ISSUE 4
Newsletter of
Mullins & Mullins
Lawyers and Notary

Court of Arbitration for Sport

by Matthew Stapleton and Alicia Hill

Controversy seems to be surrounding many decisions of sports bodies recently. Among the headlines are sports such as Tennis; Peter Korda's 'prohibited substance' decision comes to mind, Cricket; with Ricky Ponting's disciplinary hearing, Cycling; the furore over the Australian Women's cycling team, and Rugby League; where South Sydney officials expressed their concern to provide 'natural justice' to players accused of misconduct.

The perception that has been generated, rightly or wrongly, is of self-serving, agenda-driven organisations who deny, or unfairly restrict those accused, of their legal rights to natural justice.

The existence of an independent, neutral, and knowledgable body, to which disputes could be directed to be determined according to either association rules, terms of contracts, or international agreements, would appear to be an answer to the problems experienced by varied sports associations. The Court of Arbitration for Sport (CAS) would appear to provide a viable, workable solution to the perceived problems.

What is the Court of Arbitration for Sport (CAS)?

It is an independent, objective, international tribunal founded in Switzerland in 1983 by the International Olympic Committee (IOC) to offer parties a means of settling disputes adapted to the specific needs of the sports world.

CAS operates under the auspices of the International Council of Arbitration for Sport (ICAS). It has the capacity to undertake ordinary arbitrations, hear appeals of decisions, (after all internal association remedies have been exhausted) and, it can also offer advisory opinions.

CAS has a decentralized court established in Sydney, servicing the entire Oceania region.

How does a dispute come before it?

- The dispute must be directly or indirectly linked to sport. It can be commercial or relate to the practice and development of sport;
- The dispute can only be brought by an individual or legal entity with capacity to act. For example, an athlete, club, sports association or federation, organiser of an event, sponsor, radio or television company;
- CAS requires a written agreement by the parties to submit their dispute to CAS for arbitration. Parties can either agree to submit their one-off dispute to CAS, or a clause can be incorporated into individual contracts or into articles of an association to automatically refer disputes to CAS.

What type of decisions can it make and are they binding?

Arbitration involves parties presenting their cases before an arbitrator, or a panel of arbitrators of their choice, who after hearing all the arguments make a finding called an award. Arbitral awards are binding and confidential. Appealed decisions will be published unless the parties agree otherwise. Advisory opinions are non-binding and not confidential.

An award is final and binding on the parties from the moment it is communicated. The decision can be enforced in the same way as a judgment of a court, and it may be executed in accordance with the UN Convention on Foreign Arbitral Awards thus allowing international disputes to have a decision implemented across any of the 100 signatory countries to the UN Convention.

It is possible to appeal a decision, however judicial recourse is to the Swiss Federal Tribunal on very limited grounds.

Who can make the best use of it?

Groups or individuals dealing with international aspects such as foreign 'import' players, competitions held in several countries, off-season playing contracts in other countries, international federations, or competitions, are obvious examples of groups that can benefit from CAS arbitration in sporting disputes.

Disputes that arise within Australia can also make use of the National Sports Dispute Centre, (NSDC). This centre is jointly operated by the Australian Olympic Committee (AOC), the Australian and New Zealand Sports Law Association (ANZSLA) and the Australian Sports Commission (ASC).

The centre offers a complementary range of services to CAS, including mediation, as well as arbitration, a referral service and a tribunal.

Benefits of CAS

The benefits offered by CAS include:

- specialist legal arbitrators;
- speedy resolution;
- inexpensive and cost efficient when compared with the courts;
- confidentiality;
- its suitability for international disputes; and
- parties can choose the relevant law for the Arbitrators to apply.

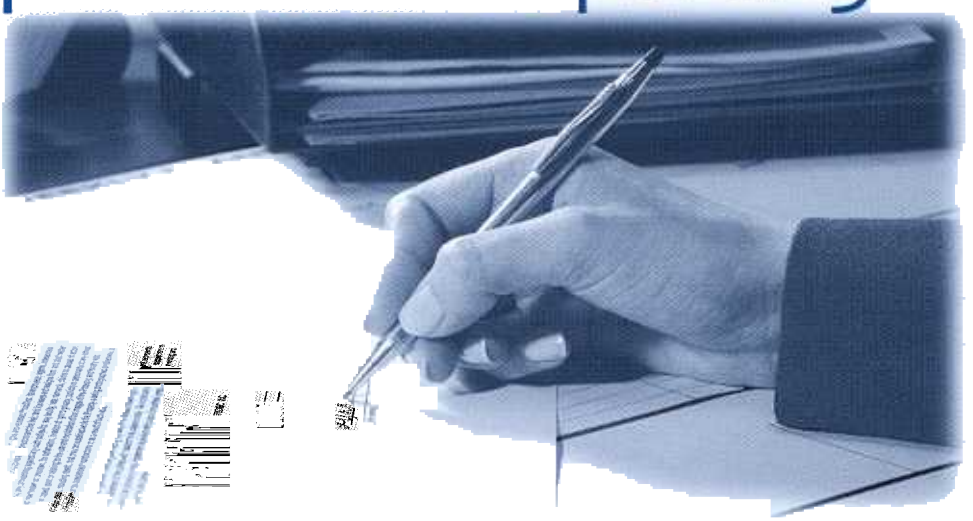
Conclusion

Domestic or regional groups, associations, federations, or competitions can benefit through the range of services that CAS and NSDC offer. CAS and NSDC provide an independent, objective, and informed forum for dispute resolution that can be utilised as a last resort mechanism if internal dispute resolution processes fail. Utilisation of these forums avoids the perception of agenda-driven and self-serving decision making that is sometimes portrayed in the media.

Mullins & Mullins is a member of the ANZSLA, and can advise further on the above organisations, their procedures as well as providing representation in sports law arbitrations.

Disciplinary provisions in sporting co

by Simon Hayes



Commonly, professional sports persons must sign a contract to compete with a chosen club or in a series of events. These contracts are primarily employment contracts and contain provisions relating to the payment to the sports person for their performance, travel, costs and insurance. Sporting contracts also contain disciplinary provisions to control the conduct of the sports person/employee. Examples of these provisions have been discussed in the recent report of the O'Regan Inquiry into the conduct of Australian Cricket players (see http://www-aus.cricket.org).

Typically, the content of disciplinary provisions is as follows:

- A sports person agrees to be bound by the rules of the employer. Commonly there is a number of employers (some of whom are not specified in the contract) including both state and international bodies and each employer has its own set of rules.
- A range of penalties including fines, suspension or termination of employment can be imposed on the sports person who contravenes the rules.
- The sports person is required to appear (or can elect to appear) before a tribunal.
- A grievance procedure is inserted allowing complaints against the employer to be directed to a designated officer of the employer.

Disciplinary provisions were originally drafted in sporting contracts before sports persons were professionals and focused on regulating the sports person's "on field" behaviour. With the advent of professionalism the provisions have remained but now focus on regulating the sports persons conduct "on and off the field", thereby enabling the employer to control not only the sports person's conduct but the image of the sport. The employer justifies the inclusion of these provisions in contracts by advocating that the sports person is a marketing tool - the right image will attract sponsorship, endorsements and spectators.

It is widely accepted by sports persons and the general public that disciplinary provisions within sporting contracts are enforceable. In contrast, standard employment contracts do not contain disciplinary provisions (except in the case of public service contracts). This is because standard employment contracts have not evolved in a similar fashion to sporting contracts ie: from amateur to professional. If disciplinary provisions were to be inserted into standard employment contracts undoubtedly employees would vigorously challenge them due to their imposition of extraordinary regulations on employees.

For example an accountant from a high profile firm visits the bar at "Rivers" on a Friday night. He becomes intoxicated and exchanges physical blows with someone, at which point he is ejected from the premises. It is unlikely that the accountant would be disciplined by his employer nor would the

'Out of Bounds': Defamation

by Sam McNeice

During the Australian Tennis Open, Lindsay Davenport and Martina Hingis opened a legal can of worms by commenting that one of their colleagues "played like a man" and was "half man." These comments were directed at 19 year old Amelie Mauresmo because of her masculine physique.

Is this comment and consequential debate defamatory? This brings us to the issue of whether a sporting identity can to some degree protect their reputation by commencing an action in defamation.

In Australia, sport is one of the most significant areas to attract public comment- everyone from the armchair critic to the national news media has an opinion. But where do comments step over the boundary into the murky waters of defamation?

Defamation law has long recognised that one's reputation has economic value which affects the ability to find and keep a job. This is no different for the sporting professional. The goal of defamation actions is to vindicate the tarnish on one's reputation, secure compensation for any actual damage done, and to deter future instances.

To have a case in defamation the matter complained of must:

- be defamatory;
- identify the athlete as the person being defamed; and
- be published to at least one person who is not the person defamed.

Defamatory matter can include spoken words, written words and visual representations. A defamatory statement is seen as one tending to lower a person in the estimation of others, inducing others to shun, avoid, ridicule or despise that person.

For example, in 1980, rugby league figure Les Boyd was successful in an action for defamation against the Sydney Daily Mirror, after the newspaper published an article under the headline "Boyd is Fat, Slow and Unpredictable". The article went on to impute that Boyd was so fat as to appear ridiculous as he came onto the field and that he had allowed his physical condition to degenerate to the point where he had become a hopeless player. While these comments did not suggest any moral blame, Boyd was still open to ridicule as to his physical appearance.

Secondly, the athlete must be able to be identified as the person defamed. This is usually straightforward, but where the statement concerns a group such as a sporting team there can be difficulties.

The final hurdle in a successful action is publication. Publication in this sense means communication to any third party. Further, any person who repeats or further publishes a defamatory communication will also be liable. Distributors (such as newsagencies or libraries) will only be excused if they can show they did not know the material was defamatory.

Defences

Defamation has traditionally rested on the proposition that it is not actionable to speak the truth. However, in Queensland, the defence of truth is subject to a test of public benefit, which may not justify the disclosure of true but private facts. For example, in *Chappell v TCN Channel Nine Pty Ltd*, Chappell was successful in preventing the broadcast of an

ntracts: Are they legal?

public expect him to be. However if a member of a NRL side behaved in the same manner he may be disciplined pursuant to his contract.

Therefore sporting disciplinary provisions impose regulations beyond that of a standard employment contracts. These regulations include:

- Governing a sports person's conduct during their day-to-day living;
- Imposing penalties before a sports person has the opportunity to defend any allegations;
- Imposing a penalty not allowing the sportsperson to compete hence earn a living;
- Imposing the rules of a number of different employers that are rarely uniform thereby increasing the potential liability for different penalties; and
- Not requiring tribunals to disclose the reasons of their decisions thereby compromising the accountability of decision makers.

In Queensland the *Workplace Relations Act 1997* provides the right to challenge unfair contractual provisions. The Act enables the Industrial Commission to amend or declare void a part or all of an employment contract if it considers any conditions are harsh, unconscionable or unfair. Therefore disciplinary provisions can be amended or declared void by the Commission. Unfortunately, to date, no legal action in regards to disciplinary provisions in sporting contracts has occurred. Similar legislation applies in other states.

Professional sport has reached a point where there are conflicting interests. On one hand are the controlling forces of the sport; the employers, sponsors and fans prescribing the behaviour and discipline of the sports person, thereby creating the sport's image. On the other hand is the individual's desire for similar freedoms and rights of any employee.

The potential exists for the law to protect the sports persons' interests, however it is undecided how far courts will "balance" the conflicting interests.

Recently, the players of the Australian Rugby League competition have been head-lining newspapers with their "off field" behaviour. This initiated a summit between the players and the games' administrators to institute a code of conduct. However the drafting of the code again questions whether additional regulations on the behaviour of players will compound disciplinary problems or will it successfully balance the interests of both the players and the leagues' administrators and sponsors.

Sporting contracts are contracts of employment and the insertion of disciplinary provisions that impose extraordinary regulations on the sports person, in particular, on their "off field" behaviour not only encroach upon the sports person's private life but could be held illegal. Therefore legal advice should be sought where a sports person, of any level, is facing a disciplinary action or an employer is drafting disciplinary provisions.

n Sport

interview with a woman who alleged she had a sexual relationship with the married cricketer. The court said that "a public figure's private activity is a matter of public interest only if it has some bearing on his or her capacity to perform public activities".

Another widely used justification is fair comment. Because sport is so widely critiqued, the defence of fair comment was developed to protect discussion in relation to matters of community concern.

In Australia aspects of sport may be so prominent as to be a matter of general public importance or concern, therefore the material must be based on fact and clearly indicated as comment. Further, while there is a requirement that the comment must be of public interest, it is generally accepted that the affairs of sports, particularly major spectator sports, qualify as newsworthy. Similarly, sporting celebrities and top professionals are a common source of comment as they hold themselves out as public figures and role models.

Defamation is of particular significance for sporting identities as their marketability is dependent upon their reputation. Defamation laws attempt to strike a balance between freedom of speech, the individual's right to privacy and to a lesser extent media accountability.

What's in a Name?

By Elizabeth Sheehan

Kieran Perkins has lodged an application to register the word by which he has become known, "Superfish" as a trade mark. This follows on from the other sports persons who have done the same such as the "Great White Shark" and the "Oarsome Foursome". The law of trade marks controls how an individual is able to make a claim to a word.

What is a trade mark?

A trade mark is a sign which distinguishes the goods or services dealt with the course of trade by one person from goods or services of any other person. A trade mark can be a letter, name, word, signature, number, device, brand, heading, label, aspect of packaging, shape, colour, sound, scent or any combination of these. It must not be a sign that is ordinarily used to indicate the kind, quality, quantity, intended purpose, value, geographical origin, or is generally used to describe goods or services.

What rights are given by registration of trade mark?

A registered trade mark is considered personal property. The registered owner of a trade mark has exclusive rights to use the trade mark within Australia for the goods and services for which it is registered. Further, the holder of a trade mark can sue if the trade mark is used by an unauthorised user. However, it is not necessary to register a trade mark to use it. Trademarks are also protected by common law and the trade practices and fair trading legislation.

How are trade marks registered?

A trade mark is registered by applying to the Trade Marks Office of IP Australia. Anyone can register a trade mark. An applicant must include a graphical representation of the trade mark and specify the category of goods or services in relation to which the application is made. There are 42 categories under which it can be registered.

It is not possible to register certain signs such as a flag or seal of a Commonwealth State or territory. Certain words that cannot be registered such as "Patent", "Registered Design" and "Olympic Champion". Registration will be refused if the sign cannot be represented graphically or it is likely to deceive or cause confusion. It is also possible for other parties to object to the registration of a trade mark on these grounds.

Editorial

by John Mullins

In this edition of M&M Sport we again try to deal with a wide range of legal/sporting issues, trying to focus on those that are topical and current. The article on disciplinary provisions and contracts is particularly relevant to the current state of rugby league, where you can see these provisions being used regularly to discipline players.

We also deal with issues of defamation of sportspeople and the ability to register trademarks. These articles deal with the importance of the protection of intellectual property which lies with the sportsperson or team. There is a need to be able to protect this valuable intellectual property in the same way that business looks after these matters.

Business recognises the need to protect intellectual property both by registration of trade marks and taking action when any other company or product breaches its intellectual property rights and/or passes off, or participates in, deceptive of misleading conduct. High profile sports people also need to ensure that they protect their marketability by aggressively defending their reputation.

We also deal with an explanation of the Court of Arbitration for Sport and report on the IOC Conference on Drugs in Sport.

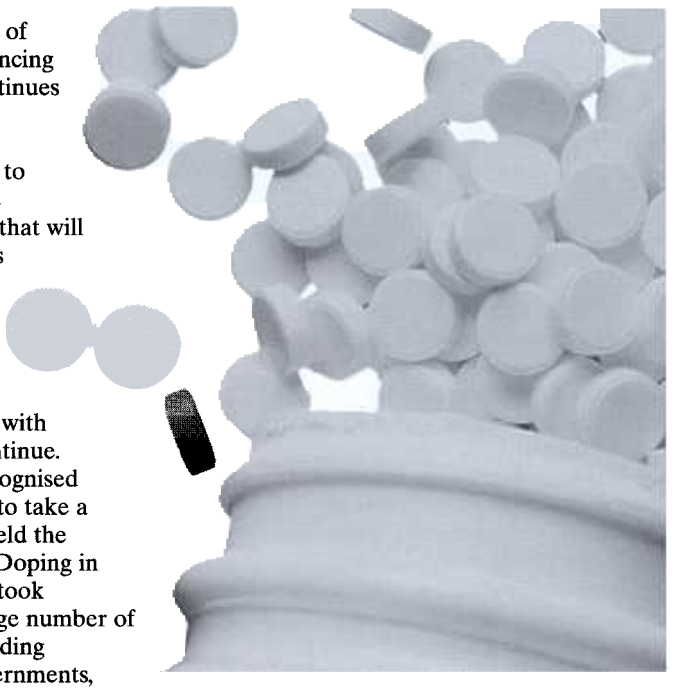
It will be interesting to see whether, over the ensuing 18 months leading up to the Olympics, that the Court of Arbitration for Sport is used regularly, or whether litigants will continue to use the traditional courts and tribunals for resolution of their disputes.

Finally, the issue of drugs in sport is not going to go away and I suspect that by Sydney 2000, people will be sick of hearing about it. It is only however by keeping the issue high on the agenda that any worthwhile progress can be made to resolve the problem.

As always, we welcome your input and your feedback. My direct Email address is: jmullins@mullins-mullins.com.au

IOC Conference on Drugs in Sport

by Matthew Stapleton



The issue of the use of performance enhancing drugs is one which continues to dominate headlines. Despite the ongoing attempts of authorities to deal with the issue, it is unfortunately an issue that will not go away. As long as some athletes perceive that the benefits of drug use outweigh the risk of being caught, or think that they can get away with it, the problem will continue.

The IOC recently recognised this and in an attempt to take a stance on the matter held the World Conference on Doping in Sport. The conference took submissions from a large number of interested parties including representatives of governments, non-governmental organisations, National Olympic Committees and International Sports Federations. The end result was the "Lausanne Declaration on Doping in Sport".

The key points of the Declaration are:

- The application of the Olympic Movement Anti-Doping Code to not only athletes, but to coaches, instructors, officials and medical staff working with athletes.
- The National Olympic Committees and the majority of International Sporting Federations agreed to impose a minimum ban of 2 years for a first offence. This is the issue which caused the most controversy, as Cycling and Soccer did not agree.
- In specific "exceptional circumstances", which are to be evaluated by the International Federations, there may be provision for modification of the 2 year sanction.
- Establishment of the International Anti-Doping Agency. This will be an independent international agency responsible for co-ordinating the various programmes necessary to achieve the objectives of the declaration.
- The IOC, International Federations and National Olympic Committees, maintain their jurisdiction to apply the doping laws in accordance with their own procedures. Therefore, an athlete who returns a positive result will initially be dealt with by their respective sport's federation, or their Olympic Committee. If a positive result is returned at the Olympics, the IOC has jurisdiction.
- The conference recognised the jurisdiction of the Court of Arbitration for Sport as a final avenue of appeal once all avenues within the International Federations, NOC, or IOC, have been exhausted.
- The general principles of law shall apply to all disciplinary procedures. This includes such things as the right to a hearing, the right to legal assistance and the right to present evidence and call witnesses.

M&M Mullins & Mullins
LAWYERS AND NOTARY
Level 22 Central Plaza One
GPO Box 2026, Brisbane Q 4001
345 Queen Street, Brisbane Q 4000
Phone: (07) 3229 2955
Fax: (07) 3229 8075
Email: jmullins@mullins-mullins.com.au