THE ROLE OF CONTRACT IN SPORTS LAW

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As the very name of this Journal reveals, it is common nowadays to talk of a body of law called 'Sports Law'. But, strictly, there is no unique body of law which can be so labelled. Rather, participation in sport is regulated by the same laws as all other human activities and endeavours. The law of contract, in particular, plays a central role in the regulation of sporting activity.

This article examines when and how the law of contract applies in a sporting context and how that law may, from time to time, require adjustment or modification in respect of certain sporting contracts especially those incorporating international agreements such as the World Anti-Doping Code or involving many parties.

There is no unique body of 'Sports Law'. Rather, just like in many other areas of human endeavour, many standard principles of law from different fields are adapted and applied to the sporting context in which they need to be considered. The law of *torts*, principles of *administrative and public law*, the special rules which have developed in respect of *private international law*, the general law doctrine of *restraint of trade*, *criminal law* and legislation such as the *Trade Practices Act 1974* and the *Corporations Act 2001* all have a role to play, directly or by analogy, in many sporting disputes.

But there can be no doubt that the law of contract is the cornerstone on which 'Sports Law' has been built and which is of primary importance in most areas where there is an interface between sport and the law. Whether sport is being played at an elite level or at a more humble one there is always a contract working somewhere. Usually it is an enforceable one.

Without seeking to be exhaustive, inevitably it is to the law of contract that one needs to turn first when one is considering matters such as:

(a) the sale of media rights in respect of a sporting event or competition;

(b) sponsorships rights;

(c) participation rights and obligations in major events or competitions;

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(d) the eligibility of individual athletes or teams to compete in particular competitions or events;

(e) the selection of athletes for sporting teams;

(f) the removal of athletes from teams for which they had been selected;

(g) disciplining of athletes including but not confined to, commission of doping offences;

(h) the rights to host a major sporting competition or event;

(i) the engagement of athletes or players by teams or organisations to compete in various sporting competitions and events;

(j) management contracts between athletes and managers;

(k) agreements relating to ground or venue hire including 'signage' rights; and

(l) membership rights in sporting clubs or organisations.

Moreover, whilst often the contracts are of a local or domestic (that is non international) nature, increasingly commonly sporting contracts include a transnational aspect. The paradigm example is the influence in most major sports in Australia and, hence, in the contractual regimes in place in respect of those sports, of the 2009 World Anti-Doping Code ('the WADC') which has been described pithily '*as a kind of international law of sport in the anti-doping area*'[1] but which, in truth, is simply a contract, albeit one of enormous importance to very many athletes and sporting organisations.

The confines of this article do not permit even a cursory, let alone proper, discussion of the role of contract law in all its potential applications in the sporting field and, therefore, it will focus on four topics as follows:

(a) the situation in which 'contracts' in the sporting field may be held to be non-binding and, thus to create no rights or obligations;

(b) the core principles which apply in every sporting dispute where there is a binding contract;

(c) the relevance of contract law in selection disputes; and

[1] Paul David, *A Guide to the World Anti-Doping Code*, (Cambridge, 2008) 40.

(d) the application of contract law in disciplinary matters, including doping offences.

Situations in which there is no enforceable contract

It goes without saying that sport, at an elite level, is now big business. Unsurprisingly, therefore, in most circumstances, contracts made in respect of sporting activities will be regarded as legally binding and enforceable by courts of law. But that has not been, and is still not, always the case. In the case of truly amateur sports, especially where the ruling body is an unincorporated voluntary organisation, the courts have shown a tendency to find that the parties did not intend or contemplate that the 'contracts' between them would be legally enforceable or, alternatively, to decline to intervene as a matter of discretion. The seminal authority on this issue in Australia remains the decision of the High Court in *Cameron v Hogan*.[2] There, the relevant principle was expressed in this way:

> There are, however, reasons which justify the statement that, **at common law as well as in equity, no actionable breach of contract was committed by an unauthorised resolution expelling a member of a voluntary association, or by the failure on the part of its officers to observe the rules regulating its affairs, unless the members enjoyed under them some civil right of a proprietary nature.** As a generalisation it expresses the result which it produced by the application of a number of independent legal principles: it is not in itself the enunciation or explanation of a rule or rules of the common law. One reason which must contribute in a great degree to produce the result is the general character of the voluntary associations which are likely to be formed without property and without giving to their members any civil right of a proprietary nature. They are for the most part bodies of persons who have combined to further some common end or interest, which is social, **sporting,** political, scientific, religious, artistic or humanitarian in character, or otherwise stands apart from private gain and material advantage. **Such associations are established upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal relations inter se, the rules adopted for their governance would not be treated as amounting to an enforceable contract.** (emphasis added)

Although *Cameron v Hogan* was a case involving a political organisation, the same principles had been applied in respect of sporting organisations. Illustrative

[2] (1934) 51 CLR 358 especially at 370 – 371.

of this approach is the decision of Cox J in *Smith v South Australian Hockey Association Inc.*[3] Like many of the cases, this was one involving a suspension by a sporting disciplinary tribunal but the principles expressed apply with equal force to other forms of sporting dispute. The plaintiff was a highly qualified hockey played who had played at both State and National level. He allegedly abused and assaulted an umpire and, as a result, was suspended by the SA Hockey Association for 13 matches. At the time he was suspended he was playing purely as an amateur and receiving no remuneration for his participation although he had been paid in 1987 for playing. In these circumstances, Cox J found that the plaintiff had no legal right to bring the claim because he had not come within any of the exceptions expressed in *Cameron v Hogan*. In other words, he found that there was no clear positive indication that it was intended that there be a legally enforceable contract between Mr Smith and the Hockey Association.

Applying those principles to the facts before him, Cox J found that the plaintiff had no right to bring his action because there was no intention to create a binding contract. In particular, he found that the plaintiff did not come within any of the *Cameron v Hogan* exceptions because:

(a) at the time of his suspension, he was not being paid for playing hockey;

(b) there was no other plausible evidence of him suffering any other significant financial loss by reason of his suspension; and

(c) the Court was not satisfied that the player's reputation would be damaged by the suspension.

However, in more recent times, the courts have been more ready than previously to find some legal basis for enforcing the rules found in such associations especially in relation to large and influential bodies.[4] Nowadays it seems that comparatively little may be required to persuade a Court that the case falls within one of the exceptions identified in *Cameron v Hogan* or is otherwise justiciable. Thus:

(a) where a selection would result in the athlete or player being paid a sum of money (albeit a modest amount) in respect of the event or game for which selection is sought, then a Court would probably find

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[3] (1988) 48 SASR 263; see also *Dixon v Esperance Bay Turf Club (Inc)* [2002] WASC 110 at [107] – [112] and, more recently, *Kovacic v. Australian Karting Association (Qld) Inc* [2008] QSC 344.

[4] See, e.g. Cheshire & Fifoot's *Law of Contract*, (Butterworths 9th Australian Edition, 2008) 223– 225 (5.10]; *Rose v. Boxing New South Wales Inc* [2007] NSWSC 20 but see, for a contrary approach, *Kovacic v. Australian Karting Association (Qld) Inc* [2008] QSC 344.

that the parties intended that the contract between them be legally binding;[5]

(b) likewise, where the sporting body in question has a virtual monopoly in controlling the right of athletes or participants to compete or participate in the particular sport and can impose disciplinary sanctions upon those who seek to compete or participate in the sport, it is likely that the Court will find that the parties intended the contract between them to be legally enforceable. As observed by Templeman J in *Rush v W A Amateur Football Club Inc*:[6]

> Although a registered player has no proprietary right or interest in the league, as I understand it, his right to play or participate in Australian Rules Football in this State, as an amateur, is governed exclusively by the league. While no pecuniary value can be placed on that right, it nevertheless has considerable value to those who play the game for the love of it. No greater control could be exercised by an association over its members than to deprive them permanently of that enjoyment.

(c) as Mance LJ observed forcefully in *Modahl v British Athletic Federation:*[7]

> The submission that no one can have intended this [i.e. to create a legally enforceable relationship] in a sporting context seems unrealistic in relation to the modern sporting scene, which, whatever the labels of amateurism, has aspects affecting substantially the career, livelihood and prosperity of participants.

(d) where the sporting body in question is incorporated (either as a company or under the Incorporated Associations legislation in the various Australian jurisdictions) and the disappointed athlete is a member of the incorporated body then a court may feel free to find that the athlete has locus standi to take proceedings against the company or association to restrain it from treating as valid any purported decision which is contrary to the rules of the corporation

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[5] See, e.g. *Shepherd v South Australian Amateur Football League Inc* (1987) 44 SASR 579 at 582; *Jackson v Western Australian Basketball Federation Inc* (1990) 21 ALD 283 at 285; *Ex parte Appleton* (1982) Qd R 107; see also *Justice v S.A. Trotting Control Board* (1989) 50 SASR 613 at 614–615; *Mitchell v Royal NSW Canine Council Ltd* (2001) 52 NSWLR 242 at 246 [34]; *McKinnon v Grogan* (1974) 1 NSWLR 295)

[6] [2001] WASC 154 at [54]; see also *Bornecrantz v Queensland Bridge Association Inc* – unreported decision of Queensland Supreme Court – Chesterman J, 24 March 1999 – BC 9901032; *Kane v Canadian Ladies' Golf Association* (1992) 102 Nfld. and *P.E.I.R*. 218 at 219; *Daley v NSW Rugby League Ltd* (1995) 78 IR 247 at [14]; *Law v National Greyhound Racing Club Ltd* [1983] 1 WLR 1302; *R v Football Association; ex parte Football League Ltd* [1993] 2 All ER 833; *R v Disciplinary Committee of the Jockey Club; ex parte Aga Khan* [1993] 2 All ER 853 at 860, 864).

[7] [2002] 1 WLR 1192 at 1222 [105].

or association without running foul of the decision in *Cameron v Hogan*;[8]

(e) it has been suggested that even where there is no enforceable contract an aggrieved party may have a right to seek a declaration as to the validity of the rules of a body which have been utilized to his or her disadvantage.[9]

In the end, it is always a matter of construction of the rules of the individual organisation as to whether they intended to create legal relations, whether they confer on members a sufficient right of property to give the members standing to seek a declaration of injunction, or whether there is some other circumstance which gives the members standing to seek those remedies.[10]

Parties become bound by contract when, and the manner in which, they intend and contemplate becoming bound. That is a question to be answered on the facts of each case.[11] Moreover, irrespective of whether a court would find that there was to be discerned a relevant intention of the parties to be bound by the consensual arrangement they have entered into, the courts retain a *discretion* to intervene if interference is considered necessary for the attainment of justice.[12]

Historically, courts have been reluctant to exercise the discretion to review the decisions of sporting bodies. As observed by Megarry VC in *McInnes v Onslow-Fane*:[13]

> The courts must be slow to allow any implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts.

In summary, therefore, whilst many contracts made in respect of sporting activities such as those relating to media rights, sponsorship arrangements, provision of services by players or athletes or those relating to hire of venues or

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[8] See, e.g, *McClelland v Burning Palms Surf Life Saving Club* [2002] 191 ALR 759 at 786 - 788 [103] – [109]; but see, to the contrary, *Kovacic v. Australian Karting Association (Qld) Inc* [2008] QSC 344 at [27] – [28].

[9] *Dixon v Esperance Bay Turf Club* (Inc) [2002] WASC 110 at [113].

[10] *McClelland v Burning Palms Surf Life Saving Club* [2002] 191 ALR 759 at 783 [92]; *Rose v. Boxing NSW Inc* [2007] NSWSC 20 at [46] – [60].

[11] *Eccles v Bryant & Pollock* [1948] Ch 93 at 104; *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at 176 [71].

[12] *Mitchell v Royal New South Wales Canine Council Ltd* (2001) 52 NSWLR 242 at 246 – 247 [34] – [42]; *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 at 550, 568 – 569.

[13] [1978] 1 WLR 1521 at 1535; see also *Nadhal v British Athletic Federation* [2002] 1 WLR 1192 at 1226 [115]; *Sheehy v Judo Federation of Australia Inc* (unreported decision of NSW Supreme Court (Bryson J) 1 December 1995 – BC9506786) at p.2; *Zusman v Royal WA Bowling Association* [1999] WASC 86 at [37] – [41], [45] – [54]; *De Pasquale v The Australian Chess Federation* [2000] ACTSC 94 at [22] – [23].

grounds are undoubtedly legally binding and enforceable in courts of law some other consensual arrangements between parties with sporting context may not be so regarded. This is especially the case where one is talking about arrangements in respect of truly amateur sports or involving small, voluntary associations. But even in such cases, subject to the exercise of discretionary powers by a court, the primary basis for seeking to enforce any rights is the contract or consensual arrangement arrived at between the parties.

The Core Contractual Principles Applicable in the Sporting Context

Just as the ordinary principles of contract apply to leases[14] they apply likewise in respect of contracts with a sporting flavour. However, there are particular factors relating to some types of contract made in respect of sporting activities which mean that some of the orthodox principles of contract law have no or little application (such as the orthodox principles relating to how a contract is formed) whilst others may require modification or adaptation given the particular sporting context (such as the principles of contractual construction).

Formation of Contract

The traditional, orthodox approach to the formation of contract rests upon notions of finding an 'offer', 'acceptance' and 'consideration'.[15] Most contracts relating to sporting activities, especially those relating to the 'business' of sport such as media, sponsorship and marketing contracts can be adequately accommodated within the orthodox approach. However, many other important contracts in the sporting field cannot. Those contracts are typically ones which involve athletes on the one hand and peak sporting organisations (whether domestic or international) on the other in respect of such matters as *selection* disputes or *disciplinary* proceedings. Usually, in such circumstances, the relevant 'contract' will be found in several interlocking documents entered into by different parties but which may, nevertheless, evidence or constitute a multipartite contract.

A rugby union player may wish to play in a local rugby competition. He or she may, perhaps, become a member of a club. In such a circumstance he or she may sign a membership form, registration form or some other form of acknowledgement by which he or she undertakes to abide by not only the rules of the particular club which he or she is joining but also the 'rules' or 'contracts' which the club has made with its state federation or national federation and which the national federation has, in turn, made with the international organisation and such rules or contracts may incorporate, by reference or necessary implication, contracts which the national federation or international federation has made with other international organisations such as the World Anti-Doping Authority.

[14] *The Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 29 – 30, 38, 40, 51 and 56.
[15] Cheshire & Fifoot, above at 10 [1.16].

In such a situation, offer and acceptance analysis does not necessarily work well.[16]

A striking illustration of a binding contract being found between one athlete and another (indeed between an athlete and other sporting organisations) where there was no direct contract between the relevant parties is the leading Australian decision of *Raguz v Sullivan*.[17] That case involved a selection dispute in respect of the Sydney 2000 Olympics. The Judo Federation of Australia nominated Ms Raguz for selection as a member of the Australian Olympic team in the sport of judo. The Australian Olympic Committee and the Judo Federation of Australia had entered into a selection agreement, governing the terms and conditions applying to the selection of athletes for the 2000 Olympic Games. The agreement provided for an arbitration process in respect of disputes and containing an exclusion agreement purporting to make the Court of Arbitration for Sport ('CAS') the sole avenue of appeal. Athletes provisionally selected for the team were invited to adhere to the selection agreement through the execution by them of nomination forms and team membership agreements which reiterated the arbitration and exclusion provisions of the selection agreement. Both Ms Raguz and Ms Sullivan executed the nomination forms. Although Ms Raguz was nominated for selection by the JFA, Ms Sullivan appealed to CAS. Her appeal was successful. Ms Raguz sought to challenge the CAS decision by appealing to the NSW Supreme Court. The exclusion agreement contained in the selection agreement between the AOC and the JFA was relied upon by Ms Sullivan and the AOC as a basis for asserting that the Supreme Court of New South Wales had no jurisdiction to hear the matter. A central issue, therefore, was whether the exclusion agreement was binding upon Ms Raguz even though she was not a direct party to the selection agreement. The Court of Appeal held that it was.

The court relied upon the old English in *Clarke v Earl of Dunraven*[18] in support of its conclusion. That case involved two participants in a yacht race each of whom had executed a document with the race organiser but not, in form, with each other. Lord Herschell had stated:

> I cannot entertain any doubt that there is a contractual relation between the parties to this litigation. The effect of their entering for the race, and undertaking to be bound by these rules to the knowledge of each other, is sufficient, I think, where those rules indicate a liability on the part of one to the other, to create a contractual obligation to discharge that liability.[19]

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[16] cf. *Brambles Holdings Ltd v. Bathurst City Council* (2001) 53 NSWLR 153 at 176 – 181 [71] – [85].
[17] (2000) 50 NSWLR 236; see also *Rose v. Boxing NSW Inc* [2007] NSWSC 20 at [46] – [51].
[18] [1897] AC 59.
[19] ibid at 63*Raguz v Sullivan* (2000) 50 NSWLR 236 at 250 [65].

The Court of Appeal held that the selection agreement together with the various nomination forms and team membership agreements were interconnected documents constituting a single multipartite arbitration and exclusion agreement between the JFA and AOC on the one hand and all of the athletes who executed the nomination form and team membership form on the other. Moreover, those same documents created binding contractual relationships between the individual athletes.[20]

By the same process of interlocking documents evidencing a multipartite contract the provisions of the WADC in relation to doping offences will become binding upon even amateur sports persons playing a sport at a relatively humble level. This is evidenced by the decision of CAS in *International Rugby Board v Troy.*[21]

The International Rugby Board (IRB) was a signatory to the WADC. This obliged it to ensure that it and its constituent members had in place anti-doping rules materially identical with the WADC. The Australian Rugby Union (ARU) was a member of the IRB and had agreed to be bound by its rules including having in place anti-doping rules materially identical with those of the WADC. Mr Troy, who was an amateur rugby union player playing in the Newcastle District Rugby Union competition, signed a membership form with the ARU agreeing to observe the ARU's anti-doping by-laws. CAS held that Mr Troy was bound by those anti-doping by-laws and ultimately found Mr Troy had committed anti-doping offences.

These two cases indicate that both selection disputes and disciplinary proceedings have, at their core, a contractual basis. They also demonstrate that, often, the contract involved is not one which is readily identifiable by resort to the traditional notions of 'offer and acceptance' but rather needs to be identified on a more complex basis by reference to successive but interlocking agreements between various parties.

Interpretation of Sporting Contracts

Many sporting disputes revolve around the proper interpretation of the contract in question. This is particularly evident in selection disputes and disciplinary proceedings but the process of interpretation is important also in determining whether or not a sporting contract is intended to be binding.[22]

Contracts or contractual provisions or regimes relevant in a sporting context can range from commercial agreements made between sophisticated and large

[20] (2000) 50 NSWLR 236 at 250 – 253 [65] – [82].
[21] CAS 2008/A/1664 reported in (2009) 4 (1) ANZSLJR 1; see also *Rose v. NSW Boxing Inc* [2007] NSWSC 20 at [46] – [51].
[22] see fn. 10 above.

organisations such as those with respect to media rights or the hosting of a major sporting event by a particular city (eg, hosting agreements in respect of Olympic games) to the rules and by-laws of small voluntary organisations often prepared or drafted without the assistance of lawyers. Moreover, the contractual regimes in place may incorporate, expressly or by necessary implication, contractual regimes which have, as intended, an international reach with, literally, hundreds, or even thousands, of parties.

Given this diversity it would be surprising if, in respect of every contractual construction exercise involved in a sporting field, the same approach to construction or the same principles of construction apply without some adjustment or modification. As will be discussed below, in some contractual situations, some adjustment or modification to the generally accepted principles of construction is necessary in respect of sports contracts. However, it is necessary first to set out briefly the core principles of contractual construction which apply in respect of all written contracts in Australia. They are as follows.

The construction exercise must be approached *objectively*, not subjectively.[23] Therefore, what matters is what each party by words and conduct would have led a *reasonable person* in the position of the other to believe. That is, what a reasonable person would have understood by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is determined by what a reasonable person would have understood them to mean.[24]

Determining what a reasonable person would have understood the terms of a contract to mean normally requires consideration not only to the *text*, but also of the *surrounding circumstances known* to the parties and the *purpose* and *object* of the transaction.[25] The task is thus one of construing the text of the contract in its *permissible* context.

Primary importance is attached to the text, that is to say the *language* in which the parties have expressed their agreement.[26] The text includes not only the wording of the particular contractual provision in issue but also the language of the contract as a *whole*.[27] But the meaning a reasonable person would attribute to the language used by the parties may be displaced after consideration is given to the surrounding circumstances and the purpose or object of the transaction.

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[23] Toll (*FGCT Pty Ltd v. Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40]; *Pacific Carriers Limited v. BNP Paribus* (2004) 218 CLR 451 at 461 – 462 [20] – [22]; *International Air Transport Association v. Ansett Australia Holdings Limited* (2008) 234 CLR 151 at 174 [53].

[24] *ibid*.

[25] *ibid*.

[26] *Franklins Pty Ltd v. Metcash Trading Ltd* [2009] NSWCA 407 at [52] – [53]; *Regency Media Pty Ltd v. AAV Australia Pty Ltd* [2009] NSWCA 199 at [47] – [48].

[27] See *Re Media Entertainment and Arts Alliance*; ex parte *Hoyts Corporation Pty Ltd* (1993) 178 CLR 379 at 386 – 387.

By the expression 'surrounding circumstances known to the parties' is meant all the relevant and admissible facts actually (and mutually) known to the parties. It does not include knowledge which the parties ought to have had but did not, in fact, have.[28] Further it is not necessary that ambiguity exist in a contract before evidence of surrounding circumstances is admissible. Rather, the context in which the agreement was made, including the surrounding circumstances, must be considered in the first instance.[29]

The *purpose and object* of the transaction itself is ascertained objectively – it is ascertained by considering what a reasonable observer, in the situation of parties, would conclude was the purpose and object of the transaction.[30] Ascertaining the purpose of reasonable people in the position of the parties requires attention to the genesis of the transaction, the background, the context, the market in which the parties were operating as known to both parties.[31] However it is the *common* or *shared* purpose or object about which extrinsic evidence can be adduced, not evidence of the objectives merely of only one of the parties even if made known to the other.[32]

Where, after considering the text and the context, the meaning of the particular contract or contractual provision is still ambiguous other principles of construction may be employed by a court in order to determine the proper construction of the relevant contract or provision.

In particular, where there is such ambiguity or where the language of a contract is open to several constructions, the construction to be preferred will be the one which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust 'even though the construction adopted is not the most obvious, or the most grammatically accurate'.[33]

In commercial contracts, especially where two or more constructions are available, the construction which avoids commercial nonsense or inconvenience or is the more commercially sensible is to be preferred.[34]

The contract is to be construed at the time it was entered into.[35] Moreover, unlike oral contracts, or partly oral and partly written contracts, the construction

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[28] *QBE Insurance Australia Limited v. Vasic* [2010] NSWCA 166 at [35].
[29] *Franklins Pty Ltd v. Metcash Trading Ltd* [2009] NSWCA 407 at [14] – [16], [49], [90], [239] – [305].
[30] *Ryledar Pty Ltd v. Euphoric Pty Ltd* (2007) 69 NSWLR 603 at 656 [264].
[31] *Zhu v. The Treasurer of the State of New South Wales* (2004) 218 CLR 530 at 559 [82].
[32] *Codelfa Construction Pty Ltd. v. State Rail Authority of New South Wales* (1982) 149 CLR 337 at 354.
[33] *Australian Broadcasting Commission v. Australasian Performing Rights Association Ltd* (1973) 129 CLR 99 at 109.
[34] See *Zhu v. The Treasurer of the State of New South Wales* (2004) 218 CLR 530 at 559 [82]; *The Movie Network Channels Pty Ltd v. Optus Vision Pty Ltd* [2010] NSWCA 111 at [129].
[35] *Franklins Pty Ltd v. Metcash Trading Ltd* [2009] NSWCA 407 at [322].

of a written contract is a question of law.[36] Although not necessarily a part of the construction exercise, it must be borne in mind that a written contract (indeed, any contract) may contain inferred[37] terms or implied terms[38] in addition to its actual express terms.

The principles or guidelines which apply to the construction of written contracts do not differ whether the construction exercise is being undertaken at *law* or in *equity* although the consequences to be assigned to the properly construed contract may differ.[39] Moreover, with some modifications, the same principles apply to the construction of a written contract, irrespective of its nature, be it a commercial contract, a lease[40], the constitution of a company[41], a statutory agreement[42] or even consent court orders[43]. Likewise, the same principles of construction apply whether one is trying to construe a compromise[44] or a building contract[45], a guarantee[46] or an insurance contract.[47] Similarly, those principles apply even if the contract is contained in or evidenced by a Deed.[48]

There is no problem applying these principles without change, or substantial change, in respect of many contracts applicable in the area of sporting activity such as commercial agreements relating to media or sponsorship rights, contracts for the provision of services by athletes, venue hire arrangements or the like. There are, however, at least three problematic areas where the principles which I have summarised may require some significant adaptation when considered in a sporting context. Those areas are as follows:

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[36] See, eg, *Handbury v. Nolan* (1977) 13 ALR 339 at 341, 345, 347 and 350.

[37] As to the distinction between inferred terms and implied terms, see *Hawkins v. Clayton* (1988) 164 CLR 539 at 570 – 571.

[38] For the circumstances in which terms will be implied, see *BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council* (1991) 180 CLR 266; *Moneywood Pty Ltd v. Salamon Nominees Pty Ltd* (2001) 202 CLR 351 at 374 [80].

[39] per Mason J in *Louinder v. Lees* (1982) 149 CLR 509 at 523 – 525; see also *Toohey v. Thomas* (1867) LR 3 Ch App 61 at 67; *Satyam Computer Services Ltd v. Upaid Systems Ltd* [2008] EWHC 31 (Comm) at [74] – [76]; *Bank of Credit & Commerce International SA v. Ali* [2002] 1 AC 251 at 263 [17], 264 [21], 265 [25] and 282 [79]; McMeel, *supra*, (Fn 3) at [1].

[40] *Phoenix Commercial Enterprises Pty Ltd v. City of Canada Bay Council* [2010] NSWCA 64 at [150].

[41] *Lion Nathan Australia Pty Ltd v. Coopers Brewery Limited* (2005) 156 FCR 1 at 28 [123] and 49 [244]; *Owners of Strata Plan No. 3397 v. Tate* (2007) NSWCA 207 at [64] – [70].

[42] For instance, there is a species of statutory agreement popularly known as State Agreements. Generally, these are contracts entered into between State governments and mining companies in respect of exploitation of mineral rights (see, generally, Warnick L, 'State Agreements' (1988) 62 ALJ 678). It has been held that such agreements are to be construed in accordance with the principles of construction applicable to commercial agreements not statutes (*Mineralogy Pty Ltd v. State of Western Australia* [2005] WASCA 69 at [13] – [15]).

[43] *Masterton Homes Pty Ltd v. Palm Assets Pty Ltd* [2009] NSWCA 234 at [109].

[44] *Bank of Credit & Commerce International (SA) v. Ali* [2002] 1 AC 251 at 259 [8], 264 [21], 265 [26], 267 [31], 269 [39] and 281 [78].

[45] *Beaufort Developments (NI) Ltd v. Gilbert-Ash NI Ltd* [1999] 1 AC 266 at 269.

[46] *Egan v. Static Control Components (Europe) Ltd* [2004] 2 Lloyd's Rep. 429 at [37].

[47] See eg. *Johnson v. American Home Assurance Company* (1998) 192 CLR 266 at 272 [19].

[48] *400 George Street (Qld) Pty Ltd v. BG International Ltd* [2010] QCA 245 at [30] – [32].

(a) in respect of the 'rules' or 'by-laws' of a sporting association especially where the relevant document has not been drafted by a lawyer;

(b) in respect of contracts or contractual provisions which are intended to have international effect such as the provisions of the WADC which are incorporated into the rules or constitutions of domestic sporting bodies;

(c) whilst this category overlaps with each of the first two, in respect of multi-party sporting contracts.

Poorly Drafted Sporting Contracts

Sports, particular amateur ones, are not always financially well resourced. Often the relevant contractual regimes in place in respect of such sports are drafted or prepared by well-meaning lay people without any formal legal qualifications. This has some virtues – the documents are generally more succinct and use more 'plain English'. However, it also means there are found often in such documents elements of imprecision, uncertainty, incompleteness and internal inconsistency.

Sporting organisations, however, are not the only bodies who often record the most important agreements in crude and summary fashion. This is also the case sometimes in business and the rules of construction have been adapted by the courts to cope with such situations. Where the contract is poorly drafted the court construes such documents fairly and broadly without being too astute or subtle in finding defects. It strives to find an interpretation which is not improbable or unbusinesslike if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision on a sensible and businesslike basis.[49]

Unsurprisingly, the courts have adopted a similar approach in respect of the rules of sporting bodies. Thus, in *Croatia Soccer Football Club Ltd v. Soccer Australia Limited*[50] the court noted that, since in the case of domestic clubs or sporting bodies, their rules and regulations are not drafted with the same legal precision as formal commercial contracts, the construction exercise calls for a commonsense approach aimed at ensuring a *workable* set of rules.

It is therefore important to bear in mind that the court is likely to take a more tolerant approach to the construction of the rules of a sporting organisation,

[49] *Mitsui Construction Co Ltd v. Attorney-General of Hong Kong* (1986) 33 Building LR 1 at 14; *Lancedale Holdings Pty Ltd v. Heath Group Australasia Pty Ltd* (1999) 33 ACSR 247 at [34] and [44]; *Collins Hill Group Pty Ltd v. Trollope Silverwood and Beck Pty Ltd* [2002] VSCA 205 at [14]; *Hillas & Co v. Arcos Ltd* (1932) 147 LT 503 at 514.

[50] Unreported decision of NSW Supreme Court (Einstein J) 23 September 1997; BC9704797 at 31.

especially a comparatively humble one, than it would in respect of a commercial contract drafted by, or prepared with the assistance of, lawyers.

Sporting Contracts which have an international effect

As previously indicated there are many contracts which incorporate contractual regimes intended to have an international effect. Foremost are the rules of the hundreds of sporting associations or bodies which have adopted the WADC as the core of their anti-doping policies. But the WADC is intended to apply throughout the world in a consistent fashion even though the rules of contractual construction may differ from one jurisdiction to another (especially given the differences which arise in principles of construction in common law countries as contrasted to civil law ones).

For present purposes, perhaps the most significant provision of the WADC is Article 24.3 which reads as follows:

> The Code shall be interpreted as an independent and autonomous text and not by reference to the existing laws or statutes of the Signatories or governments.

As Paul David, in his very useful book, *A Guide to the World Anti-Doping Code*, states:

> This important provision emphasises for tribunals, which have to consider the interpretation of the Code, that general principles of interpretation are to be applied, rather than particular principles of interpretation and law derived from one particular national legal system or another. The focus in interpreting the Code should, accordingly, be on the principles of interpretation which are common to all legal systems because, if that approach is adopted, it is more likely that the Code will be interpreted and applied in a consistent manner.[51]

Such an approach to interpretation of the WADC or of anti-doping rules of a sporting organisation based on its provisions is consistent with the international nature of the text as a code which is intended to function outside the constraints of a particular legal system.[52] It is also consistent with the way in which common law courts have treated the interpretation of international treaties or conventions which, in the author's view, are in an analogous position.

The approach of courts to the interpretation of international treaties or conventions is that they should be interpreted 'uniformly by contracting states'[53]. Moreover, such international treaties should not 'be interpreted by reference

[51] Above note 1 at 86.
[52] See page 18 of the 2009 WADC.
[53] *Povey v. Qantas Airways Limited* (2005) 223 CLR 189 at 202 [25]; *LK v. Director-General, Department of Community Services* [2009] HCA 9 at [36].

to presumptions and technical rules of interpretation applied in construing domestic statutes or contracts'[54] but rather should be interpreted in a manner which emphasises uniformity, and achieves comity, and is 'consistent with broad principles of general acceptation'[55].

There are some differences in the principles of interpretation of contracts between common law and civil law jurisdictions.[56] It is possible, therefore, that the WADC, or provisions of anti-doping rules derived from the WADC, could be interpreted differently if the governing law was held to be, say, English law as opposed to German law and the interpretation exercise was to be approached in accordance with that law. That would be undesirable and contrary to the purpose and object of the WADC.

What then are the 'broad principles of general acceptation' in the international community applicable to the interpretation of anti-doping rules derived from the WADC? These principles have been summarised as follows:

> The general principles of contractual interpretation are well-established feature of the legal principles in most, if not all, jurisdictions. In general terms, the applicable principles involve ascertaining the intention of the parties to the agreement in the objective sense, by reference to the natural ordinary meaning of the words used in the contract. The court or arbitrator must consider what a reasonable person in the position of the parties to the contract would have understood the contract to mean at the time it was entered into. The meaning will be considered in the general background context of the contract and where there is doubt as to the meaning of the words, the court or arbitrator may consider how a suggested interpretation fits with the purpose of the contract.[57]

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[54] *Povey v. Qantas Airways Limited* at 211 [60]. See, also, *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 251 – 256;

[55] *Fothergill v. Monarch Airlines Limited* [1981] AC 259; *J.I. McWilliam Co. Inc. v. Mediterranean Shipping Co. SA* [2005] 2 AC 423 at 437; *El Greco (Australia) Pty Limited v. Mediterranean Shipping Co. SA* [2004] 2 Lloyds Rep 537 at 559.

[56] In particular, civil law jurisdictions take a much more relaxed approach to the admissibility of extrinsic evidence as an aid to interpretation such as the subsequent conduct of the parties. See, for example, Vogenauer, 'Interpretation of Contracts: Concluding Comparative Observations' in Burrows & Peel (Ed), *Contract Terms*, Oxford, (2007) at 135. Even within the common law world there are the same differences between jurisdictions – compare *Agricultural and Rural Finance Pty Ltd v. Gardiner* [2008] HCA 57 at [35] and *Gibbons Holdings Ltd v. Wholesale Distributors Ltd* [2008] 1 NZLR 277.

[57] P. David, above note 1 at 84. It is to be doubted whether modern principles of interpretation, in whatever jurisdiction, however, now require there to be doubt or ambiguity about the meaning of a word or phrase before consideration is given to the purpose or object of the contract. See *Lion Nathan Australia Ltd v. Cooper's Brewery* (2005) 223 ALR 560 at 573 – 574; 59 ACSR 444 at 453, 470, 490, 492 – 493; *Ryledar Pty Ltd v. Euphoric Pty Ltd* (2007) 69 NSWLR 603 at 626. Moreover, in the interpretation process, primacy should probably be given to the text for the reasons explained by McHugh J in *Applicant A*, see fn 54 above, at 254 – 255.

The need to avoid construing the WADC in accordance with the principles of construction applicable only in the particular jurisdiction does not mean it is illegitimate to take into account, for the purpose of construing the WADC or a code-derived provision, decided cases from various jurisdictions especially where the particular problem of construction within the Code has not already been considered by a court or tribunal. On the contrary, given the broad general commonality of the approach to construction irrespective of jurisdiction that will often be a desirable and proper thing to do.

There are, however, perhaps two potential problems with this 'international' approach to the construction of a Code and the associated desire or urging to maintain consistency on an international basis. First, it gives perhaps undue weight to the decision of the first court or tribunal to consider a matter. Secondly, such an approach assumes that it is easy, or relatively easy, to ascertain what courts or tribunals in other jurisdictions have said about a particular provision of an international treaty or convention. This may be a valid assumption in the case of conventions or treaties relating to shipping law or the like where the disputes are usually, or often, decided in courts and the judgments of those courts are regularly published but it is a more questionable assumption in the case of the Code where the 'court' interpreting the WADC is CAS, comprised of arbitrators not judges, and where the CAS awards are not necessarily made public and can be somewhat difficult to obtain or access even when made public.[58] Notwithstanding these concerns, especially in the light of Article 24 of the WADC and its overall purpose and objects, it is the 'international' approach to construction which must be applied in respect of the Code or anti-doping rules derived from the Code. Unless there is a consistent interpretation of the WADC by CAS wherever it is sitting and in whatever composition then there is a danger that Code's purpose of enforcing anti-doping rules 'in a global and harmonized way'[59] may be thwarted. Recently, a panel of CAS applied such an approach in the matter of *Berger v. World Anti-Doping Authority.*[60]

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[58] See, eg, David, *above note 1* at 8, 11. A unique consideration which arises by virtue of the WADC's purpose of having a consistent, harmonised approach to anti-doping matters and, to that end, largely entrusting to CAS the task of interpreting and applying the Code is that it necessitates CAS operating in a way quite different to other international arbitral bodies. The orthodox view is that one of the great advantages of international arbitration, as opposed to having disputes determined by a domestic court, is **privacy**. Thus, awards in such cases, being private in nature, have absolutely no value as **precedents**. By definition, they will never be in the public arena and are not intended to govern, or be relied upon by, persons other than the parties to the particular arbitration agreement. Yet, achievement of a common and harmonic approach to the interpretation and application of the Code demands that not only CAS awards on the Code are readily available in the public arena but also that, in effect, a doctrine of **precedent** be established in respect of such awards. In effect this means that, at least when adjudicating on disputes in respect of the Code, CAS is operating at least as much like a court as it is like an arbitral body.

[59] See 2009 WADC at p.18.

[60] CAS 2008/A/1574 paragraphs [33] – [40] of that Award, being an Award handed down in March 2010 and available on the CAS website. The Panel consisted of Malcolm Holmes SC, Tim Castle of the NZ Bar and the author.

Adoption of the WADC into the rules of domestic sporting bodies also requires relaxation of the rule of construction that contracts be interpreted in the light of the language of the contract as a whole.[61] The WADC requires its signatories to implement its core provisions 'without substantive change'.[62] Thus, significant textual linguistic and styling differences may be found in the rules of sporting bodies between those parts of the rules which relate to doping offences and those which do not. It is important, therefore, when construing the anti-doping rules of a sporting body derived from the WADC only to have regard to the anti-doping provisions and not to the rules as a whole.[63]

Interpretation Issues in Multi-Party Sporting Contracts

As the case of *Raguz v. Sullivan* indicates,[64] in many sports where there is a chance for an individual or team to compete at the highest international level the relevant contracts which may arise for consideration will be ones to which there are many parties not only in Australia but also abroad.

In this circumstance it is extremely difficult to apply, at face value, some of the principles of construction which have been discussed. In particular, given the number of parties, their disparate backgrounds and their lack of any true connection with each other in respect of the drafting and formation of the contract it is extremely difficult to see how the principles of construction which permit evidence of the surrounding circumstances actually known to the parties to be taken into account have any meaningful application[65]. Likewise, it is difficult to see how the principles relating to taking into account the common or shared purpose and object of the transaction from the parties' perspective can have significant content when there are hundreds of parties in many different countries and with, perhaps, disparate purposes and objects. In such cases it would be a long and undoubtedly futile task to find any shared or common purpose as is required.[66]

No case in a sporting context appears to have considered these problems expressly. However, it seems that in multi-party sporting contracts, especially where the parties are not drawn from the same jurisdiction or country there is much to be said for the view that, in construing the agreement, the only surrounding circumstances (including the purpose and object of the contractual

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[61] See note 27 above

[62] Article 23.2.2 of the WADC and see ASADA on behalf of *Surf Lifesaving Australia v. Clark and Others* CAS 2009/A/2001 at [26] – [34]

[63] For an illustration of the problems which may arise if provisions derived from the WADC are sought to be construed in the light of provisions not so derived see *Berger v. World Anti-Doping Authority* note 60 above at [58] – [61].

[64] See [23] above.

[65] As to those principles see [34] – [38] above.

[66] For discussion of the relevance of purpose and object in construing the contract see above notes 25, 30, 31 and 32.

provision in question) which can be used as an aid to construction are those that one can know without evidence from the terms of the document itself. It would be, literally, an impossible task in most cases to ascertain the surrounding circumstances *actually known* to *all* of the parties to the contract. To even embark upon such an exercise would be extraordinarily expensive and time consuming.

By analogy, there is judicial support for the proposition that, in such circumstances, the only circumstances that should be used as an aid to construction (save, perhaps, in exceptional cases) are those which can be seen from the terms of the document itself. In *Phoenix Commercial Enterprises Pty Ltd v. City of Canada Bay Council*[67] Campbell JA had to consider the situation of a contract in the form of a lease which was a long term one capable of assignment and subject to indefeasibility principles. In such circumstances, especially because of the virtual impossibility of an assignee being in a position to know the surrounding circumstances which were actually known to the original parties, his Honour held (with the concurrence of the other two members of the Court) that the only relevant surrounding circumstances, for the construction exercise, were those which could be gleaned from the terms of the document itself.

In multi-party sporting contracts, the difficulties of each party actually knowing the same things are at least as severe as the situation with which Campbell JA was confronted. Moreover, like in the *Phoenix Commercial Enterprises Pty Ltd* case, in multi-party sporting contracts parties 'come and go' from the contract at different times. Therefore, it seems that when construing a multi-party sporting contract the better view is that, almost always, the only relevant surrounding circumstances are those which can be ascertained from the terms of the document itself. If this is correct, it is a significant modification of the ordinary principles of construction which apply to most written contracts.

The Role of Contract Law in Selection Disputes

The scope and content of selectors' duties will depend very largely upon the terms of the agreement between the participants and the sporting organisation relating to selection. The selectors must abide *strictly* by the terms of the selection agreement and a failure to abide those terms will result usually in the decision being overturned.[68]

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[67] [2010] NSWCA 64 at [166]; such an approach is also consistent with the approach taken to corporate constitutions and strata plan by laws where it has been held there should be a 'tight' rein on having recourse to evidence of surrounding circumstances and that, ordinarily, caution should be exercised in going beyond the language of the contract – see *The Owners of Strata Plan No. 3397 v. Tate* (2007) 70 NSWLR 344 at 360 – 362 [65] – [71]. Moreover, such an approach is also consistent with that adopted in respect of international conventions or treaties where similar issues arise and where primacy is therefore given to the text – see above notes 53 to 55 and 57.

[68] *Australian Football League v. Carlton Football Club Limited* [1998] 2 VR 546 at 550; *Rush v. WA Amateur Football Club Inc* [2001] WASC 154 at [31] – [32]; *Kane v. Canadian Ladies' Golf Association* (1992) 102 Nfld and P.E.I.R. 218 at 219.

The starting point, therefore, in any consideration of the legally enforceable duties of selectors is the terms of the selection agreement (if any) themselves. Those terms have to be interpreted in accordance with the principles of contractual construction which I have discussed above.

In some sports, such as swimming, where the selection agreement is very largely objective with selection being gained by the athletes who fill the relevant places at a particular event provided they swim a certain time the selection process is an easier one and unlikely to attract challenge.[69] However, in many other sports it is not possible or desirable to have such objective selection criteria. In such cases, much will depend upon the opinion, judgment, skill and experience of the selectors involved. Indeed the selectors, usually, are chosen because of the trust they enjoy in respect of such matters.

In such situations, if there is a desire to fetter the selectors' discretion or to limit the matters to which they can have regard then it will be necessary to spell those matters out in the selection agreement. Otherwise, a court of law or, for that matter, CAS, is very unlikely to interfere with the selectors' decision absent clear evidence of bad faith, actual bias or blatant disregard of the fundamental rules of procedural fairness.

There can be little doubt now that good faith, in some degree or to some extent, is part of the law of performance of contracts and this includes selection agreements.[70] Thus, where the selection agreement affords the selectors an unfettered discretion as to selection in whole or in part then, in respect of that unfettered discretion, the selectors' decision may only be challenged if it is demonstrated that the selectors have acted *arbitrarily*, *capriciously* or *unreasonably*. Unreasonableness, in this sense, is analogous to what is known, in public law, as *Wednesbury* unreasonableness, that is to say, the decision is one which no reasonable person could have arrived at. This is the situation in respect of contractual discretions at general law[71] and it is the same in a sporting context.[72] Likewise, it must be remembered that, in the selection context, principles of administrative law or public law have been held to provide very useful guidance not only in respect of the extent to which a contractual discretion is fettered but also in respect of the relevant criteria which selectors may take into account

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[69] But that is not always the case. See, eg, *Mewing v. Swimming Australia Ltd CAS 2008/A/1540.*

[70] See, generally, *United Group Rail Services Limited v. Rail Corporation of New South Wales* [2009] NSWCA 177 at [61].

[71] *Socimer International Bank Limited v. Standard Bank Limited* [2008] 1 Lloyds Rep 558 at 575 – 577 [60] – [66]; *Paragon Finance Plc v. Nash* [2002] 1 WLR 685 at 701 [38]; *Aerial Taxi Cabs Co-operative Society Ltd v. Lee* (2000) 178 ALR 73 at [76].

[72] *Australian Football League v. Carlton Football Club Limited* [1998] 2 VR 546 at 557; see also 552, 564 – 565, 566 – 569, 579; *Zusman v. Royal Western Australian Bowling Association (Inc)* [1999] WASC 86 at [28] – [34]; *Law v. National Greyhound Racing Club Ltd* [1983] 1 WLR 1302. For the same position in CAS Awards, see the CAS award rendered on 2 April 2004 in the matter of *Yachting New Zealand v. Murdoch* at [6.42] – [6.46] and *D'Arcy v. Australian Olympic Committee* CAS 2008/A/1574 at [84], reported in (2008) 3 (1) ANZSLJR 1.

in making their decision. Again, it will be a question of construction as to whether the selection agreement is intended to state exhaustively the relevant factors or considerations to be taken into account by the selectors[73] but even there the criteria are found to have been stated exhaustively nevertheless, unless the selection agreement says to the contrary, the *weight* to be attached to those criteria is a matter for the selectors alone. As stated by the CAS panel in *Yachting New Zealand v Murdoch*:

> The Nomination Criteria themselves do not assign any particular weight to be attached to any particular aspect of the results achieved at the specified Regatta. In the absence of the Nomination Criteria specifying the relative weight to be attached to various considerations then, as a matter of general law, that was a matter for the Panel alone (see Minister for Aboriginal Affairs v. Peko-Wallsend (1986) 162 CLR 24 at 41 and Isaac v. Minister of Consumer Affairs [1990] 2 NZLR 606 at 635). On the facts of the present case it could not be said that 'it is clear that the weight given to the matters so considered is so lop-sided that in truth no appropriate weighing process has been conducted.' (per Lee J in McPhee v. Minister for Immigration & Ethnic Affairs (1988) 16 ALD 77 at 79; see also Re Moore; ex parte Bulk Handling Limited (1982) 56 ALJR 697).[74]

Thus it can be seen that general principles of contract law, guided, by way of analogy, by administrative law decisions, are central to determination of selection disputes.[75]

Disciplinary Offences/Anti-Doping Rule Violations

In many respects what has been said above in respect of selection disputes applies equally in respect of disciplinary matters. Each is governed by the contract which provides for their resolution. In particular, the contractual discretions as to what type of penalty to impose must be exercised in the same manner as discretions relating to selection are.[76] However, it is the interface between application of contract law and the rules of procedural fairness which merits particular attention.

The rules of procedural fairness (or 'natural justice' as it used to be called) are not engraved on tablets of stone.[77] Rather, the principles of natural justice or fairness must adapt to their context and be approached with a measure of

[73] See, eg, the CAS award in *Yachting New Zealand v. Murdoch* rendered on 2 April 2004 at [6.11].
[74] *Yachting New Zealand v. Murdoch* CAS award 2 April 2004
[75] For a very useful discussion on the impact of administrative or public law on sports law see Beloff '*The Impact of Public Law and Sports Law*' (2003) Journal of the Commonwealth Lawyers Association at 51 – 54.
[76] See note 73 above and the reference to *D'Arcy v. A.O.C.* in note 72 above.
[77] *Lloyd v. McMahon* [1987] AC 625 at 702.

realism and good sense.[78]A sporting body's power to discipline a participant in the sport which the sporting body controls or regulates is derived from the contract between it and the athlete in question.[79]

The rules of procedural fairness (leaving aside the content of those rules for the moment) are regarded by the law as part and parcel of that contract unless otherwise expressly excluded. As stated by Campbell J in *McClelland v. Burning Palms Surf Life Saving Club*[80]:

> In Australia, the preferable view is that natural justice comes to operate in [sporting bodies] by the rules of those private organisations being construed on the basis that fair procedures are intended, but recognising the possibility that express words or necessary implication in the rules could exclude natural justice in whole or in part ...

The contract between the sporting body and the athlete has a central, decisive role in determining the athlete's rights to be notified of the charge, the form the hearing, the athlete's right to representation at the hearing, the duty of the disciplinary body to give reasons or not and the nature of the evidence to be heard at the hearing. They also may play a role in determining the grounds upon which members of the disciplinary body may be *recused* from hearing the matter. The orthodox view, in this respect, is that *actual bias* must be shown in order to have such a member removed from hearing a disciplinary matter.[81] However there is nothing to prevent the relevant rules providing for a more liberal regime in respect of disqualification of disciplinary panel members.

Article 8 of the WADC is a good example of a contractual regime imposing minimum standards of procedural fairness. It provides as follows:

> **8.1 Fair Hearings**
>
> Each Anti-Doping Organization with responsibility for results management shall provide a hearing process for any Person who is asserted to have committed an anti-doping rule violation. Such hearing process shall address whether an anti-doping rule violation was committed and, if so, the appropriate Consequences. The hearing process shall respect the following principles:
>
> - a timely hearing;
> - a fair and impartial hearing panel;

[78] *Nadahl v. British Athletic Federation* [2002] 1 WLR 1192 at 1230 [128].
[79] *Law v. National Greyhound Racing Club Limited* [1983] 1 WLR 1302 at 1307; *McClelland v. Burning Palms Surf Life Saving Club* (2002) 191 ALR 759 at 783 – 784 [95].
[80] (2002) 191 ALR 759 at 785 [97].
[81] *Maloney v. National Coursing Association* (1978) 1 NSWLR 161 at 171; *Re Maggacis* [1994] 1 Qd R 59 at 65 – 66; *Kovacic v. Australian Karting Association (Qld) Inc* [2008] QSC 344 at [19].

- the right to be represented by counsel at the Person's own expense;
- the right to be informed in a fair and timely manner of the asserted anti-doping rule violation;
- the right to respond to the asserted anti-doping rule violation and resulting Consequences;
- the right of each party to present evidence, including the right to call and question witnesses (subject to the hearing panel's discretion to accept testimony by telephone or written submission);
- the Person's right to an interpreter at the hearing, with the hearing panel to determine the identity, and responsibility for the cost, of the interpreter; and
- a timely, written, reasoned decision, specifically including an explanation of the reason(s) for any period of Ineligibility.[82]

The contract will also usually specify the types of sanction which may be imposed in a disciplinary matter. Sometimes the sanction regime imposed by the relevant contract can be complicated and multi-layered. Once more, the WADC is a paradigm example of a contract containing a very detailed, multi-layered regime in respect of sanctions.[83]

At every stage of the disciplinary process contract plays the central role in determining the rights and obligations of the respective parties and the sanctions which may be imposed. Whilst, by analogy to public law principles, or by the process of implication of terms, courts may, in some cases, seek to amplify or modify what the contract says the fact remains that it is the express language of the contract which will govern such matters in the overwhelming majority of cases.

Conclusion

The golden thread running through all aspects of sports law is contract. At any level or in respect of any particular aspect of a matter or transaction in which

[82] [Comment to Article 8.1: This Article contains basic principles relative to ensuring a fair hearing for Persons asserted to have committed anti-doping rule violations. This Article is not intended to supplant each Signatory's own rules for hearings but rather to ensure that each Signatory provides a hearing process consistent with these principles.]

[83] See Articles 9 – 12 inclusive of the WADC. The author has discussed this sanction regime in more detail in his paper 'The World Anti-Doping Code' delivered at the International Sports Arbitration Course held in Cambridge, United Kingdom in July 2009 at [88] – [100]. Where the disciplinary provisions do not specify the sanctions to apply or gives a discretion as to sanction, that discretion is exercised in the way discussed in the cases referred to in notes 71 – 74 above.

a sports lawyer may become involved, thorough knowledge of contract law will be his or her most valuable asset. The principles of contract law which apply in the sporting field are essentially the same as applicable in respect of all contracts. But there are a number of aspects in respect of which the law of contract operates or is to be applied in a different way to that in which it operates in respect of other activities. These include:

(a) Courts are more inclined to find participants in sporting activities did not intend to enter into binding legal relations, especially if the involvement is at an amateur one, than they are in respect of other human activities;

(b) in contracts relating to participation in sport, courts are willing to find that a binding contract has been formed even if it would otherwise be difficult to find a relevant 'offer', 'acceptance' or 'consideration';

(c) the accepted principles of construction of contracts require modification or adaptation in respect of certain sporting contracts particularly those which incorporate international agreements such as the World Anti-Doping Code or which involve many parties.

Generally, however, as is illustrated by the case law relating to selection disputes and disciplinary offences, sport is not a law unto itself. Rather, participation in sports is regulated by the same contractual rules and principles as any other activity.