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## Rushing to Judgment: The Evolution of Sports Disciplinary and Arbitral Bodies in Ireland

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### ABSTRACT

This article provides a review of judicial scrutiny of decisions of the leading sports authorities in Ireland. It focuses primarily on the Gaelic Athletic Association ('GAA'), Ireland's leading sports organisation, and the manner in which it has dealt with the increasing incidents of so-called 'ambush injunctions', whereby individual participants seek, primarily through the use of interlocutory orders, to circumvent playing suspensions. The GAA's experience, which is all the more remarkable given that it administers fundamentally amateur games, has been reflected across the Irish sporting spectrum with the Irish horse-racing authorities (the 'Turf Club'), the Football Association of Ireland

('FAI') and the Irish Rugby Football Union ('IRFU') facing similar 'rushes to judgment'.

An interim assessment of the GAA's recently enhanced disciplinary mechanism – the Disputes Resolution Authority – follows this introductory context. The DRA, of which the author is a panel member, is an arbitral-based disciplinary tribunal, independent of the GAA's central authorities, and hears disputes referred to it on an appellate basis only. The establishment of the DRA is of interest for Irish sports administration as a whole. It is suggested that a body of similar operational remit might be used as the basis of a national sports disputes tribunal for Ireland. This analysis of the DRA and the concomitant promotion of a *soi-disant* Irish Court of Arbitration for Sport, forms the central part of this brief review, throughout which frequent use is made of the persuasive authority of English law.

### KEYWORDS

Sport – Gaelic Athletic Association – Judicial Review – Ambush Injunctions – Irish Sports Disputes Tribunal – Court of Arbitration for Sport

### INTRODUCTION

Clearly, if a player's livelihood is at stake, or if he/she is deprived of the opportunity of competing for a high honour which... may not present itself again... the court may be moved to entertain a complaint. Further, it should not be thought that the court's vigilance will be activated only when the member's rights to earn a livelihood or other economic interest is threatened... there are many people throughout the country who are not motivated by economic gain, but who are inspired by other ideals and a sense of community good.... Such persons may have dedicated substantial parts of their lives to these commendable endeavours, and expulsion from the... organisation to which they belong... might well have a sufficiently serious effect on the person's reputation and standing in the community, and his own self-esteem, to move the courts to intervene' (*Barry v Ginnity*, Unreported, Circuit Court, McMahon J, 13 April 2005, at p. 7). 1

This article focuses on the Gaelic Athletic Association, Ireland's largest sporting organisation. As evidenced by the GAA's recent decision to open its stadium headquarters (Croke Park, capacity 80,000) to permit the playing of the hitherto 'foreign and banned' sports of rugby and soccer, the GAA's role in Ireland goes beyond its sporting ethos. It is, all at once, a broadly nationalistic, social and cultural entity (De Burca, 1999; Cronin 1999). The GAA has over 2,500 registered clubs on the island of Ireland and the principal sports administered by it are hurling and Gaelic football. Its major competitions, which take place, initially, at a provincial level and build to an All-Ireland championship, are organised on an inter-county basis. All thirty-two counties on the island of Ireland, as well as teams from London and New York, take part in the GAA's premier competitions. Players are selected from representative and parish clubs within their county or city of origin's boundaries. Despite recent developments permitting players to exploit indirect sponsorship opportunities, players at all levels remain amateur in ethos. The pride in representing one's county, and the sacrifices that have to be made in order to do so, are immense. A combination of these factors, allied to a general frustration with the Byzantine nature of the GAA's disciplinary mechanisms, has resulted in a marked increase in court challenges to decisions of this sports governing body. As Donnellan (2004) notes, the epitome of these challenges occurred on 14 July 2004 when Co. Westmeath midfielder Rory O'Connell was granted an injunction by the Irish High Court, thus 2

restraining the GAA from imposing the balance of his three-month suspension for stamping on a opposing player during a Leinster Championship first round game on 23 May 2004. The interim order permitted Mr. O'Connell to play for Westmeath in the Leinster Football Final of 18 July 2004, the county's first Leinster title victory.

The O'Connell litigation raises three points of interest, which in turn provide this article's structural framework. First and generally, the deeply embedded societal role that the GAA plays throughout Ireland raises fundamental questions about the 'public' nature of ostensibly private sporting organisations. It demands and gives an interesting perspective on the public/private law divide as it affects the amenability of decisions of sports governing bodies in Ireland to judicial review. Second, the tactic used in the O'Connell litigation is often labelled an 'ambush injunction'. The manner in which this opportunistic legal tactic has been used, primarily by leading professional jockeys, will be examined. Third, in an intensely professional sport such as horse racing, where the putative breeding fees of a successful horse can run into millions, the motivation underlying such litigation – to ensure the availability and services of a leading jockey – is self-evident. In contrast, what motivates an amateur player to spend in excess of €10,000, as O'Connell did, on challenging a playing suspension? In part, the response to that question sowed the seeds for the creation of the Disputes Resolution Authority. Thus the final part of the article reviews the DRA's first year of operation with an emphasis on the manner in which it utilised existing authority – principally Irish, English and Court of Arbitration for Sport (CAS) case law – on topics such as procedural unfairness, bias and related breaches of natural justice; issues which are characteristic of those facing sports disciplinary tribunals worldwide.

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### JUDICIAL REVIEW AND IRISH SPORT

When a decision of an Irish sports governing body is challenged by an individual or club, the action most frequently rests on a private law based claim of breach of contract or it may, when appropriate, proceed on the basis of the common law doctrine of restraint of trade. The Irish courts have also noted that the common law and private contractual rights of such claimants are underpinned by an array of implied constitutional rights such as the right to fair procedures, to natural and constitutional justice and the right to earn a livelihood. Moreover, the Irish courts have also demonstrated a willingness to adopt a 'quasi-public law' approach and have, for instance, set aside decisions of sports bodies on the grounds of irrationality and insupportable conclusion (*Bolger v Osborne* [2000] 1 ILRM 250). Nevertheless, and primarily due to the efficacy of such actions, the Irish courts have, albeit infrequently, had to consider whether the decisions of domestic, private entities such as sporting authorities might be amenable to judicial review.

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The Irish courts have traditionally replied in the negative (McCutcheon, 1995). In *Murphy v Turf Club* [1989] IR 171, the Irish High Court held that, although the Turf Club exercised dominant control over racing activities in Ireland, its powers and duties were not sufficiently 'public' in dimension to be susceptible to judicial review. Consistent with the English Court of Appeal decision in *Law v National Greyhound Racing Club* [1983] 1 WLR 1302, the Irish High Court held that the Turf Club's authority derived principally from the contractual relationship between it and those agreeing to be bound by the Rules of Racing. Accordingly, as those powers gave rise to private rights enforceable by private action, the Turf Club's decision – in this instance the revocation of the applicant's licence to train horses – was not amenable to judicial review. In contrast, in the earlier decision of *Quirke v BLE* [1988] IR 83, leave had been given for judicial review of the applicant's refusal to undergo a drugs test. *Quirke* can probably be distinguished on the ground that the appropriateness of judicial review as a remedy was not considered in argument. It is submitted that for future reference, the Irish courts are likely to be persuaded by the decision of the English Court of Appeal in *R v Disciplinary Committee of the Jockey Club, ex p. Aga Khan* [1993] 1 WLR 909 and hold that even where decisions of a monopolistic private body adversely affect the rights of members of the interested public, the appropriate relief remains a private law action for breach of contract (McCutcheon, 2000).

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Despite recent affirmation of the authority of *Aga Khan* in decisions such as *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC Admin 2197, the debate as to amenability of the decisions of sports bodies to judicial review is a continuing one in England. Beloff (1989; 1995; 1996; 1999) has argued consistently that if there is an evident and significant public dimension to a decision of a sports governing body then that decision should be susceptible to judicial review. More technically, Beloff contends that the parameters of judicial review as laid down by the English Court of Appeal in *R v Panel on Take-Overs and Mergers, ex p. Datafin* [1987] QB 815 should be extended to encompass the decision-making competencies of leading sports authorities. The *Datafin* criterion held that in assessing the amenability of an entity to judicial review, the source of that body's power, is, usually, the decisive test. Clearly, if that body's powers are statutory in nature and source then that body is subject to judicial review. If the source is contractual in nature, then the entity is subject to private law only. Where there is ambiguity, the English Court of Appeal held that a court should look at both the source of the body's power (its institutional basis) and the nature of the duty it is performing (its functional operation). Consequently,

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where it can be demonstrated that the authority of an ostensibly and historically private body has been sufficiently woven into the fabric of public regulation, it might, on occasion, be held amenable to judicial review. The caveat 'on occasion' indicates that even if a sports body was deemed to be a public entity under the *Datafin* test, the nature of the specific disciplinary decision in question might still be considered private in character and hence not subject to judicial review.

Are decisions of the GAA sufficiently woven into the fabric of public regulation in Ireland so as to be vulnerable to judicial review? Cox (2004, p. 33) notes, '...a particularly significant question mark hangs over the status of the GAA – a body that quite apart from receiving government funding is so closely linked with the Irish nation and is in charge of an activity which is so close to the hearts of Irish people that it may in principle be regarded as a public body, albeit one that makes both public and private decisions.' Undoubtedly, the GAA has, since its foundation in 1884, been seen as an integral manifestation of Irish nationalism (Mandle, 1987). Its more contemporary societal role is evidenced in a recent report by the Economic and Social Research Institute of Ireland (Delaney and Fahey, 2005), which noted that in terms of social capital the GAA's contribution is immense with approximately 40% of *all* sports volunteer work in Ireland originating within the association. The ESRI report also noted that almost one-third of all Irish adults are members of a sports club and that one-third of that sports membership in Ireland is accounted for by the GAA. Similarly, of the approximately 50% of all Irish adults who attended a sports event in 2005, nearly two-thirds went to a GAA match. In acknowledgment of its contribution, the Irish government has, over the past decade, directed significant funding towards the GAA. In a recent speech, the Irish Minister for Sport reviewed this policy noting that since 1998 his Department's Sports Capital program has allocated €133m for the funding of GAA sports facilities, which is the equivalent of 35% of total funding allocated to all Irish sports over the same period. This was in addition to the €110m, which had been provided towards the redevelopment of Croke Park and the supplementary €11m under the guise of the Irish Sports Council and in lieu of the GAA's games development programmes (O'Donoghue, 2006).

Should the decisions of an organisation which, within eight years, has received almost a quarter of a billion euros in grant aid from state coffers, be considered necessarily public or governmental in nature? There is a strong argument to that effect. The GAA regulates an important aspect of Irish national life. It attracts significant public funding. Moreover, should it cease to exist, Irish society and government would face a severe deficit in terms of social capital, to the extent that it might be necessary to establish a statutory body to continue to perform those functions. Nevertheless, and in broad analogy of circumstance and history, it must be remembered that in *R v Football Association, ex parte Football League Ltd* [1993] 2 All ER 833, the English High Court held that decisions of the Football Association are not amenable to judicial review.

On a related point, under section 3 of the European Convention on Human Rights Act 2003, every organ of the Irish State is to perform its functions in a manner compatible with the State's obligations under the Convention. Section 1's definition of an 'organ of the State' includes a tribunal or any other body (other than the President, the Irish Parliament or Committees thereof or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised. Would the GAA be considered an 'organ of state' for these purposes? It is speculated that the answer would be no. It is noteworthy that in *M/S Zee Telefilms Ltd. & Anr v. Union of India & Ord* [2005] INSC 72, where the Supreme Court of India in ascertaining whether the Board of Control for Cricket in India should be deemed 'state' under article 12 of the Constitution of India, replied in the negative. The (3:2) majority held that decisions of the BCCI, in this instance the licensing of broadcasting rights to private commercial channels, could not be challenged on grounds of 'national importance' through the fundamental rights chapter (Part III) of the Indian Constitution.

Santosh Hegde J explained the rationale of the majority in the following passage:

...it should be borne in mind that the State/Union has...chosen to leave the activities of cricket to be controlled by private bodies out of such bodies' own volition (self-arrogated). In such circumstances when the actions of the Board [of Control of Cricket in India] are not actions as an authorised representative of the State, can it be said that the Board is discharging State functions? The answer should be no. In the absence of any authorisation, if a private body chooses to discharge any such function which is not prohibited by law then it would be incorrect to hold that such action of the body would make it an instrumentality of the State.

It is suggested that a similar approach would be adopted by the Irish courts. As a matter of practice, the s. 1 reference to 'a tribunal or any other body...which is established by law' might be of greater critical interest to Irish sports bodies because, arguably, the provision creates a 'horizontal' effect whereby even in cases between private individuals, the courts must ensure that Convention rights are not violated

(Hunt, 1998). This contention remains at a nascent stage, although the most likely and regular matter for consideration by the courts in the circumstances of sport will be the horizontal effect of article 6 – the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (Boyes, 2001). This matter will be returned to when the importance of the *Stretford v FA Ltd. & Anor.* [2006] EWHC (Ch) 479 litigation for arbitral-based sports disciplinary bodies such as the DRA will be discussed. Before elaborating further on the substantive elements that might underpin a full court challenge to the competency of a sports disciplinary mechanism, a tactic that has been used frequently in Ireland to circumvent the decisions of such internal disciplinary tribunals should be discussed.

## AMBUSH INJUNCTIONS

Prior to the US trials for the 1994 Winter Olympics, Tonya Harding, a leading American ice-skater, was sensationally accused of complicity in a crippling physical attack on her main rival, Nancy Kerrigan. It emerged that Harding's former husband had clubbed Kerrigan across the knees, though he alleged that his ex-wife had approved of his actions. The subsequent criminal investigation appeared to rule Harding out of competing at the Lillehammer Olympics but she sued the United States Figure Skating Association *inter alia* on grounds of breach of contract and loss of reputation, seeking US\$20 million in damages. Harding's legal tactic was the opportunistic strategy referred to as an 'ambush filing' of litigation, that is a last-minute litigation of enough merit to convince a court to award an injunction lifting the effect of a playing suspension and timed, on the very eve of a major competition, to prevent the sports authority from effecting a defence. One of the repercussions of *Harding v United States Figure Skating Association* [1994] 851 F.Supp. 1476 was that the US Congress amended its Amateur Sports Act (now the Ted Stevens Olympic and Amateur Sports Act 1998) implementing three reforms: a court may not impose an injunction against the United States Olympic Committee within 21 days of the beginning of a major competition, it encouraged arbitration as the preferred means of resolving sports disputes and it sought the creation of a federal sports ombudsman, whose office could be used as a forum for conciliation and mediation.

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An American ice rink seems a strange place to locate a discussion of any element of Irish sports law. Nevertheless, a number of Irish sports organisations have had to deal with similar uses of interlocutory or interim injunctions by suspended athletes. At the outset, it must be stated that individual sportspersons are, of course, fully entitled to seek to assert their rights by seeking interim relief of the nature outlined. Nevertheless, there can be, on occasion, an opportunistic element to the process, which from the standpoint of the governing authority of the sport in question is worrying in its detrimental, long term effects. It is these concerns, as opposed to the perspective of individual athletes, which are now addressed.

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To reiterate, the delays inherent in the court litigation process mean that the ordinary courts are generally unsuitable for settling disputes of a sporting nature. Applications for interlocutory injunctions of the kind mentioned play on the fact that they have the potential to disrupt the seasonal and tightly scheduled nature of sports competitions. Interlocutory injunctions are designed to preserve the status quo pending full trial, which would ordinarily in these circumstances mean the (lengthy) postponement of the competition or event in question. In these instances however, the courts, in wishing (understandably) to avoid the scenario of delaying the sports competition as a whole, are, effectively, presented with the choice of either reinstating the player or refusing the application. In turn, this means that the applicant merely has to have a good arguable case that on the balance of convenience s/he should be given an opportunity to play and that the stated suspension should be set aside until its merits can be discussed in full at trial. Evidently, the applicant would, on being permitted to play the game in question, have little interest in pursuing the matter to trial; thus, the interlocutory injunction is manipulated into effecting a final remedy.

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As far as Irish sports organisations were concerned the situation was aggravated by the fact that there were not even obtaining the benefit of all but the most cursory judicial scrutiny of their rules because on the interlocutory application it was sufficient for the court to find that the applicant's case was 'arguable' *simpliciter*. For instance, in *Kinane v Turf Club* Unreported, Irish High Court, McCracken J, 27 July 2001, the plaintiff-jockey, who had been banned for two days for careless riding in a minor race at Leopardstown, subsequently obtained an interim injunction against the decision of the Appeal Committee of the Turf Club. The temporary suspension of the race ban permitted the plaintiff to ride in (and win) one of the most prestigious races on the flat racing calendar, the King George VI and Queen Elizabeth Diamond Stakes at Ascot. Subsequently, Mr. Kinane would serve a two-day ban for his careless riding at Leopardstown, as imposed by a freshly constituted Appeals Committee of the Turf Club. That two-day ban did not coincide with any major race.

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Kinane was successful by exploiting the fact that the Appeals Committee of the Turf Club had not followed the procedure it had agreed with him, principally, a refusal to entertain a plea in mitigation of sentence.

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In response to this litigation, and in recognition that challenges of this kind would only intensify in frequency and sophistication – note *Moran v O'Sullivan* Unreported, Irish High Court, Carroll J, 18 March 2003 – the Turf Club recently carried out a full review of its disciplinary mechanisms (O'Connor, 2006). The importance that the Turf Club placed in these reforms is signified by its appointment of a former Chief Justice of the Irish Supreme Court as the first chairman of its new, quasi-independent appeals board.

Faced with a similar scenario, such as the litigious nature of the O'Connell suspension, the GAA was presented with a choice: either it contested these 'ambush', interlocutory orders into full trial, seeking argument of the substantive issues and, if successful, costs, or it addressed the matters internally. The latter option was chosen on the grounds that it would prove the better long-term solution. Challenging litigation taken by members, and seeking costs against them would, it was felt, prove unpopular and self-defeating. Neither would it address the genuine frustration (evidenced by the litigation costs that members were willing to bear) that members had with the procedure and form of the GAA's existing disciplinary structures and rules. In sum, the litigation was the catalyst for the establishment of the GAA's Dispute Resolution Authority. 17

## DISPUTE RESOLUTION AUTHORITY

The GAA established a Disputes Resolution Authority (DRA) at its annual constitutional congress in 2005. The DRA operates in accordance with the Irish Arbitration Acts 1954-1980. It is independent of the GAA's central authorities and hears disputes on a final appellate basis only. The DRA maintains a panel of arbitrators from which it establishes arbitration tribunals to deal with disputes referred to it. The panel consists of solicitors, barristers, arbitrators and persons who are, according to the Preamble to the DRA's Dispute Resolution Code, 'by virtue of their experience and expertise in the affairs of the...[GAA]...properly qualified to resolve disputes relating to the Rules of the [GAA]'. Before providing an interim assessment of the DRA's first year of operation, three contextual points must be reiterated. 18

Firstly, the DRA operates within a legal culture that is sympathetic towards arbitral-based dispute resolution and the decision-making competency of socially beneficial, private organisations. In *Keenan v Shield Insurance* [1998] IR 89 at 96, McCarthy J of the Irish Supreme Court stated, 'It ill becomes the Courts to show any readiness to interfere in such a [arbitration] process; if policy considerations are appropriate, as I believe they are in a matter of this kind, then every such consideration points to the desirability of making an arbitration award final in every sense of the term.' Similarly, save where the decision of the sports body materially affects the reputation or livelihood of an individual member, in a manner that clearly breaches that player's related constitutional rights, the Irish courts acknowledge that the expertise and experience of the stated sports governing body makes it best placed to decide how to regulate its own sport. Equally, the Irish courts prefer that claimants exhaust all available internal remedies before embarking on litigation and acknowledge that domestic tribunals provide a quicker, more flexible and less adversarial means of dispute resolution. The last factor is of particular importance in Ireland where sports communities are small, informally based and overwhelming voluntary and amateur in nature. Prolonged and expensive litigation can tear at the very fabric of such a sport to its long-term detriment. 19

In this light, the DRA, and similar entities, will also have welcomed the recent English High Court decision of *Stretford v FA Ltd. & Anor.* [2006] EWHC (Ch) 479. The origins of the stated case lie in the plaintiff's acquisition of the right to represent footballer Wayne Rooney as his registered agent. In June 2005, events surrounding this transaction led to the institution of disciplinary proceedings against the plaintiff by the Football Association. The plaintiff contended that the disciplinary proceedings did not comply with Article 6 of the ECHR as invoked under the Human Rights Act 1998. The FA responded by applying for a stay of all further proceedings in the action pursuant to section 9 of the Arbitration Act 1996 on the ground that the dispute fell within the arbitration agreement constituted by Rule K of the Rules of the Football Association. Rule K is a conventional arbitration agreement demanding that disputes of this nature be dealt with by way of a private hearing and a confidential award. Moreover Rule K5(b) provides that, 'The parties shall be deemed to have waived irrevocably any right to appeal, review or recourse to a court of law.' 20

The fundamental issue of the case at hand was whether Rule K was a valid waiver of the rights conferred on the plaintiff by article 6 of the ECHR. The Chancellor of the High Court viewed Rule K as a valid waiver noting that it was entered into on a contractual and consensual basis and that to hold otherwise would be contrary to the public policy underpinning the implementation of the Arbitration Act 1996. It is most likely that the Irish courts would take a similar approach to the waiver provisions in the DRA's Dispute Resolution Code – 'No member or unit of the [GAA] may issue proceedings relating to any such Dispute in any Court of Law in any jurisdiction' – and permit an application for a stay of proceedings under section 5(1) of the Arbitration Act 1980. In more general application, there is a revealing obiter to the judgment of the Chancellor of the High Court in *Stretford* wherein the public interest argument as to the 'importance' of sport is dismissed. Acknowledging that the issues between Mr Stretford and the FA were 21

legal rather than 'sports orientated', and that football regulation is 'no doubt of interest to the general public', the Chancellor, with admirable succinctness, nonetheless concluded 'it is not so important that differences arising in its performance cannot be resolved by arbitration' (*Stretford v FA* [2006] EWHC (Ch) 479, at para. 46).

The second contextual point of interest is that under Irish law there is no obligation on an arbitrator in a domestic arbitration to give reasons for his decision. Nevertheless, article 11.2 of the DRA's Dispute Resolution Code holds that a tribunal panel is obliged to do so. That provision is to be commended. It is based on the principle that through reason-based awards a body of precedent emerges over time to the further assistance of consistent decision-making within the sport or sports in question. Moreover, it is consistent with a policy found in entities as diverse as the statutory, national sports disciplinary tribunal of New Zealand, the more informal sports disputes resolution panels found in Canada and the UK and the CAS (Findlay, 2006). 22

There is one caveat, which is that in writing awards DRA panel members should avoid general and sweeping statements of principle because such 'arbitral activism' is contrary to the norms of arbitration, which must at all times be dispute specific and adjudicative in nature (*FEB v FIBA CAS 98/209*; Reeb Vol 2 p. 500). As Stewart (2003, p. 93) notes, over-reasoning an award may simply provide a disgruntled party with an opportunity to challenge the award in the courts, thereby defeating the fundamental objective of an arbitral award, which pursuant to s. 27 of the Irish Arbitration Act 1954, is final and binding in its nature. It is contended that any precedent that might be drawn from reasoned awards should be allowed emerge through the normal process of interpretation and commentary, and it is strongly advised that the prospective interpretation of putative matters of dispute should be discouraged in awards emanating from private sports tribunals such as the DRA. In a similar vein, although DRA awards have thus far avoided any tendency towards over-elaboration, it is advised nevertheless that the parameters of a reasoned award, as laid down by Donaldson LJ in *Bremer Handelsgesellschaft v Westzucker (No. 2)* [1981] 2 Lloyd's Reports 130 at 132, should continue to be adhered to: 23

All that is required is that arbitrators should set out what, in their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. That is all that is meant by a 'reasoned award'.

Given that, under Irish arbitration law, the decisions of domestic arbitrators operating in private tribunals are vulnerable to legal challenge only in a very limited number of circumstances, it is unsurprising that a decision of the DRA has yet to be challenged in the ordinary courts. For instance, although at common law the Irish High Court has the jurisdiction to set aside an award where an error of law appears on its face, it has been held that this jurisdiction should be used sparingly. In *Sheehan v FBD Insurance plc* Unreported, Supreme Court, Keane J, 20 July 1999, the Irish Supreme Court noted that a court should only set aside on these grounds where the alleged error of law is so contrary to the fundamentals of Irish law that it cannot be allowed to stand. Even then, an Irish court will not be provoked unless, in the context of the decision as a whole, the question of law at issue is integral to the determination of the dispute at hand. Moreover, and as reiterated by the High Court in *Tobin and Twomey v Kerry Foods* [1999] 3 IR 483, the Irish courts should always be slow to intervene with an arbitral process, to the extent that it is not the function of the court to scrutinise the deliberative process of an arbitrator or panel of arbitrators. The stated case involved *inter alia* an application to remove an arbitrator. The complainant utilised all the principal grounds available under the Irish Arbitration Acts, notably claims of a failure to use reasonable dispatch pursuant to section 24 of the Arbitration Act 1954 and a claim of misconduct pursuant to section 37 of the Act. 24

In refusing the relief sought, the High Court stated that the power contained in s. 24 should be invoked infrequently and only where there is considerable, inexcusable delay. This cause of action is unlikely ever to arise in the context of the DRA, whose code provides a detailed timetable for the production of awards as supervised and administered by the DRA's secretariat. On the misconduct ground, the High Court stated that in this context 'misconduct' is not necessarily personal impropriety on the part of the arbitrator rather procedural irregularity. Therefore, so long as an arbitrator has given both sides an equal opportunity to be heard and has not prejudged the outcome, the award should not be susceptible to challenge. In any sports arbitral body, the greatest danger in its initial years of establishment lies, in terms of misconduct, in the 'enthusiasm' of its arbitrators whereby the integrity of the arbitral process is supplanted by their desire to demonstrate their expertise. The DRA has largely avoided this zealotry, adhering to the general principles alluded to by Kenny J in *Lynam v Leonard*, Unreported, High Court, 30 June 1972: 25

While an arbitrator may use technical knowledge when deciding any issue, he should not rely on a matter which has not been mentioned without giving the parties an opportunity of dealing with it in argument and this applies with greater force when a non-legal arbitrator is dealing with a question of law.

The third contextual note prior to assessing DRA case law is that in line with international practice, the DRA refuses to intervene in the context of challenges to the on-field decisions of referees applying the 'laws' of the game. The policy underlying this refusal is that to do otherwise would undermine the integrity and authority of referees, and ultimately the sport in general (*Mendy v AIBA CAS AdH Atlanta 1996/006*; Reeb Vol 1 p. 413, *Canadian Paralympic Committee v IPC CAS 2000/A/305*; Reeb Vol 2 p 567 and *Segura v IAAF CAS AdH Sydney 2000/13*; Reeb Vol 2 p 680). In this, the DRA operates within the guidelines expressed by CAS arbitrator, Michael Beloff QC, in *Yang and Korean Olympic v International Gymnastics Federation CAS 2004/A/704* at 3.17: 'In short, Courts may interfere only if an official's field of play decision is tainted by fraud or arbitrariness or corruption; otherwise although a Court may have jurisdiction it will abstain as a matter of policy from exercising it.' In that case, Yang had competed in the final of the men's individual gymnastics all-round event at the 2004 Athens Olympics. The judges miscalculated Yang's scoring average for his performance on the parallel bars resulting in him being awarded the bronze medal. The defendant sports body admitted that but for the error, Yang would have been declared the gold medallist. On a strict application of the International Gymnastics Federation's rules, Yang's appeal was rejected on the grounds that any objection to a scoring average had to be made in the immediate aftermath of the individual apparatus in dispute, thus time barring the eventual objection. 26

### DRA INTERIM ASSESSMENT

DRA claims, transcripts of which are published on its website at <http://sportsdra.ie>, fall broadly into three categories. The first category is where the claimant argues that the respondent unit of the GAA has, in its disciplinary remit, not acted in a procedurally fair manner in accordance with its own rules. The second category entails breaches of natural justice, for instance, claims of bias. The third, and by far most frequent category, is based on the contention that the respondent unit of the GAA has incorrectly interpreted the disciplinary or eligibility rule at issue. 27

### STRICT COMPLIANCE

Cases in this first category are usually premised on the claim that the respondents have failed to strictly comply with their own rules, and surrounding procedures, in a manner that distorts the application of said rules to the detriment of the applicant. In these instances, the DRA generally abides by the principles laid down in *USA Shooting and Quigley v UIT CAS 94/129*; Reeb Vol 1 p. 187 where, in overturning a decision to ban the applicant for unintentionally taking a banned substance present in certain medication prescribed for his bronchitis, the CAS stated: 28

The fight against doping is arduous, and it may require strict rules. But the rule-makers and rule appliers must begin by being strict with themselves. Regulations...*must* be predictable...emanate from duly authorised bodies...be adopted in constitutionally proper ways...not be the product of an obscure process of accretion...[ nor should they be]...a thicket of mutually qualifying or even contradictory rules...understood only on the basis of the de facto practice over the course of many years of a small number of insiders.

In strictly Irish precedent, the DRA has seen regular mention of cases such as *Clancy v Irish Rugby Football Union* [1995] 1 ILRM 193 and *Dundalk Football Club v Eircom League and Kilkenny FC* [2001] 1 IR 434. In *Clancy*, the plaintiff had been deemed temporarily ineligible to play for his new club. The decision had been based on a reasonable interpretation of a well-established 'quarantine' transfer rule whereby in a transfer between teams in the same league competition, the transferring player cannot immediately play for his new club. The decision was set aside because strict compliance with the appropriate procedures surrounding the rule, as to the constituency and standing of the hearing Committee, was not followed. The background to the case was that Clancy felt that it was essential for him to play in as many domestic league matches as possible to be considered for selection for the Irish rugby team for the then forthcoming World Cup of 1995. This remains typical of the true motivations that underlie many of the claims presented to the DRA – the plaintiff-applicant is simply desperate to play and compete. 29

*Dundalk Football Club* is a reminder that not only must a sports governing body act intra vires its rules but where, for instance, those rules do not cover a particular fact situation, they should not be manipulated to reach even what the governing body deems a reasonable outcome. Where there is a lacuna in the application of the rules, then under Irish sports law, the governing authority must, in effect, bear the brunt of whatever flows through that gap, until such time as that gap is closed by way of the rule-making authority of its constitutional body. Consistently, sports bodies 'cannot invent prohibitions or sanctions where none appear' (*R v IOC CAS AdH Nagano 98/002*; Reeb Vol 1 p. 419). In the stated case, Kilkenny FC played Limerick FC in a first division match of the national soccer league. Kilkenny won, duly qualifying for the play-offs to the premier division but were found to have played an improperly registered player. It seems that the player in question did not have the opportunity to sign a registration form, which, helpfully, had been completed for him by a Kilkenny official. Dundalk, who finished immediately 30

below Kilkenny in the final league table, objected. The relevant rule suggested that Kilkenny be docked three points. The specific rule was mandatory in nature and did not allow any extenuating circumstances to be taken into account. Nevertheless, the Eircom League referred the matter to arbitration. The arbitrator ordered a replay of the Limerick game, which Kilkenny won. Dundalk challenged this process in the High Court where it was held that the Eircom League had no jurisdiction to act outside of its mandatory rule regarding improperly registered players.

Specific to DRA case law, in case no. 1/2006, <http://sportsdra.ie/documents/50708.doc>, wherein the applicants argued that the disciplinary entity of the respondent body had sat without the appropriate quorum, the DRA panel, in dismissing the claim, remarked that minor technical breaches of procedure ought not to ground DRA claims. The panel held that the DRA could not become a refuge for minor claims. In any event, the DRA's practice of hearing claims de novo and in full should negate the impact of previous procedural errors or unfairness. At bottom, and in order to be substantiated, it appears that DRA claims must be based on some manifest and material unfairness; failing this standard, the self-regulatory competency of the respondent body will not be questioned. The corollary is also true and unduly and disproportionately legalistic interpretations should not be given to procedures if these are to the detriment of applicants. In this, the DRA will allow for a 'certain looseness', as based on the principles established in *Smith v FINA CAS Atlanta 001 Reeb Vol 1 p. 377*. In that case, the United States had sought the disqualification of Irish swimmer Michelle Smith from the 400-metre freestyle event at the Atlanta Olympics on the grounds that the Olympic Committee of Ireland had substituted her into the event after the entry deadline. FINA initially refused to permit the substitution but when informed by the IOC that it was not rigidly enforcing the deadline, FINA reversed its decision. An ad hoc division of the CAS upheld this decision and Smith went on to win her third gold medal of the 1996 Games (Pilgrim, 1997).

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### **NATURAL JUSTICE**

The DRA's code of operation is underwritten by an adherence to the maxims of *audi alterem partem* and *nemo iudex in sua causa*. Given that the sports community in Ireland is a relatively small one, adherence to the latter has the potential to prove somewhat troublesome. Ideally, it is acknowledged that any member of a disciplinary tribunal who fears a possible conflict of interest arising out of the matter at hand should step aside. However, given the realities of sports administration in a small jurisdiction such as Ireland, the DRA code states that an objection to a member of a DRA panel can only be grounded on a 'genuine conflict of interest'. This is in line with the requirements of section 39(1) of the Arbitration Act 1954, which provides the Irish High Court with the power to give relief where an arbitrator is not impartial. In *Bord na Mona v Sisk* [1990] 1 IR 85, the applied interpretative test was whether a right minded person with full knowledge of the facts would conclude that there is/was a real likelihood of bias. In that case, a well-known architect was appointed as an arbitrator in a dispute between the parties. A decade previously, the appointed arbitrator had been involved in the design of a project that had been developed by a subsidiary of the respondent. The plaintiffs argued that this previous relationship had led to a real danger of bias in the conduct. Although the court acknowledged that there might, at first instance, be a perception of bias, an objective analysis of the facts led it to conclude that there was no real likelihood of bias.

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Further assistance on the issue of bias in the conduct of sports tribunal proceedings can be found in the recent English High Court decision *Flaherty v NGRC* [2004] EWHC 2838 (Ch). In that case, the trainer of a greyhound challenged a decision by the defendant's stewards to reprimand and fine him on a charge of administering an animal in his charge with a performance enhancing substance. Flaherty argued that the findings of the NGRC's stewards were invalid, ultra vires or otherwise unlawful because the defendants had conducted the disciplinary proceeding against him unfairly. Central to the claim of procedural unfairness was a claim of actual bias on the part of one of the stewards or, alternatively, ostensible bias on his part. In the course of a comprehensive judgment, Evans-Lombe J dismissed the claim of bias through an application of the test laid down by Lord Phillips MR in *Re Medicaments and Related Class of Goods* [2000] 1 WLR 700 at para 37:

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Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve. A judge may be biased because...he has reason to prefer one outcome of the case to another...because he has reason to favour one party rather than another...because of a prejudice in favour of or against a particular witness...or...it may arise from particular circumstances which...predispose a judge towards a particular view of the evidence or issues before him.

### **INTERPRETATION**

The majority of claims lodged with the DRA concern disputes as to the interpretation of the rules of the GAA. Given that the rules of the GAA constitute a contract with its individual members and units, the fundamental tenets of contractual interpretation apply in disputes of this nature. As in claims of strict procedural compliance where the DRA generally abides by the principles laid down in *USA Shooting and Quigley v UIT CAS 94/129*; Reeb Vol 1 p. 187; in this instance, the DRA adheres to the principles found in

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cases such as *B v IJF* CAS 99/A/230; Reeb Vol 2 p. 369. In that case, the applicant, a silver medallist at a judo world championships, had tested positive for a performance enhancing substance a week prior to the tournament. The governing rules permitted disqualification in such circumstances only for positive tests *during* competition. Although the respondent argued that this lacuna was simply an oversight in its anti-doping code, CAS held that applicable rules, as strictly stated in sanction and offence, should be interpreted in the applicant's favour.

Similarly, the approach taken by the DRA is, to begin with, a literal interpretation of the disputed rule. 35  
Under the requirements of certainty, consistency, fairness, natural justice and precedent, the DRA operates under the principle that rules should be interpreted strictly as against both parties. This should be the case even where such an interpretation might attach manifest inconvenience as to the future implementation of the rule in question and/or where that interpretation appears unsympathetic to the personal plight of the parties involved. In this, there is, as with all entities of similar origin, an acknowledgement by the DRA of the separation of powers between its judicial role and the legislative role of the GAA's constitutional congress. If the literal approach proves unsatisfactory, then a schematic construction of the disputed rule is given. The policy adopted by the DRA can be reconciled with that taken by CAS in cases such as *Perris Wilkins v UK Athletics* CAS 2003/A/455; Reeb Vol 3 at p. 454 – where a rule is open to an ambiguous interpretation the principle of *contra preferentem* applies to the detriment of the sports governing body. The Irish authority cited most frequently in this regard is that of *Bolger v Osborne* [2000] 1 ILRM 250. In that instance, a *contra preferentem* reading of a rule permitted a leading horse trainer in Ireland to challenge in the ordinary courts a decision by a disciplinary committee of the Turf Club, which had fined him for allegedly not running a horse on its merits during the course of a competitive race.

In the circumstances the rules must be applied as in the case of any rules constituting any other contract, 36  
and in so far as there is any ambiguity in them, such ambiguity must be construed against the defendants and in favour of the plaintiff. It is equally the case that where the rules give such powers as fines, suspensions or losses of licenses the rule must be exercised strictly also from the plaintiff's point of view and in a manner which is not arbitrary' (*Bolger v Osborne* [2000] 1 ILRM 250, at p. 263 per Macken J).

#### **INTERIM ASSESSMENT**

In its first year of operation, the DRA has dealt with approximately 50 claims. It has received mixed 37  
reviews, mainly resulting from a series of events arising out of its very first hearing. The case presented the DRA with a number of difficulties symptomatic of those faced by similarly constituted disciplinary tribunals throughout the sporting world. The background to these proceedings originates with the eligibility of a club footballer called Mark Vaughan. Vaughan's club, Kilmacud Crokes, won the Dublin county club championship in 2004. That triumph permitted Crokes to proceed to the provincial (Leinster) club championships. In November 2004, Vaughan was red carded during the course of a game in that provincial championship. According to the disciplinary rule in question, the stated suspension was to be served during the next game in the competition in which the suspension had been incurred. In May 2005, Vaughan was to play a significant role in his club's defeat of St Brigid's during the first round of that year's Dublin county club championship. Prior to the fixture, St Brigid's had objected to Vaughan's eligibility arguing that the Leinster club championship was an extension and continuation of the club county championships within the province; thus Vaughan should have been under suspension.

In DRA case no. 1/2005, <http://sportsdra.ie/documents/dra12005.pdf>, the DRA panel held that on a 38  
literal interpretation of the disputed rule, Vaughan was not debarred from playing in the game against St Brigid's. The DRA panel found that the rule as then constituted meant that the county, provincial and, where applicable, the All-Ireland stages of the club championship were not one stage of the one competition, and were in fact separate entities. The panel recognised that this interpretation might be (and was) contrary to the general view of the rule but that anomalies in the GAA's rules on 'layered' suspensions – that is, suspensions that must be cross-referenced against different representative levels of the competition in question – could only be addressed by the GAA's constitutional Congress. Rather embarrassingly, the usefulness of the judgment appeared to be put in question when it was revealed that the panel had not taken into account an amendment to the GAA's constitutional, Official Guide, and had been using a slightly outdated version of that Guide. Subsequently, a freshly constituted DRA panel rejected a claim by St Brigid's based inter alia on the above ground, arguing, somewhat uncomfortably, that:

...arbitrators determine a reference on the basis of the material put before them. It is up to the parties to present and marshal their arguments. It would undermine entirely the benefit of arbitration were parties to be permitted to re-agitate on the basis of arguments which were known to them at the time (DRA case no. 9/2005, <http://sportsdra.ie/documents/dra92005.pdf>, at para 48).

The Vaughan affair was unfortunate. It presented the DRA with a steep learning curve and subjected it to 39

significant media criticism and, at times, wholly undeserved ridicule (Humphries, 2005). Nonetheless, the GAA as a whole has ultimately benefited from it in the sense that the incident has prompted a comprehensive internal review of the GAA's disciplinary code with a view to achieving greater consistency in the application and interpretation of that code (Moran, 2005). The GAA has, for instance, amended its rulebook so as to eliminate the Vaughan anomaly. Overall, it is predicted that as DRA precedent settles and, most importantly, as the inconsistencies and anomalies in the GAA's disciplinary code revealed in such claims are addressed, that figure will fall. In fact, in many ways, one of the primary purposes and contributions that an entity such as the DRA makes is in promoting transparency in the rules of its foundational body. It is envisaged that the GAA rules that will attract advisory DRA concern in the near future are those that provide for mandatory penalties without any discretion for extenuating circumstances and the drafting of a 'bringing the game into disrepute' charge. Although most sports have versions of the latter charge in their rulebook, the charge is open to criticism as being too uncertain as to the conduct that it purports to cover. Moreover, the 'catch-all' nature of a 'conduct unbecoming' charge presents difficulty as to the notification of charges, its consistent application and the jurisdiction it gives to discipline members for 'off-field' activities that might be seen to materially affect the reputation of the sport in question (Kosla, 1999).

On a related point, there have been concerns that the DRA has been too accessible in the first year of its operation and that it has tended to entertain claims of a trivial nature. Consequently, in May 2006 the minimum deposit required for a DRA hearing was doubled from €500 to €1,000. It has also been recommended that respondents should apply for costs in a more forceful manner than has hitherto been the practice. The intimate nature of sports disputes means that costs have always proved problematic even at the highest level, such as at CAS. Respondents, typically administrative units, dislike applicants, typically individual players or clubs, being left with prohibitive costs. Experience has demonstrated that this is the case even after the most adversarial of disputes (Redman, 2005). The problem at DRA hearings is typically as follows. A county or provincial board (the respondent) suspends a player or club (the applicant). The matter goes to the DRA with both sides fully represented by legal counsel at the hearing. It is seldom that in a scenario where the DRA finds for the respondents that that county or provincial board will make an application for costs. This is because the respondents are acutely aware of the costs that the applicants have already undertaken and will be sympathetic towards a person or club who, on completion of the hearing, will remain an important constituent part of their organisation. This 'clemency on costs', while understandable on a personal basis, nevertheless encourages the pursuit of trivial claims; thus, the policy has been to recommend respondent units of the GAA to apply for costs if appropriate (DRA case no. 22/2005, <http://sportsdra.ie/documents/dra222005costs.pdf>). 40

Apart from costs, the DRA has also faced some problems regarding the consistency of its decision-making. The DRA draws its three-person tribunals from a panel of over 40 persons of varying legal, sporting and administrative expertise. This structural, compositional factor and the unavoidable novelty of claims faced by the DRA in its first year of operation meant that some inconsistency and uncertainty was inevitable. In line with international practice, the DRA's secretariat has tried to ensure that at least one member of each DRA tribunal has sat on an earlier tribunal. It is hoped that this will promote some consistency in the procedural operation and substantive decision making of the DRA. In addition, the policy of publishing decisions on the Internet should assist those taking and resolving cases. A yearly digest of case law, similar to Mathieu Reeb's CAS Digest, is also envisaged. Again, this policy can be reconciled with the fundamental objectives of the DRA, and all by analogy all similar entities, which is to provide members of the GAA with basic fairness and clear guidelines as to the interpretation and operation of the GAA's disciplinary code. In sum, there is no doubt the DRA is a commendable and worthwhile initiative, which could and should serve as the basis of a national sports dispute tribunal for Ireland. 41

## SPORTS DISPUTES TRIBUNAL OF IRELAND

Recently, Ireland's most successful Olympian, Michelle de Bruin, who won three gold medals and one bronze in various swimming events at the 1996 Atlanta Olympics, has proposed the creation of an Irish Court of Arbitration for Sport (De Bruin, 2005). De Bruin, now a practising barrister at the Irish bar, has considerable first hand experience of the workings of CAS arising from its dismissal of her appeal against a four-year ban by FINA on a charge of manipulating a urine sample used in doping control (*B v FINA* CAS 98/211; Reeb Vol 2 at p. 255). De Bruin's view is that an Irish CAS would operate in the jurisdictional shadow of the International CAS and that it would be subsidised domestically by the Irish Sports Council. De Bruin further suggests that any application for public funding by a sports body be made conditional upon that body's agreement to refer disputes to the Irish CAS. In terms of its appellate jurisdiction, its arbitral-based procedures and its decision-making competency, De Bruin's proposition offers little that is outside the capacity of the DRA, save one exception. De Bruin's putative Irish CAS would also provide a dedicated mediation and advisory opinion services. It is agreed that this could only enhance the non-adversarial resolution of sports disputes in Ireland to the extent that a dedicated sports ombudsman could be charged with that specific task (Morris, 2000). 42

This author's personal preference is that Irish sport requires a compromise between 'hard' law and 'soft' arbitration in the guise of a statutory tribunal (Anderson, 2005). This entity would be similar in operation and scope to that established under the Sport and Recreation of New Zealand Act 2002, s. 8 (Gibson, 2005). In 2006, the Federation of Irish Sports, a voluntary association whose membership currently consists of over seventy Irish sports governing bodies, announced the formation of sports specific resolution service, provisionally called Just Sport Ireland ([www.irishsports.ie](http://www.irishsports.ie)). JSI is based on the self-regulatory model provided by UK's Sports Dispute Resolution Panel and the quasi-statutory sports dispute resolution centre promoted by the Canadian government under the Promotion of Physical Activity and Sports Act 2003, s. 9. It appears that this dispute resolution service will draw its expertise from a standing panel of arbitrators and mediators consisting, typically, of legal professionals, sports administrators, former players and coaches as well as sports scientists and physicians. While advanced developments are awaited on this scheme, its three primary objectives appear commendable: to provide a dispute resolution service (conciliation, mediation, arbitration) for the final resolution of sports disputes; to provide advisory opinions on disputed matters of a sporting nature; to educate all those involved in Irish sport in an endeavour to reduce the likelihood of sports disputes arising. It is contended that these objectives provide a neat synopsis of all that is advantageous in the promotion of such arbitral entities and that they can be further reconciled with the boundaries of *lex sportiva*; namely, good governance, procedural fairness, harmonisation of standards and equitable treatment (Foster, 2005). 43

## CONCLUSION

The Irish courts rightly hesitate before intervening in disciplinary hearings held by private associations. Intervention is deemed appropriate only in the most extraordinary circumstances such as where the association has clearly breached its own rules to the imminent, serious and irreparable harm of the plaintiff's constitutional rights, and only then on the proviso that the plaintiff has exhausted all internal remedies. The policy underlying this 'triple lock' is that the applicant party in question is bound by contract to the authority of the sports governing body. Respecting that principle of freedom of contract, and for good social policy reasons, the Irish courts recognise that sports governing bodies are in a better position than the courts to determine how their affairs are to be run. That reticence notwithstanding, there is no doubt that sports bodies in Ireland should continuously monitor the appropriateness and clarity of their rules. Further, it is clear that on the grounds of efficacy of administration and basic fairness, individual sports bodies in Ireland should be encouraged to enhance their own disciplinary tribunals and promote a national sports disputes resolution authority. In overall summary, it seems safe to assert that if a decision of an Irish sports body is one that a tribunal properly instructing itself as to the facts and the law could have reasonably reached, it will not be set aside by the ordinary courts. Equally, where on the rare occasion a decision of a sports tribunal in Ireland is deemed amenable to judicial scrutiny, that review should amount to no more than an assessment of whether the disciplinary process in dispute ended in what was once neatly referred to as 'a fair result' (*Calvin v Carr* [1980] AC 574, at p. 593 per Lord Wilberforce). 44

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