2012 that any medal won by British participants, or those from any country, is earned on the field of play by the athlete and not in the tribunal room by their lawyer. In any event, if presented with a similar set of contentious circumstances, CAS Ad Hoc 2012 will be able to avail of a rich body of arbitral jurisprudence or precedent to inform and guide its opinion.

CAS Ad Hoc at London 2012

So what to expect of CAS Ad Hoc (and of sports law) at London 2012? The answer can only be speculative in nature because every Games has presented CAS Ad Hoc with different, and at times, unusual challenges. At the Commonwealth Games of 2010 in New Delhi, for example, CAS Ad Hoc had to consider the residency

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requirements of an applicant seeking to represent Norfolk Island in lawn bowls![28] More likely, it is the eligibility and selection issues of the kind that manifested themselves in the women's bobsled event at the Vancouver Games of 2010 which provides a better guide as to the type of work CAS Ad Hoc arbitrators can expect at London 2012. In those proceedings, a complex dispute arose involving Ireland, Australia and Brazil and regarding the International Bobsleigh & Tobogganing Federation's application and interpretation of its qualification and quota system for the Games in question.[29]

Ironically, if a CAS Ad Hoc had existed for the 1908 Games it would have been presented with a number of controversies. The 1908 Games were gloriously controversial and featured (among many controversies about the standardisation and codification of extant sports rules): the first and only Olympic "walkover" when the Americans pulled out of the 400 meters for men final because of what they perceived was an unfairness in the British interpretation of the rules and thus leaving the sole British entrant to run the race on his own; the carrying of the exhausted and disoriented Italian runner Donranda Petri over the line at the end of the marathon leading to his disqualification from first place; and even the refusal of the Americans at one point to dip their flag in front of King Edward VI in the royal box.

PREDICTING SPORTS DISPUTES

The Olympics and Paralympics end in early September. By then one of the most lucrative leagues in the sporting world, the English Premier League, will be in full swing. There is an exasperating tendency in the United Kingdom to equate sport generally with male pursuits and specifically with professional football, to the detriment of the wider world of sport in all its guises – male, female, amateur, professional, and recreational. Nevertheless, elite professional football often best illustrates individual topics within the umbrella of sports law. Moreover, professional football also demonstrates the more general evolution and emerging sophistication of sports law. For instance, it can be argued that standing outside a Premiership football ground is now every much an experience of law in action, as it is sport at play.

The ticket the spectator holds is a licence to enter the ground and is quasi-contractual in nature. The merchandising and advertising that the spectator encounters on entering the stadium is subject to significant legal protections such as trademark, copyright legislation and the tort of passing-off. The spectator will sit (and be monitored by CCTV) in an all-seater stadium designed and operating within the raft of health and safety and public order legislation that followed the Hillsborough stadium disaster of 1989. The players on the pitch are as much commercial entities as they are athletes. Their contracts are complicated documents including provision for insurance and image rights and reflecting the precarious and abridged nature of any professional career in sport, but also the contractual freedoms that have accrued from legal decisions such as that of the European Court of Justice in *Bosman* in 1995.[30]

Elite players will now more likely be employed not by football clubs but by a public limited company quoted and traded daily on the stock exchange. If players commit playing offences, their hearings and appeals will be heard by sophisticated arbitral tribunals that seek to adhere to the principles of natural justice and even article 6 of European Convention on Human Rights. If the injury inflicted is sufficiently serious and is outside that which is ordinary and incidental to the game of football, the culprit might be sued in negligence by the injured player or even face criminal liability. On completion of the game, a number of players will be chosen randomly for routine tests for performance enhancing drugs; tests that flirt with the very boundaries of personal privacy. When the spectator returns home, they will in all likelihood look at the highlights of the other Premiership matches of the day. The contest for those broadcasting rights – as highlighted by the recent European Court of Justice decision in *Murphy* – will have been every bit as (anti-) competitive as the game itself and because they have, in large part, funded events on the field are thus said to be in need of advanced legal protections.[31]

In this light, when faced with an industry, such as professional football, that is becoming ever more complex and diverse, and in a society that has become more litigious and risk averse, the involvement of the law and lawyers in sport is likely to become ever more prevalent. This involvement does not necessarily always have to be seen in a negative, opportunistic or adversarial light. It is hoped that immutable principles of the law such as certainty and fairness, and more general attributes associated with the law such as deterring violence, eliminating corruption, ensuring equality of opportunity and promoting inclusivity, will complement and ultimately benefit sport as a whole. Admittedly, this perspective may be somewhat idealistic. At best the expectation is that the law might operate in a manner similar to a good referee; it should be firm but unobtrusive. It should, where possible, fade into the background and not unduly influence matters on the pitch or in the arena. In sum, it should act primarily to enhance the enjoyment of games, and to facilitate participation in, rather than the litigation of, sport.

CONCLUSION: DEFINING SPORTS LAW

Finally, if asked to give a technical definition of sports law, I would suggest the following: the term "sports law" can be used to describe *inter alia* the collective applications of (a) traditional areas of law, such as contract, tort, criminal, administrative and EU law, to the general circumstances of, and various stakeholders within, modern sport; (b) the particular impact that a range of statutory

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provisions might have on sport; for example, legislation governing discriminatory and unsafe practices in a workplace or monopolistic or fraudulent behaviour in an industry; (c) issues of public and social policy otherwise influencing the legislature and the courts, from the allocation of resources to the allocation of risk; and (d) *lex sportiva*, where that term is taken to portray the co-existence of the various internal administrative regulations and dispute-resolving mechanisms of sport (particularly CAS) with domestic, supra-national and international law.

In a non-technical sense, it must be noted that a number of leading commentators deny the existence of a discrete, stand-alone and substantive union worthy both of dedicated legal analysis and the term "sports law". At best, the sceptics argue that the area is one of the *application* of traditional areas of law such as contract tort, EU etc to sports-related circumstances and should be described as no more than "sport and the law". The semantics and substance of this "sports law" vs "sport and the law" debate aside, and with due regard to the aforementioned commercial, regulatory and societal aspect of sport, this author argues that it is surely difficult to deny the fact the sports law "has arrived" in light of the reality that it is being taught in law schools, deliberated upon by students, written about by academics and practitioners, published in journals such as this, practised by dedicated units in law firms; and litigated in the courts. Accordingly, I say that the future of sports law might be encapsulated in the Olympic motto: *Citius Altius Fortius*!!!

Footnotes

[1] http://www.london2012.com/about-us/the-people-delivering-the-games/the-london-organising-committee.

[2] See generally Hampton, Janie. (2008) *The Austerity Olympics*. London, Aurum Press.

[3] Cook, Theodore. (1909) *Official Report on the Fourth Olympiad, London 1908*. London, British Olympic Association, p. 24.

[4] On the preparations for the Games, see further Baker, Kenneth. (2008) *The 1908 Olympics: The First London Games*. London, SportsBooks, chap. 1.

[5] Zarnowski, C Frank (1992) "A Look at Olympic Costs", *Journal of Olympic History* (1) 16–27, p. 20.

[6] Cook, T (1909), op. cit., p. 24

[7] The research on the history and development of sport in Britain at the material time is voluminous. Nonetheless, three monographs that continue to reward on re-reading include Birley, Derek, (1993) *Sport and the Making of Britain*, Manchester University Press, Manchester; Holt, Richard. (1990) *Sport and the British: A Modern History*, Clarendon Press, Oxford and Vamplew, Wray; (1988) *Pay Up and Play the Game: Professional Sport in Britan, 1875–1914*, Cambridge University Press, Cambridge.

[8] For a witty review of how the British "invented" these sports see Norridge, Julian. (2008) *Can we have our balls back, please? How the British Invented Sport*. London, Allen Lane.

[9] *Enderby Town Football Club v the FA* [1971] Ch 591.

[10] *Enderby Town Football Club v the FA*, op. cit., 609.

[11] *Enderby Town Football Club v the FA*, op. cit, 605.

[12] The most celebrated example would, probably, be that of *Eastham v Newcastle United FC* [1964] Ch 413 where a player challenged the extant "retain and transfer system" in professional football principally by arguing that it was an unreasonable restraint of trade.

[13] For a detailed review of the case law see Anderson, Jack. (2010) *Modern Sports Law*. Oxford, Hart, chap. 2. See also Gardiner, Simon et al. (2012) *Sports Law*. 4th ed., London, Routledge; James, Mark. (2010) *Sports Law*. Basingstoke, Palgrave MacMillan, 2010; Lewis, Adam and Taylor, Jonathan (2008) *Sport: Law and Practice*. 2nd ed., Haywards Heath, Tottel Publishing.

[14] *Calvin v Carr* [1980] AC 574, p. 593, Lord Wilberforce.

[15] See, for instance, *Chambers v British Olympic Association* [2008] EWHC 2028 (QB).

[16] See generally Blackshaw, Ian. (2009) *Sport, Mediation and Arbitration*. The Hague, TMC Asser Press, 2009.

[17] See further http://www.sportresolutions.co.uk.

[18] The website of the CAS, http://www.tas-cas.org, is an excellent resource with information on its code of operation, its history, membership and jurisprudence.

[19] On the last point, see, for example, CAS 2010/A/2172 *Oleg Oriekhov v UEFA*. In that case, Oriekhov, a football referee, challenged a life ban given by the sport's European governing body on foot, of a betting fraud on a match he had refereed. The ban was upheld by CAS.

[20] Thus far in 2012 the most notable doping case at CAS involved the former winner of cycling's Tour de France, Alberto Contador, who received a two-year ban for doping infractions. The award, published on 6 February 2012, is listed as CAS 2011/A/2384-6 *UCI and WADA v Contador & RFEC*.

[21] The rules are available at http://www.tas-cas.org/adhoc-rules.

[22] CAS OG 10/04 *Claudia Pechstein v DOSB & IOC*.

[23] For further background see McArdle, David. (2011) 'Longitudinal profiling, sports arbitration and the woman who had nothing to lose' in McNamee, M and Miller, V (eds) *Doping and Anti-Doping Policy in Sport*. London, Routledge, pp. 50–65.

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[24] CAS 2011/A/2658 British Olympic Association v World Anti-Doping Agency.
[25] For further details see http://www.sportresolutions.co.uk.
[26] CAS OG 2000/011 *Raducan v IOC*.
[27] The principle of strict liability remains central to current anti-doping policy in sport and holds that any athlete who tests positively for a banned substance is solely responsible for the substance being found in their body, irrespective of whether they unintentionally or negligently consumed the prohibited substance. The default sanction for a breach of doping rules is a two-year suspension.
[28] CAS CG 2010/01 *Jones v CGF*.
[29] CAS OG 10/01 and 02.
[30] Case C 415/93 *Union Royal Belge des Société de Football Association ASBL v Bosman* [1995] ECR I-4921.
[31] *Football Association Premier League & Others* [2012] 1 CMLR 29.

Biography

Dr. Jack Anderson is a Reader in Law at the School of Law, Queen's University, Belfast. His primary research interest is in the relationship between sport and the law and he has published widely in the area and including *Modern Sports Law* (Hart, 2010). In 2012 he edited a collection entitled *Landmark Cases in Sports Law* (Asser Press). His current research focuses on gambling-led corruption in sport. Jack blogs at http://blogs.qub.ac.uk/sportslaw

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The Sources and Interpretation of Olympic Law

Abstract: In this article, Mark James and Guy Osborn discuss how the relationships between the various members of the Olympic Movement are governed by the Olympic Charter and the legal framework within which an edition of the Olympic Games is organised. The legal status of the Charter and its interpretation by the Court of Arbitration for Sport are examined to identify who is subject to its terms and how challenges to its requirements can be made. Finally, by using the UK legislation that has been enacted to regulate advertising and trading at London 2012, the far-reaching and sometimes unexpected reach of Olympic Law is explored.
Keywords: sports law; Olympic Charter; Olympic Games; Court of Arbitration for Sport

INTRODUCTION

The Olympic and Paralympic Games of the 30th Olympiad, held in London between July and September 2012, will be the largest sporting and cultural event in the world with a global audience reaching into the billions.[1] This festival of athletic endeavour and celebration of sporting achievement has grown into a massive commercial enterprise, with the latest estimates of the London 2012 budget reaching almost £11 billion.[2]

What is less well known is that there is a complex legal framework in place to govern the relationships