

**THE WORSHIPFUL COMPANY OF ARBITRATORS**

**“SPORT – Private Grief or Public Prurience”**

**by**

**RT. HON. SIR PHILIP OTTON**

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(Andrew Drysdale Esq)**

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1 In a lifetime we have seen a revolution in Sport. Fifty years ago sport was still played by gentlemen and amateurs according to what was referred to as the Corinthian ethic. You had to be a good sportsman in order to be a good sportsman. Referees’ and Umpires’ decisions were final and inviolate.

2 This ideal has been inexorably eroded. By 1945 George Orwell was writing:

“Serious sport has nothing to do with fair play. It is bound up with hatred, jealousy, boastfulness, disregard of the Rules and sadistic pleasure in witnessing violence; in other words it is WAR minus the shooting”.

3 David Griffith-Jones QC – a leading practitioner and author in this field has written:

“The public in the United Kingdom and elsewhere appears to have an insatiable appetite for sport, and there is an increasing number of people and

organisations anxious to feed (and to feed off) that appetite... The ‘Business of Sport’ has developed to the point that it is surely now one of the largest commercial sectors in the world and one would accordingly expect the law increasingly to be deployed in its conduct.”

It is my theme that the present state of deployment in the law is in some respects, far from satisfactory and there is room for improvement.

- 4 It was probably the rich gentlemen’s sport of yachting which revealed the need for an arbitral panel to resolve the arcane disputes in this sport. In 1851 the New York Yacht Club members formed a syndicate to build a yacht which was to challenge the Royal Yacht Squadron. The result was the 95ft. schooner “*America*”. She was duly entered in a race which was open to yachts belonging to the clubs of all nations. The race took place around the Isle of Wight and 15 yachts participated. What occurred is best illustrated by the famous exchange between Queen Victoria and her signal master:

“Say, signal master, are the yachts in sight?

‘Yes, may it please Your Majesty’

‘Which is first?’

‘The *America*’

‘Which is second?’

‘ Ah Ma’am, there is no second’”.

The *America* crossed the winning line. Following the race there was what was to be the first of many protests in the history of the America's Cup against *America*, alleging that she had failed to round a lightship. The allegation was not pressed, perhaps in the interest of the sport and international relations and, it was formally dismissed. The Cup went to America where it was preserved as a perpetual Challenge Cup for "friendly competition between foreign countries".

- 5 I will not relate the series of challenges and the allegations of rule changes, cheating, manipulation of protests and the like that followed. The New York Yacht Club successfully defended all challenges until 1983 when Allan Bond and the Royal Perth Yacht Club won the Cup for Australia. By tradition it is the privilege of the challenger to nominate the design of the yachts to compete. Four years later New Zealand challenged Australia to a 12 metre yacht race and announced that they would compete in a boat built out of fibre glass. It was disparagingly referred to as the "Tupperware 12". As she consistently won the name was changed to "The Plastic Fantastic". San Diego Yacht Club then challenged the legality of the plastic boat during which the unfortunate comment was made 'The last 12 metres built around the world have been built in aluminium

so why would you build one in fibre glass unless you wanted to cheat?’ Fortunately, perhaps, ‘*Stars and Stripes*’ won, the Cup returned to America and the dispute died down.

- 6 In 1987 a challenge was made for a match with boats 90ft on the water – the ‘Big Boat Challenge’. San Diego rejected the challenge as invalid. The challenger commenced proceedings in the Supreme Court of New York. For the first time in its 136 year history, the Cup entered the legal system. The Deed of Gift contained no provision for the resolution of disputes of this kind. The Judge held that the challenge was valid. The San Diego then announced it would defend with a catamaran. The challenger returned to court, seeking a contempt order against San Diego. The Judge told them to have their race and come back later. The catamaran one by a large margin. Thereafter the Judge delivered her decision that the defence with the catamaran was invalid. However on appeal that decision was reversed and the Cup returned to San Diego.
- 7 Not surprisingly the powers that be decided that litigation was an unsatisfactory way of resolving differences in what was, after all, a sporting event and they adopted the San Diego Protocol which expressly excludes any recourse to the courts. Disputes in the world of yachting were thereafter dealt with by The America’s Cup

Arbitration Panel and an International Jury. The Panel has jurisdiction to resolve all matters of interpretation of the Protocol and disputes between the participants in relation to the Protocol. Any protest arising on the water or relating directly to the racing are the province of the International Jury appointed for each Challenge series of races.

8 In this year of the Olympic Games we can be sure of one uncertainty and one certainty:

(1) The uncertainty is whether the stadium and the other facilities will be ready on time.

(2) The certainty is that in the course of the Games there will be allegations of the use of performance enhancing drugs. The history of how such allegations have been handled by Disciplinary Bodies in the past makes unhappy reading.

9 Katrin Krabbe was a talented athlete, blond and with an impressive physique. She was only 15 years old in 1989 when the border separating East and West Germany came down. She was already a student of an elite sporting academy in East Germany, the Neubrandenburg Club. Major sports apparel and equipment

manufacturers immediately moved in and signed up the stars under sponsorship contracts. In 1990 Katrin Krabbe won the European Championships and the following year the World Championships in Split in the 100 and 200 metre sprints. With the Barcelona Olympics approaching in 1992 she prepared her pursuit for gold.

- 10 The first reports of wide-scale and systematic anabolic doping of top-rank athletes in East Germany before the wall came down were already rife in the media. Suspicions and innuendoes abounded that Katrin Krabbe's success was possibly due to the doping machinations of the former East German regime. Following her success in Split Katrin underwent the humiliation of 40 'in' and 'out of' competition tests. She was literally pursued everywhere by officials armed with paper cups and sealable bottles. All 40 tests proved negative.
- 11 In January 1992 when she was training in South Africa she was asked with two other females to submit to a doping test. On analysis the urine in the 'A' bottles of all three samples was found to be from the same person. Similarly with the 'B' samples. All the samples were clean with no trace of any doping substance. Either the athletes had conspired to manipulate the tests or an error had occurred in the laboratory. Given the strict conditions under which

samples of urine are obtained, the laboratory mistake seemed a more plausible explanation. Even so, all three were immediately suspended from competition indefinitely on the ground of suspected manipulation and their sponsorship deals were put on ice. All three were eventually acquitted by the German Disciplinary body and the International Amateur Athletics Federation and their suspensions lifted.

12 But the Disciplinary procedures and the Appellate process were so slow that it took six months for them to be cleared. During this period they were deprived of any form of competition in the build up to the Games. By the time they were re-instated it was less than a month to the Olympics. Not surprisingly Katrin Krabbe and the other two decided not to participate. Krabbe's attorney's fees were in excess of \$500,000 which she had paid from her own resources. Bad and sad as it was, this might have been the end of the story. But it was not so.

13 Little did they know that the South African laboratory had re-analysed all the urine samples from the Neubrandenburg athletes in the previous years and found that all the specimens contained traces of Clenbuterol, a substance used in cattle feed to build up muscle tissue prior to slaughter. Speculation reared its ugly head. How did

such a substance get into the bodily fluids of a female athlete? Quite easily, it was said, by way of an anti-asthma medication known as ‘Spiropent’. In Germany it was only available on prescription, in Britain it could be purchased over the counter at Boots. Who provided the Spiropent to the athletes? Their trainer. How did he obtain a prescriptive drug? His answer to the press – “from the black market”.

14 The athletes were again immediately suspended from all competition indefinitely. Proceeding on an unpublished and untested opinion of a South African professor that Clenbuterol was a “pharmacologically-related combination to anabolic steroids”. The German body, arrogating to itself the powers of the IAAF and without prior warning or affording the athletes to be heard or to call evidence imposed a 4 year ban on competition. On appeal it was held that the German body had overstepped its authority. Clenbuterol was not a prohibited substance on the IAAF doping list when it had been used by the athletes and the Executive Body had no jurisdiction to impose the 4 year ban. That was not the end of the story either.

15 The athletes were then accused of “sport misconduct”, a misdemeanour, and for the time being the 4 year ban remained in

place as the appropriate punishment. It was later held that the indefinite ban was illegal and the four year suspension was both illegal and disproportionate. But the finding of sport misconduct was upheld on the basis that the athletes had violated 'fair play' in taking a prescription drug without medical need and in allowing their trainer to procure it on the black market. A twelve month ban was imposed and Katrin Krabbe never ran competitively again. As her lawyer put it 'Katrin Krabbe's dreams of fame and fortune were crushed by the brutality and incompetence of the governing bodies of her sport'.

16 This story is not an isolated one. Other athletes have been similarly treated and one was similarly diagnosed after his toothpaste had either been stolen or commandeered by officials, thus raising an interesting Human Rights dimension.

17 These stories illustrate how brilliant athletes at the peak of their career can be destroyed by the absence of coherent and independent dispute resolution procedures which guarantee natural rights and fair process. Such a body must command respect, trust and confidence of participants, governing bodies and the public alike. It must be truly independent, not merely providing better conducted disciplinary committees and appeal panels within the respective

National Associations and International Federations. [It must be a genuine independent organisation for the resolution of disputes in sports comparable to the London Court of International Arbitration, the ICC in Paris or the AAA in the United States, in the field of international commercial arbitration and to include a facility for Mediation as well].

- 18 The potential harm to a sportsman's reputation if an allegation of doping becomes public is immense, even if the athlete is subsequently cleared of the offence. Ideally any anti-doping programme should ensure that the allegation is kept confidential, particularly where an interim suspension is imposed pending the disciplinary hearing. But it would not work; information has a tendency to leak out before the hearing, leading sometimes to lurid speculation in the Press. The practical solution is to cut down the period between the analysis and the charge, the period between the charge and the disciplinary hearing, and between the determination and the appeal, thereby achieving, as closely as possible, a balance between the potential damage, and the need for transparency and accountability.
- 19 Usually the national and international rules of any sport will provide that substantive proceedings be heard in private. Traditionally, this

has been a benefit for the accused athlete, but that orthodoxy has been questioned at Strasburg. The ideal would be to give the athlete the choice. Clearly an athlete should not be required to attend a public hearing when his private medical condition is to be explored. Whether the hearings are public or private, the rules should give the accused a full and fair opportunity to challenge the evidence adduced against him, including by cross-examination of witnesses and the right, if a case to answer is established, to adduce documentary, factual and expert witness evidence of his own. Whether he should be entitled to legal representation would be a matter for the Tribunal on a case by case basis.

- 20 Against this background let me turn to consider the contractual relationships between individual players and their clubs, players and their agents and between clubs in Association Football, Rugby Football, Boxing and scores of other competitive sports.
- 21 The possible contractual relationships surrounding players can be many, varied and complex. A professional footballer is employed by his club yet he is subject to contractual terms imposed by the game's governing bodies. If he plays for his country he is subject to national rules dealing with allegations of misbehaviour. Thus during the World Cup the England players were under contract to the

Football Association 'FA'. The World Cup organisers are known by a french title as 'Federation Internationale de Football Associations' ('FIFA'). FIFA has its own rules with the ultimate say in discipline. In 2002, the Paraguayan goal keeper was suspended because he was serving a three match ban for spitting at Brazil's Roberto Carlos in a qualifying round. Brazil's Rivaldo was fined for play-acting with such thespian skill that he succeeded in getting a Turkish player sent off while he played on for the rest of the game.

- 22 On the domestic scene, an English player has a right to appeal to the Board of the Premier League or the Football League of which I am a Convenor.
- 23 Dennis Wise who formerly played for Chelsea, was transferred to Leicester City. After an away game in a European Competition he broke a team mate's jaw in a hotel bedroom incident arising out of a game of cards. The next day the chairman of the club summarily terminated his contract without giving the player an opportunity to be heard. He appealed to the Football League Tribunal on procedural and substantive grounds. The Tribunal consisted of an experienced former manager, a former distinguished premier league player and myself. The procedural grounds were impressive, alleging a denial of natural justice and a breach of Article 6 of the

ECHR. This placed the Tribunal in a difficult situation. If the procedural arguments succeeded we would be obliged to send the case back to the club for a proper hearing. We sought to get round this difficulty by suggesting that as time was of the essence the best course would be for the Tribunal to hear the case de novo there and then. The parties agreed. We heard all the evidence (none of which the chairman of the club had heard). We found Wise guilty of assault. We were then faced with a dilemma as to what the appropriate penalty should be.

- 24 If the assault amounted to serious misconduct then under the terms of his contract we had no option but to impose termination. If the misconduct did not amount to serious misconduct the contract required imposition of a fine. The maximum fine stipulated was two weeks wages.
- 25 In a persuasive mitigation we were urged not to impose termination. Wise would undertake not to return to the club, it was hoped that he would shortly be signed on by a North London club. If his contract was terminated he was in danger of not being able to sign on with any club before the January deadline for the rest of the season and this would lead to substantial financial loss. Moreover, he offered to indemnify the player for all his lost wages, appearance money and

indeed any amount that the player would have earned but for his injury – a considerable sum. He was also willing to pay compensation for the injury, pain and suffering.

26 We had no difficulty in concluding unanimously (indeed my colleagues felt very strongly) that Leicester had used the incident to extricate itself from an expensive contract. Wise was reputedly earning £30,000 per week and rumour had it that the club was in financial difficulties. This factor alone made it difficult to say that the sacking was appropriate.

27 Against this background and taking into account everything we had heard and been told we decided against termination and fined him two weeks wages. Thus £60,000 plus the indemnity plus compensation easily went into six figures.

28 The club then appealed to the Football League Appeals Committee who upheld the appeal finding that, given that Wise had committed serious misconduct, it was up to the club whether to fine him or to terminate his contract.

29 Wise was not unnaturally discontent with this outcome. The North London deal fell through and his solicitors announced that he was

suing the club in the High Court for wrongful termination claiming £2.3 million damages, and also commencing proceedings in the Employment Tribunal for wrongful dismissal.

30 The press reaction, and of others to our decision was mixed and mostly hostile. Why didn't the Tribunal take into account that Wise had a long standing reputation for violence both on and off the pitch? £60,000 was derisory, why not a more realistic penalty than a mere two weeks wages? It was even suggested that we were so soft and wet that we were actively encouraging crowd violence and so on and worse.

31 The point I make is this. In accordance with the rules these proceedings had to be conducted in private behind closed doors. If ever there was a case for a hearing in public with the press present this was it. An open hearing would not have been prurient but transparent. The press would have reported the circumstances of the assault. This would have been no more damaging to the victim or the accused if the matter had been brought before a Magistrates Court or a jury which might well have occurred if the police had become involved. Moreover the public and press would have been better informed as to the powers of the Tribunal and that the financial sanction was confined to two weeks wages. They would

also have learnt about the devastating financial effect of termination on the player's career. They would have heard of the offer to compensate the victim financially for his injury and that the only alternative disposal available to the Tribunal was fixed at a fine of two weeks wages.

32 I suggest that the Tribunal should have had the discretion to allow a hearing in public according to the circumstances and in particular, where the accused player so wishes. I also suggest that the player's contract and the rules should provide for a greater variety and flexibility according to the Tribunal's view of the seriousness of the case. It should have been empowered to suspend for such period as it thought fit coupled with an uncapped financial penalty which could have included financial compensation for the other player. It is to be hoped that the authorities will look at this situation but there may be opposition from the Professional Footballer's Association and the clubs alike.

33 Recently a recognition has emerged of the need for an independent body to determine sports related disputes, in particular in relation to doping. The Council of Europe has promulgated the Anti-Doping Convention. The International Tennis Federation has declared its Anti-Doping Programme. UK Sport has proclaimed its Anti-Doping

Policy. The World Anti-Doping body has published a Draft Code.

The European Convention states:

“Applying agreed international principles of natural justice and ensuring respect for the fundamental rights of suspect sportsmen and sportswomen; these principles will include:

- (i) The reporting and disciplinary bodies to be distinct from one another;
- (ii) The right of such person to a fair hearing and to be assisted or represented;
- (iii) Clear and enforceable provision for appealing against any judgment made...”

34 The recognition for the need for expedition is less impressive. The IAAF Procedural Guidelines provide that:

“The hearing to take place as soon as possible and under normal circumstances not left later than three months after the final laboratory analysis”.

Why three months?

35 The UK Sport Anti-Doping Policy states:

“The Disciplinary Committee hearing shall normally be convened within four weeks... The hearing may be opened and adjourned to seek further information at the discretion of the Chair of the Disciplinary Committee,

for example in order to allow time for the athlete to prepare his/her case”.

Why four weeks?

- 36 Disciplinary proceedings based on doping charges are no different in principle from disciplinary proceedings relating to non-drugs related charges. We all remember the commendable speed in which the Rugby Football Union’s ruling body two years ago dealt with Martin Johnson’s suspension which, if not revoked, would have meant his missing a vital game against France.
- 37 I suggest that time should not be lost in setting up a Disciplinary body for each sport to perform their tasks expeditiously. A small number of names should be compiled for each sport by their governing bodies who are ‘on call’ and who should be able to convene a hearing within seven days or less. In horseracing Steward’s enquiries at race meetings are common place. The Jockey Club deals with doping (jockeys as well as horses) and other disciplinary matters at very short notice as we have witnessed recently in the case of a prominent jockey alleged to have indulged in dishonesty.

38 The speed of such proceedings in this sport is no doubt prompted by the knowledge of the financial consequences to trainers, owners and jockeys if the process were too slow. There is no real reason why other major sports should not provide similar facilities for expedition particularly where interim suspension may be imposed.

39 Interim suspension is a controversial matter. It is akin to an interim injunction in civil proceedings. Adam Lewis and Jonathan Taylor are the joint editors of the authoritative text book entitled “Sport: Law and Practice”. (Incidentally, Jonathan Taylor is the Director of Studies in Sports Law at King’s College, London). In an impressively researched chapter Paul Goulding QC and others explore the balance of convenience and conclude:

“(a) The justification usually offered for the suspension is that sport depends entirely upon the supporter’s faith in the sporting spectacle as a contest on a level playing-field to be determined by sporting prowess alone, which faith will be utterly undermined if it later transpires that someone charged with (and later convicted of) a doping offence had been allowed to compete. In addition, there is no reliable way to review the results of sports events retrospectively so as to wipe out the effects of the tainted competitor, or to compensate the non-tainted athlete whose place was taken by the drugs cheat.

(b) On the other hand, if an athlete is suspended on an interim basis and the doping charge is not

made out, not only will the athlete's reputation be damaged forever. In addition, the athlete will have missed out on competing in events during that suspension, the effect of which on his career could never be known. Therefore, even if the athlete could show that the charges were brought in breach of some contractual or other duty, so that the governing body is theoretically liable to him in damages, the fact is that his losses are unquantifiable and therefore cannot be compensated by money damages. On the other hand, once a doping offence has been established, the governing body could revoke all results achieved in the meantime."

The authors also state that they are aware of no anti-doping programme that provides for a governing body to give a suspended athlete a cross-undertaking in damages in case it is subsequently unable to make out its charges. In *Modahl v. BAF Ltd* Lord Hoffman observed:

"I think that the IAAF adopted its system of instant suspension followed by disciplinary proceedings in the belief that although it might sometimes cause injustice in the individual case, it was necessary in the wider interests of the sport."

It is to be noted however that in the United States there is clear authority to support the proposition that an athlete must be given an opportunity to be heard before an interim suspension is imposed.

40 Before leaving the subject of doping I cannot resist the temptation to touch upon the issue whether a performance enhancing drug can be

endogenously (i.e. innocently) produced within the human body. Where a substance exceeds the threshold level it is presumed that the ingestion was illegal (i.e. exogenous). But an athlete may seek to adduce evidence to rebut the presumption and “to establish endogenous or innocent exogenous ingestion”.

41 In the United States two world class athletes sought to explain away abnormal amounts of testosterone in their samples. Mary Decker Slaney blamed her contraceptive pills, alcohol consumption, her menstrual cycle and/or the ageing process for the testosterone found in her sample. Dennis Mitchell blamed dietary supplements, alcohol and/or stress caused by sexual activity and lack of sleep the night before the test.

In each case the USA Track and Field Body accepted the explanation and acquitted the athlete of a doping offence. However the IAAF Arbitration Panel allowed an appeal and ruled that in each case the evidence submitted by the athlete had failed to establish to the requisite standard that the elevated ratios were caused by innocent pathological or physiological conditions.

42 As I have tried to illustrate, the state of disciplinary procedures in sport is far from satisfactory. Is there a beacon or lode star of good

practice by which the governing bodies of all sports could steer? I believe there is.

43 The Court of Arbitration in Sport (CAS) was created in 1983 under the auspices of the Olympic movement. Its principal aim was and is to secure the settlement of sports related disputes with a longer term objective of harmonising the procedural rules of national and international sports governing bodies. In 1994 the executive and judicial roles were separated into the International Council of Arbitration for Sport (ICAS) and the CAS. The CAS is based in Lausanne. Its decisions can only be challenged in the Swiss Supreme Court wherever the CAS proceedings take place.

44 In addition there is what is known as the Ad Hoc Division of the CAS, which consists of a panel of arbitrators who are actually present at the venue of the major international sporting events to provide speedy on-site resolution of disputes in all sports. Thus it sat at the Summer Olympics in Atlanta and Sydney, the Winter Olympics at Nagano and Salt Lake City, and the Commonwealth Games in Kuala Lumpur and Manchester. Of equal significance is that it was present at the European Football Championships in Belgium and The Netherlands. We can be confident that the Ad Hoc Division will be on hand in Athens and Portugal later this year.

They tend not to be involved in the pitch decisions of referees and umpires which should, wherever possible, be regarded as inviolate.

45 What is most impressive is the speed with which disputes are handled. Applications are made on a simple pro forma available at the Committee's office on site. The President of the Ad Hoc Division appoints the three member panel from the list of arbitrators present for the event, including, if possible, at least one with knowledge of the specialist sport concerned (e.g. skiing, swimming, rowing, equestrian, field and track events etc.) The aim of the Tribunal is for the decision of the Panel to be handed down with Reasons within 24 hours of the lodging of the application. A decision is immediate, final and binding and can only be appealed to the CAS Appellate committee or the Swiss Supreme Court on very limited grounds. It is reliably reported that on one occasion they sat for 19 hours in two days.

46 The CAS also provides a mediation service. The ICAS appoints a list of mediators drawn from the list of CAS arbitrators. The CAS also provides a model mediation agreement. It has considered a wide range of issues, including a contractual dispute involving the organisation of a Sports World Championship, the equivalent of judicial review proceedings against the decision of a governing body

and a request for a mandatory injunction in the context of the football transfer system.

47 I believe that the CAS process is the template for all competitive sports. If their procedures were adopted worldwide then there would be more harmonisation of the procedural rules of national and international sports governing bodies and the legitimate interest of the sport, of sportsmen and sportswomen and the public would be satisfied. Moreover, I suggest it might well minimise the humiliation of intrusion into private grief and the indulgence of voracious public prurience.

4,935 words