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Dispute Resolution in Irish Sport: The Courts as Reluctant Interlopers

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In the past decade there have been a number of judicial review cases involving sports governing bodies in Ireland. While the courts have been willing to hear such cases, it has been repeatedly emphasised that judicial intervention in the decisions of sporting organisations should not occur lightly and recourse to the courts should only happen in the most exceptional of circumstances. The Irish courts have referred to the need for sports bodies to submit their dispute to arbitration or mediation. In Ireland there are two domestic bodies offering alternative dispute resolution in the sporting context: Just Sport Ireland (JSI) and the Disputes Resolution Authority (DRA) of the Gaelic Athletic Association (GAA). The availability of alternative forms of dispute resolution in Ireland provides a welcome alternative to the expensive, often divisive, option of judicial review proceedings. Given the benefits of resolution of disputes through the DRA or JSI and in light of the Irish courts' general reluctance to become involved in sporting disputes, it is likely that these processes will become increasingly availed of, most pertinently as Sport Ireland (formerly Irish Sports Council (ISC)) has made it a condition for recognition for new governing bodies and has been actively encouraging existing sports governing bodies to insert a referral clause in their rules.

Keywords: judicial review; Ireland; sports governing bodies; alternative dispute resolution; referral clauses

Introduction

A number of sports-related cases have come before the Irish courts in the last decade (for example see: *Byrne v Irish Sports Council* [2013] IEHC 438; *Conway v Irish Tug of War Association and Others* [2011] IEHC 245, *Jacob v Irish Amateur Rowing Union Ltd* [2008] IEHC 196; *JRM Sports Ltd (Trading as Limerick Football Club) v The Football Association of Ireland* [2007] IEHC 67; *O'Connell & Another v The Turf Club & Another* [2014] IEHC 175; *Hyland v Dundalk Racing (1999) Ltd t/a Dundalk Stadium* [2014] IEHC 60; *Hyland v Dundalk Racing (1999) Ltd t/a Dundalk Stadium (No.2)* [2015] IEHC 57; *O'Hare & Another v Dundalk Racing (1999) Ltd t/a Dundalk Stadium* [2015] IEHC 198 and *O'Connell and Lambe v The Turf Club* [2015] IESC 57). While these cases have resulted in judicial intervention in the decisions of sports governing bodies, the judges have consistently emphasised that governing bodies should exhaust the relevant internal mechanisms and instead of seeking redress in the courts, the matter should be resolved using arbitration or mediation. In January 2015, two High Court judgments were handed down in three test cases involving a 14 day hearing which addressed issues of quantum (*Hyland v Dundalk Racing (1999) Ltd t/a Dundalk Stadium (No.2)* [2015] IEHC 57; *O'Hare & Another v Dundalk Racing (1999) Ltd t/a Dundalk Stadium* [2015] IEHC 198). Mr Justice Hogan highlighted the need for sports governing bodies to configure their internal dispute mechanisms along the lines of the Dispute Resolution Authority (DRA) of the Gaelic Athletic Association (GAA) so that even in cases involving complex issues as those presented in the three test cases could be appropriately resolved instead of seeking redress in the courts. Not only do the courts contend that these matters are best dealt with internally or through independent arbitration or mediation, they also raise the issue of public money being spent on costly litigation. All recognised sports governing bodies in Ireland receive direct funding from Sport Ireland and indirectly from the Department of Transport, Tourism and Sport (DTTAS). It raises the question whether it is appropriate that tax payers' money be used to fund such disputes. As a corollary, the reduced funds available for the sport due to the costly litigation means that the governing body diverts the much needed funds away from developing and nurturing the sport and its sports persons.

In discussing the three test cases, this article will examine the judicial review of sports governing bodies in Ireland. It will proceed to examine the recent approach of the Irish Sports Council (ISC)/Sport Ireland (Sport Ireland since October 2015) and its requirement that all governing bodies include a dispute resolution mechanism within their rules. Developments within Just Sport Ireland (JSI) will also be discussed as Sport Ireland and JSI become

increasingly involved in promoting arbitration and mediation within Irish sport. Reference will also be made to Sport Resolutions UK as it operates in a similar manner to JSI. Where relevant, parallels will be drawn between the situation in Ireland and England and Wales.

Judicial Review and Irish Sport

Typically, sport is considered to be a private activity and, as such, is regulated by private law. However, the public law will intervene in situations especially where there is an allegation of a breach of natural justice. A sports person who is aggrieved by a decision of their governing body may initially view the courts as the most appropriate forum to resolve their dispute. There are merits to seeking redress in the courts. As Little and Morris (1998: 129) note, judicial intervention embodies a 'copper bottomed guarantee of ultimate justice for individual sportsmen embroiled in stormy long running (invariably disciplinary) disputes with their governing bodies'. In other situations, it is much more beneficial for the sports person and the sporting organisation to seek to resolve their dispute without recourse to the courts as will be discussed below.

Judicial review is a means whereby the High Court can oversee the administrative decisions of public bodies (Donnellan and Leahy 2014: 57–68). The goal of this oversight is not to act as an appeal process which reassesses the merits of such decisions, but rather to make sure that such decisions are made in accordance with fair procedures and the principles of natural justice. An individual will have grounds for judicial review where the procedures involved in an administrative action were not fair, where the person contends that s/he has not been given a fair opportunity to be heard (*audi alteram partem*) or where those adjudicating were biased in some way (*nemo iudex in causa sua*). The procedure for seeking judicial review is set out in Order 84 of the Rules of the Superior Courts 1986 to 2013. Rule 18(1) provides that the orders available in judicial review proceedings include the public law remedies of mandamus (an order to secure the performance of a public duty imposed on a public body either by statute or by common law, Hogan and Gwynn Morgan (2010): 829), certiorari (order quashing the decision of a public body which has been arrived at in excess of jurisdiction or where an error appears on the face of the record, Hogan and Gwynn Morgan (2010): 829), prohibition (an order restraining a public body from doing something which would be in excess of its jurisdiction, Hogan and Gwynn Morgan (2010): 829) or quo warranto (by what authority). With regard to quo warranto, Coffey (2010: 312) notes that this order is seldom used. Historically, it was invoked to determine whether someone who claimed an office, franchise or liberty had a right thereto. The private law remedies of injunctions (Rule 18(2)), declarations (Rule 18(2)) and damages (Rule 25(1)) are also available. To be eligible to apply for judicial review, the applicant must show that s/he 'has sufficient interest in the matter to which the application relates' (Rule 20(5)). The time limit for applications is three months from the time when the grounds for the application first arose (Rule 21(1)). Extensions of this time limit are available but only where the Court is satisfied that (a) there is good and sufficient reason for doing so and (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned either (i) were outside the control of, or (ii) could not reasonably have been anticipated by the applicant (Order 84 of the Rules of the Superior Courts 1986 to 2013, Rule 21(3)). Applications for judicial review in Ireland are a two-stage process. First, the applicant must make an *ex parte* application for leave to seek judicial review (Rule 20 (1)). The necessity for the leave stage is described by Kelly J in *O'Leary v Minister for Transport, Energy and Communications* [2000] 1 ILRM 391, at p. 397 as follows:

'The judicial review procedure is designed so as to ensure that cases which are frivolous, vexatious or of no substance cannot be begun, hence the necessity for judicial screening at the stage where leave is sought. The procedure is also designed to ensure that a fair and expeditious trial takes place and that such trial is focused upon the issues, in respect of which the judge, at the leave stage, felt ought to be argued, and those alone'.

The court hearing an application for leave has discretion to direct that the application be heard on notice (Rule 24 (1)). It is also possible for the court hearing the application for leave to treat that application as if it were the hearing of the application itself, thereby short-circuiting the two-stage process. This may be done with the consent of all parties on the application of one of the parties where 'there is good and sufficient reason for so doing and it is just and equitable in all the circumstances' (Rule 24 (2)).

Judicial Review and Sports Bodies in Ireland

In most cases involving a sport's governing body, the Irish courts will only intervene in the most exceptional circumstances. For the most part, decisions made by governing bodies are immune from judicial scrutiny. However, there are situations where the courts will become involved and as a result the determination of the sport's governing body will be subject to judicial review.

At the outset it is important to distinguish judicial review of statutory bodies (such as those established in Ireland in the horse racing and greyhound industries) and the judicial scrutiny of sports bodies, which is often done on a private law (contractual) basis by way of a plenary summons. In invoking the law of contract, the sportsperson will argue that the decision reached by the governing body is tainted with procedural unfairness 'such that the implication of

a contractual duty to act fairly has been breached' (Anderson, 2010b: 28). There are a number of English decisions that also demonstrate this. In *Law v National Greyhound Racing Club Ltd* [1983] 3 All ER 300 the Court of Appeal held that the rules of the sporting organisation provided that those who participated were deemed to have submitted to the rules and jurisdiction of that sport. Similarly in *Korda v ITF* [1999] All ER (D) 337 a tennis player was held to be in a contractual relationship with the governing body in relation to its disciplinary jurisdiction. Lord Denning in *Lee v The Showman's Guild of Britain* [1952] 2 QB 329 submitted that the jurisdiction of 'domestic tribunals' was based in contract and such tribunals must comply with the rules of fairness. Anderson (2010b: 29) adds that the 'legal nexus is crucial, both in a procedural and substantive sense' and using *Modahl v British Athletic Federation* [2001] EWCA Civ 1447; [2002] 1 WLR 1192 as an example, it is imperative to consider the nature of the contractual relationship between the sports person and his/her club and the relevant national and international governing body. In the absence of a contract, the claimant will be unable to claim for damages (Anderson, 2010b: 29). If there is no contractual relationship between the parties, judicial review 'may be the *only* procedure available to the applicant' (Cox, Schuster and Costello (2004): 30).

In order for judicial review of a decision of a sporting organisation to be available, it must be a public body. Otherwise, as discussed above, any dispute about a decision made by such a body would need to proceed on the basis of a private action. This can pose problems where the organisation is not deemed to be a public body as demonstrated by the case of *Murphy v The Turf Club* [1989] IR 171. Barr J (173–74) held that judicial review was not possible due to the consensual contractual relationship of the respondent and the applicant and 'in purporting to revoke the applicant's licence, the respondent was not executing a public law function'. However, in the more recent case of *O'Connell & Another v The Turf Club & Another* [2014] IEHC 175, the Turf Club was found to be a public body as it had now been placed on a statutory footing (Irish Horseracing Industry Act 1994). McGovern J (para. 19) held that the Turf Club was now amenable to judicial review as its decisions could no longer be seen as arising only from a private law contract. Thus, it would seem that if an organisation has its origins in statute, it will be held to be a public body. In the Irish context, judicial review may be available to private bodies which operate in the public domain, the source of its power is non-statutory and it occupies a monopolistic position rather than a consensual relationship with its members (Cox, Schuster and Costello (2004): 32). In such situations, the organisation's decisions 'may be judicially reviewed even where the source of its power is non-statutory' (Cox, Schuster and Costello (2004): 32).¹ There seems to be a lack of clarity in Irish law as the courts 'have intervened to ensure fair procedure, but there appears to have been no systematic analysis on which this has been done' (O'Connor (2013): 78–79). O'Connor suggests that in a number of cases (for example: *Clancy v IRFU* [1995] 1 ILRM 195; *Barry v Rogers & Allen & Others* [2005] 4 JIC 1301; *Moloney v Bolger* [2009] 9 JIC 0601; *JRM Sports t/a Limerick Football Club v FAI* [2007] IEHC 67; *Conway v Irish Tug of War Association & Others* [2011] IEHC 245) the Irish courts have seemed to assume an implied power to intervene on the basis of the type of decision involved without assessing fully whether the organisation and the decision qualify as ones which should be amenable to judicial review.

With the exception of sports bodies created by way of statute, most sporting organisations in Ireland are private and voluntary associations. Traditionally the approach in Ireland was that only decisions made by public bodies (which include sports bodies created by statute) were challengeable by way of judicial review (Cox, Schuster and Costello (2004): 31). However, in the case of *Beirne v Commissioner of An Garda Síochána* [1993] ILRM 1 the court held at p. 2, that where the duty being carried out by a decision-making authority is of a nature which might ordinarily be seen as coming within the public domain, then judicial review is applicable. However, the inverse is that judicial review is not possible in situations when the 'decision solely and exclusively derived from an individual contract made in private law' (cited with approval in *O'Connell & Another*).

As noted above, judicial review may be available to private bodies which operate in the public domain, whose powers are not derived under statute and the relationship between it and its members is monopolistic. This raises the question whether private bodies should be subject to judicial scrutiny in the absence of government control (Gwynn Morgan, 2012: 619). One response to the question in England has been '[i]f they did not exist, the government might have to invent them' (Gwynn Morgan, 2012: 619). Beloff and Kerr (1996: 31) contend that the 'correct question is whether government would intervene and regulate *if no one else did*'. Bingham MR in *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909, at 915 referred to the applicant's arguments in relation to the status of Jockey Club in the following manner:

'Its powers are of a nature and scope which affect the public. It matters not that it is a private body: that is an accident of history. What matters is that if it or some other private body did not perform the functions it does the government would be obliged to create a body to perform those functions'.²

As with the position in England and Wales, a sporting body in Ireland may not be public in nature but given its importance in the lives of its members and taking a more holistic view, the impact it has on the community, it may be subject to judicial scrutiny. Thus, there is a public interest that warrants the intervention of the courts. It is worth citing at length the dissenting judgment of Denning L.J. (in relation to a Cornporters' Committee who ordered the plaintiff to recompense six other cornporters) in the case of *Abbott v Sullivan* [1952] 1 KB 189, at 198:

'The jurisdiction of a domestic tribunal such as the Cornporters' Committee must in the last resort be based upon contract, express or implied. Outside the regular courts of this country no set of men can sit in judgment on their fellows except so far as Parliament authorizes it or the parties agree to it. Sometimes the jurisdiction of a domestic tribunal is contained in a written set of rules to which the parties subscribe, as in the case of the Jockey Club. In other cases it is contained in no written code, but in the custom and practice of a profession, as in the case of the Inns of Court, in which case the consent is not express but is to be inferred from the very fact of joining the profession. So in the case of the cornporters, everyone who applies for admission, and is accepted by the Cornporters' Committee, must be taken to agree to the jurisdiction of the committee as by custom established. These bodies, however, which exercise a monopoly in an important sphere of human activity, with the power of depriving a man of his livelihood, must act in accordance with the elementary rules of justice. They must not condemn a man without giving him an opportunity to be heard in his own defence: and any agreement or practice to the contrary would be invalid'.

On 25 June 2015, the Supreme Court delivered its judgment in the case of *O'Connell and Lambe v The Turf Club* [2015] IESC 57. The Supreme Court held that the Turf Club was not purely a private body (at para. 24), it is the regulatory body in relation to flat racing in Ireland, while an applicant must obtain a licence in order to carry out the profession of a jockey, the jockey cannot be said to 'have freely and voluntarily consented to the exclusion of the supervisory jurisdiction of the Court in relation to doings of a body which can deprive them of their livelihoods' (at para. 26). While recognising that the Turf Club was subject to judicial review, the applicants were not entitled to the reliefs sought and thus the appeal was dismissed.

In dismissing the appeal, the Supreme Court upheld the High Court decision in *O'Connell & Another v The Turf Club & Another* [2014] IEHC 175 and reaffirmed that the Turf Club, the regulatory body for horse racing in Ireland, was amenable to judicial review and imbued with statutory powers, however, there was a private contract between the appellants and the Turf Club which required the appellants to adhere to the rules of racing and as corollary entitled the Turf Club to enforce its rules. The Supreme Court recognised the precarious position of the Turf Club. In contrast to the law relating to solicitors or medical practitioners, once the Turf Club imposes a sanction, it applies with immediate effect (subject to appeal) and does 'not require any process of confirmation or re-hearing before the High Court' (at para. 9).

A number of leading English cases (including *R v Jockey Club, ex parte AGA Khan* [1993] All ER 853; *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864; *R v Panel and Takeovers and Mergers, ex parte Datafin plc* [1987] QB 815; *Jockey Club including R (ex parte) RAM Racecourses Ltd* [1990] 3 Admin LR 265; *R v Jockey Club (ex parte) Massingberd-Mundy* (1990) 2 Admin LR 609; *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909; *Bradley v The Jockey Club* [2004] EWHC 2164 (QB); *Nagle v Feilden & Ors.* [1966] QB 6367) and the definition of public body were referred to with the Supreme Court observing that the spirited debate that surrounds the definition is 'perhaps more livelier in England than in Ireland' (at para. 11). In finding that the Turf Club was analogous to the Criminal Injuries Compensation Tribunal (see *The State (Hayes) v Criminal Injuries Compensation Tribunal* [1982] ILRM 212), Hardiman J held that while the Tribunal was found to be a non-statutory body yet subject to judicial review, the Turf Club 'in its new statutory guise as the Racing Regulatory Board, is *a fortiori*' (at para. 11).

The judgment of Supreme Court provides a very detailed discussion on the English courts and the evolution of judicial review and its application to sporting bodies. Hardiman J noted that in some of the English cases where judicial review of private bodies was permitted, the courts circumvented overruling previous judicial review cases by deciding the cases on grounds of public policy and restraint of trade contracts (at para. 17). In justifying the detailed discussion of English judicial review cases, the judge remarked that there was 'not a great deal of difference' between the approach of the courts in Ireland and in England and Wales. Donaldson MR in *Datafin* [1987] QB 815, at 838–39 asserted that the Court should 'recognise the reality of the executive power' and not 'allow their reason to be clouded by subtlety and complexity of the ways in which it can be exercised'. Hardiman J applied this principle to the relationship between jockeys and the Turf Club. While it was contended that an application for a licence was voluntary, a jockey cannot pursue his/her profession unless a licence is obtained. Thus, in applying Donaldson MR's assertion as to the recognising the reality of the executive power, the relationship between the jockey and the Turf Club cannot be viewed as a freely entered into contract (at para. 15). Once the licence is obtained, the jockey becomes bound by the rules and regulations of the Turf Club in the same way a medical professional is bound by Medical Council (which is subject to judicial review). The Turf Club, in 'exercising statutory disciplinary power and imposing penalties', is also subject to judicial review.³

From the point of view of a governing body or club, there are three broad areas of activity in which fair procedures should be observed, that is: in the creation of the rules; in the application of the rules and; in the operation of a disciplinary process conducted pursuant to such rules (Cox, Schuster and Costello 2004: 59). The Irish courts have made clear that, as with all cases of judicial review, it is the procedures involved in the decision and not the decision itself which should be the subject of the review. Thus, the courts will assess whether the decision is one which the organisation was entitled to make according to its rules and that the applicant was given an appropriate opportunity to be heard without bias. It will not overturn a decision because the judge would have come to a different conclusion

on the basis of the facts (see *JRM Sports Ltd t/a Limerick Football Club*, a case involving the tightening of licences for clubs in the domestic league in order to improve the professionalism of Irish soccer).

The fact that judicial review is only available in relation to the procedures employed in making a decision and not its merits was again reiterated in *Jacob v Irish Amateur Rowing Union Ltd* [2008] IEHC 196, a case involving an oarsman who was not selected as part of the team to compete in a competition to qualify for the 2008 Olympics in Beijing. The court refused to grant the relief sought, as there was no evidence of a lack of fairness in the procedures involved in making the decision not to allow him to compete in the qualifying event. The court noted that the applicant had the benefit of two internal appeals, and there was no evidence to suggest that it would be unjust to refuse the injunction. Laffoy J emphasised that team selection is not an issue for the courts:

‘...it is pertinent to ask whether it is appropriate at all, in the absence of proof of mala fides, for a Court to intervene in a decision of an organisation governing a particular sport as to matters of selection and de-selection for competitive events of team members based on performance and fitness’.

Laffoy J made clear that unless there was bad faith on the part of the organisation ‘or some obvious egregious injustice’ to the applicant, it would be difficult to justify the intervention of the court.

Given that judicial review is concerned only with procedures surrounding decisions and not the merits of those decisions, the majority of cases of judicial review in Ireland have been in relation to the procedural machinery surrounding disciplinary proceedings, for example the procedures surrounding drug testing, as demonstrated by the case of *Quirke v Bord Luthchleas na hÉireann (BLÉ)* [1988] IR 83. Quirke left the event without providing a sample and was subsequently banned for 18 months. The applicant complained that had he been told of the consequences of not providing the sample, he would have returned and that this information should have been provided. Thus, he was alleging that there was a breach of fair procedures in how his case was handled by the BLÉ. He was successful in his application. Barr J emphasised the ‘substantial penalty’ involved in the case (i.e., suspension of an international athlete from all major competitions for 18 months resulting in his being unable to compete in the Olympics), as well as the ‘moral implications of its imposition’ (at p. 88) which would remain even after the penalty expired. Barr J held that the applicant should have been allowed to put forward a defence before the punishment was imposed. Thus, there was a breach of fair procedures and the suspension was overturned. However, Barr J noted that this did not preclude the BLÉ from reopening the matter as long as the applicant was given the opportunity to put his side of the case in any future disciplinary procedure.⁴

There are no minimum requirements for what constitutes fair procedures. It will vary from case to case and must be judged on a contextual analysis of the situation. It would seem that the level of fair procedures to which an individual is entitled will primarily depend on the severity of the consequences of such decision for him or her (Cox, Schuster and Costello 2004: 74).

As well as adhering to fair procedures, it is also important that sports organisations apply the rules of that organisation strictly and do not take decisions that are *ultra vires*. The importance of a sporting organisation adhering closely to its internal rules and procedures is evident in *Clancy v Irish Rugby Football Union (IRFU)* [1995] 1 ILRM 193, where the Irish Rugby Football Union (IRFU) introduced eligibility rules which applied retrospectively. McCutcheon (1995: 175) notes that this decision makes clear that sports associations ‘must implement their rules to the letter, especially where a player’s interests are potentially affected by the implementation of the rule in question’.

Another case which demonstrated the importance of a sporting organisation following its rules and internal processes is *Dundalk AFC Interim Co Ltd v FAI National League* [2001] 1 IR 434 involving the potential relegation of Dundalk AFC from the premier division of the FAI National League to the first division and the allegation of fielding an ineligible player by the third place team. Ultimately, it was held that the player had been properly registered and thus no offence had been committed by the third-placed team. Thus, the problem relating to the failure to adhere to the internal procedures was rendered moot. However, the case provides an important reminder that ‘a governing body and by extension a club, once it has created its rules must follow them’ (Cox, Schuster and Costello 2004: 64).

A more recent case involving a claim of *ultra vires* action on the part of a sports organisation is *Byrne v The Irish Sports Council* [2013] IEHC 438. The applicant was a member of the ISC. Allegations of breach of a Code of Conduct in relation to conflict of interest and inappropriate interference with funding decisions were made against him. After a meeting of ISC members which the applicant was not permitted to attend, a unanimous decision was taken to launch an independent investigation into the allegations and to obtain a report on the findings. The applicant alleged that the action of calling an independent investigation was *ultra vires*. After examining the Irish Sports Council Act 1999, Peart J concluded that the ISC did not have the power to take such action and that the launch of such an investigation and that the decision to remove a ISC member could only be taken by the Minister by virtue of section 13 (2) of Irish Sports Council Act 1999. Thus, the decision to appoint an independent investigator was quashed. The applicant also alleged a breach of fair procedures as he was not given access to material relating to the allegations against him. Since the court found in favour of the applicant on the *ultra vires* issue, it was unnecessary to assess the fair procedures point, but Peart J did note that the material should have been provided to him, and that

he should have been given an opportunity to make representations to the ISC meeting where the decision to appoint the independent investigator was taken.

Although judicial review is typically not available in relation to the merits of the decision, it is possible to challenge a decision of a sporting body through judicial review on the basis that it was irrational. However, whilst this is analogous to a review on the merits, the threshold of proof is very high on this ground and in reality what an applicant must show in this instance is that the decision is so perverse that it suggests that fair procedures could not have been adhered to in reaching it. Thus, in the case of *Matthews v The Irish Coursing Club* [1993] 1 IR 346 it was held that in order to prove that a decision is so unreasonable as to warrant being overturned, 'the test of unreasonableness lies in whether the impugned decision flies in the face of common sense or is so unreasonable as to be perverse' (at p. 347). Although this is a very high bar for relief, O'Hanlon J held that this case was 'one of the infrequent cases where the intervention of the court may legitimately be invoked to challenge the validity of a decision made by an administrative tribunal' (at p. 358). Nevertheless, it is clear from the judgment that this ground is unlikely to be successfully invoked in most cases.

The aforementioned review of cases in this area demonstrates that whilst the courts in Ireland will not review a decision of a sporting body lightly, there is still space for intervention where the rules of natural justice have been breached. Thus, sporting organisations should be very careful to ensure that rules are fairly created and adhered to, particularly where significant decisions such as those relating to discipline are concerned. Likewise, although it will be a very rare case where a decision will be held to be so unreasonable as to warrant being rendered invalid in judicial review proceedings, sporting organisations should take care to ensure that any decisions reached are fully justifiable.

Judicial Review: Only in the Most Exceptional of Circumstances

The above cases highlight that judicial intervention in the decisions of sporting organisations should only occur in the most exceptional of situations and should be seen as a measure of last resort. In the same vein as the Irish approach, Lord Woolf MR in *Modahl* at p. 32 of the matter held that:

'generally a court will not interfere with the findings of fact by an independent tribunal, because an independent tribunal is somebody who has the experience of the matter. But it does have a right to interfere where a point of law is involved, or where there is alleged to be a breach of natural justice'.

Modahl was recently cited in the case of *Conway*. The case concerned an allegation of the wearing of non-compliant shoes by a team at the International Indoor Championship in February 2006. Disciplinary sanctions were levied against St. Pat's resulting in the International Federation (IF) banning the club for two years with the second year suspended and a fine of €1,000. An important issue that arose in the case was that of the contractual relationship between Conway, the club secretary, and the IF. Conway did not raise the contract issue; her claim was based on tort, although her Statement of Claim did not identify how the actions of the defendants constituted a tort as recognised under Irish law. It was contended that the IF comprised of the national associations and not of individual clubs or individuals. This was provided for in Constitution of the IF. Thus, the defendants argued that Conway enjoyed neither a contractual nexus with the IF as individual participant nor as a Club representative.

Counsel for the defendants cited the case of *Modahl*. The defendants referred to Mance LJ's judgment where he contended that there was no contractual agreement between Modahl and the International Association of Athletics Federations (IAAF). The Court of Appeal held that Modahl had a contractual relationship with the International Federation, the IAAF. Although there was no express contract with Modahl, the national governing body, the British Athletic Federation (BAF), was contractually obliged to appoint unbiased members of a disciplinary hearing. Laffoy J held that *Modahl* was of limited assistance to the present case; however, she did refer to the observations of Mance LJ as '*obiter*'. It would seem that had the *Modahl* case been of more relevance to Conway, Laffoy J would have found there to be a contractual relationship between the IF and Conway. The claim was struck out as the proceedings against the defendants were deemed to an abuse of process. Laffoy J emphasised the need for sportspersons and bodies to exhaust the internal disciplinary mechanisms of their sport before going before the courts. The judge at paragraph 7.8 observed: '...it is usual for a court to lean in favour of disputes involving sporting bodies and members being resolved by the relevant internal mechanisms'.

Echoing the sentiments of Laffoy J, Lord Justice Scott Baker in the case of *Flaherty v National Greyhound Racing Club Limited* [2005] EWCA Civ 117 at paragraph 19 made a very valid point when he stated: 'It seems to me inherently unsatisfactory that a hearing before a sporting tribunal lasting between 1 and 2 hours should be followed by a High Court hearing lasting 10 days and an appeal taking up a further day and a half'.⁵

McGovern J in *O'Connell & Another*, at paragraph 36 noted that:

'The courts in this jurisdiction and elsewhere have taken the view that the regulation of sporting activities should not, as a general rule, come within the remit of judicial scrutiny but is best left to those organisations themselves'.

This case arose from an inquiry of the Turf Club in relation to a jockey and a racehorse trainer, both of whom were licenced by the Turf Club. Both claimants were accused of engaging in suspicious betting practices, while the jockey was deemed to have failed to ride the horse in such a manner as to allow it to run to its maximum ability in the race, contrary to the Rules of Racing (Rule 273 (ix)). The Turf Club informed the applicants that the Referrals Committee would consider the matter. On foot of this, the applicants sought judicial review on the following grounds:

1. The Turf Club was a public body and thus amenable to judicial review;⁶
2. The Rules of Racing were made *ultra vires* the Turf Club and/or without jurisdiction and/or otherwise than in accordance with law;⁷
3. That sections 39⁸ and/or 45⁹ and/or 62¹⁰ of the Irish Horseracing Industry Act 1994, as amended, were unconstitutional in light of Article 15.2.1¹¹ of the Constitution;
4. That sections 39 and/or 45 and/or 62 of the Irish Horseracing Industry Act 1994, as amended, were unconstitutional in light of Article Articles 34.1¹² and 37¹³ of the Constitution;¹⁴

McGovern J at paragraph 6 remarked that ‘the application brings into focus the extent to which it is permissible (or desirable) for the courts to intervene in sporting matters’. In first deciding whether or not the Turf Club was a public body, the judge proffered that the respondent was legally ‘in a somewhat unusual position’ (at para. 13). The Turf Club was founded in 1790 and the Irish National Hunt Steeplechase Committee (INHS) was established in 1869, both of which are voluntary members’ organisations. The Turf Club is responsible for all-Ireland flat, national hunt and point-to-point racing. The 1994 Act did not create either the Turf Club or the INHS. The 1994 Act created the Racing Regulatory Body, which incorporates the Turf Club and the INHS with jurisdiction over the entire island of Ireland. In referring to the contractual relationship between the respondent and the applicant, McGovern J noted that such a relationship meant that the parties were bound by the Rules of Racing and also the rules of INHS from time to time. However, no such contract existed between members of the public, the respondent and the INHS, yet members of the public could be excluded from certain racing events under the Rules of Racing under section 32 of the 1994 Act. In addition, the Racing Regulatory Body is empowered to enforce the Rules of Racing and regulate horse racing, thus the regulation of horse racing was placed on a statutory footing in 1994. This is the case even though the pre-1994 Rules, which operated on the basis of contract, continued to apply.

In deeming that the applicants had *locus standi* to bring the application for judicial review, the judge examined the delegated legislative functions of the respondent. McGovern J, in juxtaposing the Rules of Racing and the legislative provisions, observed that the purpose of the 1994 Act (as amended) is ‘to promote integrity and fair play in horseracing. Each of the impugned Rules is consistent with and serves that purpose’ (at paragraph 34). In holding that the respondent’s powers did not amount to an administration of justice nor did it exercise a judicial function, the judge dismissed the application for judicial review. McGovern J at paragraph 39 highlighted the fact that the applicants did not contend there was a lack of fair procedures or a breach of natural justice. In a cautionary tone, the judge reiterated the fact that the applicants had voluntarily submitted themselves to the jurisdiction of the respondent. They had agreed to be bound by the rules and regulations of the sporting organisation. McGovern J at paragraph 41, in demonstrating the court’s reluctance to intervene in the decisions of sports bodies, concluded: ‘[I]t is difficult to see how this is something which comes within the ambit of public law’.

The most recent statement on this issue is perhaps the most vehement. In *Hyland v Dundalk Racing (1999) Ltd t/a Dundalk Stadium* [2014] IEHC 60 Hogan J at paragraph 39 noted that the instances where the courts intervene in sporting disputes are ‘exceptional involving something akin to fraud or manifest irrationality’. He went on to hold at paragraph 40:

‘If it were otherwise, the courts would have assumed a strange new jurisdiction which would test the traditional boundaries of justiciability, and, indeed, raise questions as to the appropriate judicial role in relation to such matters. Could, for example, the courts be expected to adjudicate on questions such as the handicapping of horses, competitor seedings, team selection or on-field disciplinary or refereeing decisions? Could it mean that the courts might subsequently be called upon to rule on questions such as whether a penalty ought to have been given or whether a player was properly sent off or even whether a point, goal or try (as the case may be) ought to have been awarded?’

Hyland is one of three test cases involving three bookmakers and a race course operator. (*Hyland v Dundalk Racing (1999) Ltd t/a Dundalk Stadium* [2014] IEHC 60; *Hyland v Dundalk Racing (1999) Ltd t/a Dundalk Stadium* (No. 2) [2015] IEHC 57 and *O’Hare & Another v Dundalk Racing (1999) Ltd t/a Dundalk Stadium* [2015] IEHC 198).¹⁵ The test cases were heard over a 14-day period where there was overlap in witnesses. The dispute arose from the requirement of a capital contribution of €8,000 from each bookmaker holding a pitch at Dundalk Racecourse. The three applicants all held established seniorities to trade at particular bookmaking pitches at Dundalk Racecourse. Seniority refers to a right of priority that a bookmaker acquires at a particular race course. In 2001 the racecourse closed down and was refurbished and reopened in August 2007 as Ireland’s first all-weather racecourse.¹⁶ On reopening the race-

course, the bookmakers were informed that they were mandated to pay €8,000 each in order for the racecourse to recoup some of the investment amounting to €35 million. The bookmakers refused on the grounds that the requirement of €8,000 was in breach of the then Executives' Seniority and Pitch Rules (Pitch Rules) resulting in a breach of contract as the applicants contended that the Pitch Rules constituted a contract between them and the racecourse¹⁷ The matter was referred to the Pitch Tribunal, which according to the Pitch Rules 'shall determine its own procedures provided that same shall comply with the principles of natural justice' (Paragraph 20 (b) of *Racecourse Executives' Seniority and Pitch Rules*). The central issue to be decided was whether the refurbished Dundalk racecourse was a new course, and if it was considered to be a new course then the Pitch Rules would not apply.¹⁸ The inverse being that if it was considered an existing course then the Pitch Rules would apply and thus the requirement of a financial contribution would amount to a breach of contract. The Pitch Tribunal decided that a financial contribution was required in the event of a new racecourse. However, the Pitch Tribunal did not determine whether Dundalk Racecourse was a new course or not. The decision of the Pitch Tribunal lacked clarity which resulted in uncertainty for the applicants. In essence, a theoretical question was put to the Pitch Tribunal, one that was not specific to Dundalk Racecourse. The Pitch Tribunal wrote to the relevant parties, recommending that they meet face to face to discuss the matter, which they did; however, the issue could not be resolved. Hogan J held that the Pitch Rules constituted a legally binding contract and that the Dundalk Racing had breached the contract by requiring a financial contribution.¹⁹ Hogan J perhaps more crucially held that the reopened all-weather racecourse was the same course as it was in 2001, albeit unrecognisable, and thus the €8,000 could not be lawfully extracted from the bookmakers who held an established seniority at Dundalk Racecourse.

The second *Hyland* case dealt solely with the questions of mitigation of loss and quantum of damages arising from the first judgment.²⁰ Hogan J emphasised the need for sports governing bodies to seek redress in the form of arbitration or mediation even in cases as complex and exceptional as this. His comments are worth citing in full (at paragraphs 30 and 31):

'this case – which is, admittedly, in many ways, a very exceptional one – nonetheless illustrates the desirability, where possible, of having complex sporting disputes of this kind resolved either by mediation, or, should such fail, by expert binding adjudication involving the appropriate mix of sporting and legal expertise.

In this jurisdiction, the Disputes Resolution Authority of the Gaelic Athletic Association has led the way with an established corpus of published formal decisions on matters such as the construction of rules, player eligibility, player transfers, fair procedures and penalties for disciplinary infringements. These decisions are nearly always accompanied by extensive legal and quasi-legal reasoning, thus providing for an open and objective method of adjudication of these invariably complex problems. All parties to this present dispute might well wish to give consideration to this suggestion and it may be that the Dispute Resolution Authority might yet serve in this regard as a model which might yet guide the Pitch Tribunal for future complex cases of this kind were they ever to arise'.

The significance of the three test cases is twofold; namely the inadequacy of the internal dispute mechanism and the amenability of the Irish courts to the use of ADR in sport disputes. The internal disciplinary procedure showed itself to be inadequate. Had the Pitch Tribunal indicated whether Dundalk Racecourse was a new course or an existing one, the issue would most likely never have come before the court. Hogan J was most vociferous in his appeal for sports persons to avail of arbitration or mediation. He explicitly referred to the DRA as a template that other governing bodies could use. The *Hyland* and *O'Hare* cases demonstrate that at times internal dispute mechanisms are not always equipped to deal with more complex problems; there are times when the courts will be called upon to give an impartial judgment. The DRA is more than capable of dealing with diverse and complicated issues. This thus shows that internal dispute panels can be very successful and lessons can be learned from how it operates and its format could be used in other sports. The DRA operates in a similar manner to the Court of Arbitration of Sport (CAS). It has qualified arbitrators who are from a legal and sporting background. The decisions are detailed and will often refer to court cases from Ireland and other jurisdictions. The DRA has been in existence for 10 years and it has built up its own *lex sportiva*. It is to the DRA and other forms of ADR that this article now turns to.

Alternative Dispute Resolution in Irish Sport

The Dispute Resolution Authority

Alternative dispute resolution in the form of arbitration or mediation can offer a speedier and less expensive solution to disputes. In Ireland, there are two domestic bodies offering alternative dispute resolution in the sporting context. The first is the DRA of the GAA, which was established in 2005 and is independent of the GAA (*GAA Official Guide-Part 1* 2016, Appendix 6 Disputes Resolution Code, pp.192–203, Rule 1.1).²¹ Disputes can be referred to the DRA once 'all available avenues of Appeal under the Rules of the Association have been exhausted' (Rule 7.13 (d) of the *GAA Official Guide-Part 1* 2016). The only disputes which the DRA is precluded from hearing are those involving doping (Rule 7.13 (e)). GAA has its own hearing committee, the Anti-Doping Hearings Committee). The DRA consists

of a Secretary who is appointed for a term of three years and a panel of a minimum of 30 people (GAA Official *Guide-Part 1* 2016, Appendix 6 Disputes Resolution Code, pp.192–203, Rule 1.1). This group is divided into two sub-groups. The first group (Group 1) consists of qualified solicitors, barristers or arbitrators, and the second group (Group 2) comprises of ‘persons without such qualification who, by virtue of their experience in the affairs of the Association, are properly qualified to resolve disputes relating to the Rules of the Association’ (Rule 1.1. Each group should have a minimum of 15 persons). In order to apply to the DRA for arbitration, the applicant must complete a written request for dispute resolution proceedings (Rule 2.1) and deposit € 1,000 towards the expenses of the DRA (Rule 2.3). Disputes are heard by a tribunal of three individuals selected from the panel and will include at least one member from Group 1 and Group 2, respectively (Rule 5.1). If the parties to the dispute agree, the Tribunal may consist of just one person nominated from the DRA’s panel. The Secretary would also need to sanction this as required by Rule 5.4. The decision of the tribunal must be in writing and accompanied by the reasons on which it is based (Rule 11.2). Decisions of the DRA are published on its website. Anderson (2010a: 653) comments that the DRA ‘is an excellent example of the benefits of ADR for a sports organisation’, denoting it as ‘a trustworthy, inexpensive, quick and expert-led alternative to the courts’.

The DRA hears cases including player transfers, player eligibility, on field violence and challenging suspensions. A recent case involving the transfer of an underage player within the county came before the DRA. In coming to a decision, the Tribunal looked at the UK Supreme Court decision, *Kennedy v Charity Commission* (2014) UKSC 20. In the matter of the arbitration under the Disputes Resolution Code and under the Arbitration Act 2010, *Peadar O’Flionn v Coiste Comórtas na gCluichí Aontroim (Antrim CCC) agus Naomh Pádraig GLC Lios na gCearrbhach (St Patrick’s GAC Lisburn)* DRA 06 of 2015, a 14-year-old player requested a transfer to another club within the county as the club he was playing for was a distance away from where his family lived (they had moved) and required a 20-mile round trip for his father. Antrim CCC refused to approve the transfer on grounds that the transfer did not comply with Byelaw 15.1 (c) in that it had not been signed by the Parent Club Secretary. The player’s father challenged the refusal before the Antrim Hearings Committee who dismissed the appeal on the grounds that there was no clear infringement or misapplication of the rule by Antrim CCC and that there was no breach of the right to a fair hearing pursuant to Rules 7.3 and 7.11 of the Official Guide 2014. In the aftermath of this decision, an application for arbitration to the DRA was filed. St Patrick’s Lisburn justified the refusal on the grounds of ‘talent drain’ (para. 8) as over half a dozen transfers had been requested in recent years, while Antrim CCC contended that the restriction was in compliance of the rules and that it was under no obligation to take into account ‘exceptional circumstances’ (para. 12). The Tribunal referred to the inflexibility of the rules and how inflexibility of interpretation or of the rules ‘have an obvious potential for injustice’ (para. 19). Antrim CCC was deemed not to have given any consideration to the ‘unique factual circumstances’ of the player and his family (para. 20). The Tribunal deemed the refusal to be unreasonable and in doing so applied the test devised by the Supreme Court in *Kennedy*:

‘The court involved in the review will take the following steps:

- a. The identification of the legitimate objective (s) to be pursued by the restrictions;
- b. Establishing a rational connection between the restriction and the achievement of one of more of those legitimate objectives; and
- c. A proportionality test, namely that the restrictions must be a proportionate response, and must be no more than necessary to accomplish the legitimate purpose in question’.

The Tribunal, in finding the refusal to allow the player transfer to be unlawful, quashed the decision made by Antrim CCC. In relation to the wording of Bye Law 15 (1) (c), the Tribunal suggested an amendment be made to the wording to allow for more flexibility (see paragraph 22).

Parallels can be drawn between the approach of the DRA and judicial review. The DRA at paragraph 24 in the case of *Aodhan Breathnach & Micheal O’Baill v Comhairle Ardoideachais*, DRA 10/2012 expressly stated that it is not an appellate body,

‘rather the DRA is akin to a review body which considers the decisions made by the authorities at first instance and on appeal with a view to pronouncing on the correctness of those decisions’.

In general, the DRA will not interfere with a decision unless it is unreasonable or irrational²² (see *In the matter of the arbitration under the Disputes Resolution Code and under the Arbitration Act 2010, Gearóid McCoindlis (GLG Seamroga Baile) v Coiste Éisteachta Uladh (CEU) agus Coiste Éisteachta Dhoire (CED)*, DRA 05 of 2015, paragraph 11 where the Tribunal referred to Finlay CJ and the test of unreasonableness in *O’Keefe v An Board Pleanála* [1993] IR 39). The DRA will not intervene, even in situations where the Tribunal may espouse a different opinion on the merits of the decision. In setting out its general principles in its first case of *Vaughan* DRA 1/2005, the Tribunal stated at paragraph 40 that where the issue relates to the interpretation of a statute or a contract, ‘the Court (and consequently the DRA) will review the decision without restraint, because it is in excess of jurisdiction to make an error of law’.

In *Aodhan Breathnach & Micheal O'Baoill*, the applicants endeavoured to rely on the European Convention of Human Rights and contended that they had a 'vested right' in regard to the retrospective application of the rules. The Tribunal was quick to point out the distinction between public law nature of rights granted under statute and those found in the rules of a private organisation such as the GAA. The claim was dismissed and both players were ordered to pay costs.

The DRA provides detailed and well thought out decisions; it refers to Irish case law and case law from other jurisdictions. The claimants and respondents are given the opportunity to present their arguments and accompanying evidence. In effect, it offers a court like approach yet in a much more informal and cost effective setting.

Just Sport Ireland

The other avenue for alternative dispute resolution in the sporting context outside of the GAA is Just Sport Ireland (JSI) which was established by the Federation of Irish Sport in 2007. It is the Irish equivalent of Sport Resolutions UK which has over 30 sports availing of its services every year.²³ Sports Resolutions UK was formerly known as Sports Dispute Resolution Panel (SDRP), which was created in 1997 after the British Athletic Federation (BAF) went into administration due to the lengthy litigation involving Dianne Modahl. In 2008 it became known as Sports Resolutions UK.²⁴ Sports Resolutions UK, unlike JSI, operates the National Anti-Doping Panel (NADP) whereas the JSI is precluded from dealing with doping cases. There are currently 46 national governing bodies that have included provisions for disputes to be referred to JSI. JSI is an independent specialised dispute resolution service for Irish Sport offering both a mediation and arbitration facility. It offers two types of arbitration, similar to the Court of Arbitration of Sport's (CAS) Ordinary Arbitration Division and the Appeals Arbitration Division. For disputes at first instance the JSI has the Standard Arbitration Procedure (Rule 15)²⁵ and for an appeal of a decision, there is the Appeals Arbitration Procedure (Rule 14). This is very similar to Sports Resolutions UK Appeals Arbitration Procedure under section 2 (Arbitration Rules of Sports Resolutions UK). JSI will have jurisdiction where an ADR clause has been inserted into the governing documents or policies of the relevant sporting organisation. JSI does not have responsibility for disputes involving doping (Rule 14.1 (b)) but it can hear cases involving: selection disputes; registration disputes; international governing body, branch or club disputes; disputes about sponsorship and; disputes relating to disciplinary procedures. JSI mediation is based on an agreement between the parties concerned to submit their dispute to mediation (Part 4, Rules 33–45). All proceedings with JSI are confidential with the exception of generic information relating to decisions being published on the JSI website (Rule 59). Details of the costs can be found on the website. The cost of mediation with JSI is €1,500, with both parties contributing €750. The mediator's fee amounts to €1,000 and the remaining €500 covers the administration costs. It is open to the parties upon the settlement of the dispute to decide that one party reimburse the other for its half of the costs.

Arbitration is available from JSI where the regulations of a sporting organisation permit the resolution of a dispute under the JSI rules or by the JSI or, alternatively, where a specific arbitration agreement between the parties allows for this (Rule 14.1). In a case in 2014, JSIA2014–006, JSI had no jurisdiction to hear the appeal as there was neither reference to JSI in the rules of the governing body nor was there an agreement to submit to arbitration. The parties can be represented or assisted by individuals of their choosing (Rule 58 (1)). Where the parties agree, arbitrations are decided by a single arbitrator or by a panel of three (Rule 19 (1)).²⁶ The decision of the panel is in writing and will state the reasons for the decision given (rule 30). Despite the confidentiality of arbitration outcomes, the JSI may publish any award issued, unless the parties expressly agree, prior to the issuance of the decision, that the award should remain confidential (Rule 59). This echoes the approach of Sports Resolutions UK under section 14 (2) (Arbitration Rules of Sports Resolutions UK). Even in such circumstances, JSI may publish non-identifying information relating to arbitrations (rule 59 (2) (i)). This is done, according to its website, 'to facilitate the establishment of a sporting jurisprudence in Ireland'. The details on the cases are very scant and often the summary of the case will only state that the case was settled or that the governing body refused to engage in mediation. In cases going back as far as 2011 some have no details with the exception of a statement that details are to follow. The lack of detail provided is there to protect the parties. However, more information could be provided without compromising the confidentiality of the parties involved. As it stands, the current practice is not conducive to creating a body of sports-related jurisprudence in Ireland. In contrast, Sports Resolutions UK includes details of cases in its annual reports. In its 2013–2014 Annual Report, it documents the case of an *Athlete v National Ice Skating Association* concerning the non-nomination of the athlete for selection for the GB non-relay speed skating team at the 2014 Sochi Winter Olympic Games. The athlete contended that the National Ice Skating Association (NISA) selectors had not complied with the published Selection Criteria in that it had not taken into account the '2013/14 season and other past performances' when it came to selecting the third and final individual place. While dismissing the claim and finding in favour of the NISA, the Sports Resolutions UK Appeal Panel acknowledged that the Performance Director had made some errors but had followed the correct selection procedures. In summing up, the Appeal Panel opined (Sports Resolutions UK Annual Report 2013–2014: 19):

'This case highlights the need for NGB's to follow and apply the criteria set out in a Selection Policy when going through the selection process. Applying different criteria, or disregarding criteria set out in the policy, may well give rise to a successful appeal if challenged'.

JSI could adopt a similar approach as that of the Sports Resolutions UK and provide more details on cases without breaching confidentiality. The Annual Report (pp. 20–21) also provides details on case management and gives some information in tabular form in relation to the cases that were concluded in 2013–2014 including Arbitration, the National Anti-Doping Panel, the National Safeguarding Panel and Mediation.

In relation to JSI, the cost of arbitration is determined at the end of proceedings and must be borne by the parties. It costs €2,000 for a single arbitrator and €3,000 for the panel of three. The breakdown of costs is as follows: €1,000 for a single arbitrator plus €1,000 in administrative costs. For a three-person panel the cost is €2,000 for the panel and €1,000 administrative fees. In the absence of agreement between the parties, the award may stipulate which party bears the costs or whether the costs are to be apportioned between the two parties. Unless the decision provides, the parties are responsible for their own expenses (i.e. legal fees, witness expenses etc.). An advance on the costs must be provided by the parties equally. A decision may be appealed to the CAS if the sport in question recognises the jurisdiction of the CAS; if not, the decision of the JSI arbitrator is final and cannot be appealed (Rule 31).

JSI also offers a Referral Facility which provides that a sports body can contact JSI and request it to make available personnel, including a legally qualified person, to that sports body in situations where it needs such suitably qualified person(s) to be appointed to the sports body's internal disciplinary and/or complaints committees, inquiries or investigations (Rule 46–49).

The availability of alternative forms of dispute resolution in Ireland provides a welcome alternative to the expensive, often divisive, option of judicial review proceedings. Given the benefits of resolution of disputes through the DRA or JSI and in light of the Irish courts' general reluctance to become involved in sporting disputes, it is likely that these processes will become increasingly popular going forward.

Recent Developments

A Public Service Reform Plan was published by the Irish Government on 17 November 2011. Under the Plan, it was decided that a number of state agencies would be rationalised and reduced. In short, it was determined that the ISC and the National Stadium and Campus Development Authority (NSCDA which was created under the National Sports Campus Development Authority Act 2006) would be merged to create one body, called Sport Ireland. On 21 January 2014, the Irish Government approved the draft bill, Sport Ireland Bill 2014. The Sport Ireland Bill 2014 passed the Second Stage in Dáil Éireann (lower house of parliament) and was referred to a Select Committee (Select Subcommittee on Transport, Tourism and Sport) on 25 September 2014. On 22 April 2015 the Bill passed through the Second Stage of the Seanad (Senate). The Bill was quickly passed through the Committee Stage in late April 2015 and then it went through the Report and Final Stages on 7 May 2015. On 15 May 2015 it became an Act and commenced on 1 October 2015 (S.I. No. 415/2015 – Sport Ireland Act 2015 (Establishment Day) Order 2015). There is no mention of arbitration in the Sport Ireland Act 2015. The Act includes enhanced provisions relating to doping in Irish sport yet does not make any provision for dispute resolution. The Irish Sports Council Statement of Strategy 2012–2014 explicitly refers to JSI being the preferred approach to resolving sporting disputes (p. 6). It also states that all sports would have to sign up to a dispute resolution mechanism by the end of 2014 (p. 7). At present, there are no details in relation to the 2015 strategy due to the merger of the ISC and NSCDA.

At present, all governing bodies seeking recognition from Sport Ireland must have 'an Internal Appeal process consistent with established principles of due process and natural justice and containing a provision that allows disputes to be referred to the alternate dispute resolution services of Just Sport Ireland' (Sport Ireland Application Form).

The inclusion of an ADR clause is important from the point of view of government funding. On a number of occasions politicians have requested a breakdown of the costs spent by governing bodies on legal fees arising from litigation (JOTCT, 2014). No such information has been provided. As sport is funded directly by the State and indirectly by Sport Ireland, money used to pay for legal bills arising from litigation comes from taxes paid by the public. While recent calls for more transparency in governing bodies and their legal bills have not been forthcoming, a decision from 1988 provides an illuminating example. In the case *Quirke v Bord Luthchleas na hÉireann (BLÉ)* (1988) IR 83; (1989) ILRM 129, a doping case in which the applicant sought judicial review, the legal costs of the case amounted to £15,000, which is just over €19,000. This represented 20% of the overall funding of the BLÉ in 1988. The BLÉ was awarded £73,000 in grant aid in 1988 (Dáil Eireann Debate, 1988). Governing bodies in more recent times have been less forthcoming when it comes to revealing the costs of litigation.

Conclusion

In short, the Irish courts are reluctant to intervene in the decisions of sports governing bodies and will only do so in the most exceptional circumstances. Thus sporting organisations in Ireland can be confident that their decision-making will not be subject to judicial intervention. However, the Irish courts will intervene in the decisions of sports governing bodies where there is an allegation of a breach of natural justice or on a point of law. In the last decade, the Irish courts have highlighted the need for governing bodies to exhaust the internal disciplinary mechanisms within their sports and if that fails to avail of mediation or arbitration.

Just Sport Ireland and the Disputes Resolution Authority offer a more informal and cost effective method of resolving disputes between sports persons and governing bodies. The arbitrators and mediators are individuals who have an interest in sport and come from a legal background. The Irish Sports Council/Sport Ireland has been instrumental in the development of the JSI as it now mandates that all new governing bodies who are seeking recognition must include a referral clause to JSI. Sport Ireland is in the process of working with another 20 sports organisations which would bring the number of sports governing bodies that have referral clauses to JSI up to 66.

The Sport Ireland Act 2015, while enhancing the provisions on doping in comparison to the provisions of the Irish Sports Council Act 1999, makes no reference to arbitration or mediation. This may be attributed to the fact that the ISC/Sport Ireland has been very successful in promoting JSI. By placing such measures on statutory footing it would have made the procedures more formal, a feature that is the antithesis of ADR. For the time being, ADR in Irish sport is becoming more acceptable and this will hopefully result in only the most exceptional cases seeking judicial review.

Competing Interests

The author declares that they have no competing interests.

Notes

- ¹ Cox, Schuster and Costello add that in the case of a public body making a decision that is private in nature, the appropriate action will be a private action by way of plenary summons.
- ² The application for judicial review was denied as the Jockey Club was deemed to be a private body, as Hoffmann LJ at 931 held: 'there is no public source for any of its powers. It operates directly or indirectly by consent'. For a detailed discussion on challenging decisions of non-state bodies under English law, see Morgan (2012).
- ³ The Court of Justice of the European Union has recognised judicial review of private bodies which exercise quasi-judicial powers, a decision of the Dutch Medical Association was held to be reviewable by the then Court of Justice (under the preliminary reference, then Article 177 EEC Treaty, now Article 267 TFEU) in the case of C-24/80 *Broekmeulen v Huisarts Registratie Commissie* [1981] ECR 2311. In contrast, C-138/80 *Borker* [1980] ECR 1975, the Court of Justice held the Paris Bar Association was not a court or tribunal for the purposes of the preliminary reference as the Paris Bar Association was not legally obliged to hear a dispute involving one of its members. The Turf Club is obliged to hear disputes and issue sanctions.
- ⁴ Quirke was distinguished in the case of *Gould v McSweeney and Others* [2007] IEHC 5 as Quirke was deemed to be a case of public rights and the issue of the athlete's livelihood was an important consideration for the court. *Gould* was held not to be a case of judicial review.
- ⁵ For a detailed discussion on judicial review and governing bodies in the English courts, see Anderson (2006) and James (2013), pp. 27–49.
- ⁶ The Irish Horseracing Industry Act 1994 placed it on a statutory footing; prior to this the Turf Club was a voluntary association governed by contract law. The respondents argued that it was a private body and thus not amenable to judicial review.
- ⁷ That the Rules of Racing were in breach of the statutory provisions governing horse racing in Ireland, the Irish Horseracing Industry Act 1994, as amended by the Horse and Greyhound Racing Act 2001. It was contended that the Rules of Racing did not advance principles or policies contained in the legislative scheme.
- ⁸ This section outlines the functions of the Racing Regulatory Body.
- ⁹ This section relates to appeals against sanctions of Racing Regulatory Body-section 45 (2) states that the Racing Regulatory Body shall provide an appeals procedure and that appeals should be heard in a fair and impartial manner.
- ¹⁰ This section refers to the exclusion of certain persons from racecourses.
- ¹¹ 'The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State'. Section 39 of the 1994 Act, the applicants contended, had failed to impose sufficient limitations upon the purported ability of the Turf Club to issue secondary instruments which resulted in an impermissible derogation of the functions of the legislature. The Oireachtas is the Irish word for Parliament which refers to Dáil Éireann (House of Deputies) and Seanad Éireann (Senate).
- ¹² 'Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public'.

¹³ Article 37.1 and 2:

1. 'Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution'.
 2. No adoption of a person taking effect or expressed to take effect at any time after the coming into operation of this Constitution under laws enacted by the Oireachtas and being an adoption pursuant to an order made or an authorisation given by any person or body of persons designated by those laws to exercise such functions and powers was or shall be invalid by reason only of the fact that such person or body of persons was not a judge or a court appointed or established as such under this Constitution.
- ¹⁴ The applicants argued that these sections of the 1994 Act violated both articles of the Constitution on the grounds that it allowed the Turf Club exercise judicial functions without apparent limitations.
- ¹⁵ The three test cases refer to three bookmakers: Hyland, the Chairman of the Irish National Bookmakers' Association (INBA), O'Hare and Hughes. The *O'Hare & Another* case also dealt with mitigation of loss and quantum of damages arising from the breach of contract findings in the first *Hyland* case. The cases were brought on behalf of over 30 bookmakers.
- ¹⁶ All-weather courses attract the best and higher ranked horses as the fast grass course is safe for such valuable horses and also as most tracks abroad are all-weather it would mean that Irish horses would be prepared for these tracks. The traditional turf course limits the number of meetings that can take place, with all-weather there is, in principle, no limitation (with the exception of economic reasons including TV rights and an insufficient number of horses), see [2014] IEHC 60, paragraphs 21 and 22.
- ¹⁷ The Rules were revised in 2011. (Horse Racing Ireland: 2011) See Hogan J, *Hyland v Dundalk Racing (1999) Ltd t/a Dundalk Stadium* [2014] IEHC 60, paragraphs 7 to 15 for a detailed discussion of the seniority rules.
- ¹⁸ This case dealt with a number of other issues including: the legality of protests outside the stadium (paragraphs 73 to 91, held to be constitutionally protected under free speech and free assembly); whether the Pitch Rules were anti-competitive and a breach of the Competition Act 2002 (paragraphs 92 to 112, held not to be a restrictive agreement under section 4 (1) of the Competition Act 2002) and whether there was a collective trade boycott. (paragraphs 113 to 140, held that there was an unlawful boycott and breach of section 4 (1) of the Competition Act 2002. Hogan J held it stop immediately or it would expose the perpetrators to criminal or civil liability and an injunction would be granted by the court to compel the relevant individuals to end the boycott). Hughes had his award of damages reduced by 20% due to his involvement in the illegal boycott.
- ¹⁹ Hogan J held that the Pitch Rules not only regulated the relationship between the individual bookmakers and individual racecourses but also regulated aspects of the relationship of bookmakers *inter se*. In effect Hogan J held that there was, in the words of Beloff and Kerr, 'a horizontal matrix of contracts binding each member to all other members', Beloff and Kerr at paragraph 2.21.
- ²⁰ Hyland was awarded €23,929 in damages, [2015] IEHC 57, paragraph 74. In *O'Hare & Another v Dundalk Racing (1999) Ltd t/a Dundalk Stadium* [2015] IEHC 198 Hogan J held that O'Hare was entitled to recover 100% of the losses he suffered in the period from August 2007 to August 2008. However, for the subsequent years, the damages were reduced to 20% owing to the plaintiff's failure to mitigate his own losses, Hogan J noted 'that there was continuing fault on both sides' (see paragraphs 8 and 9). The judge awarded €48,376 in damages to O'Hare (paragraph 77) and €41,484 to Hughes (paragraph 85).
- ²¹ The first case to come before the DRA was that of (Claimants) *Mark Vaughan and Thomas Lyons and Larry Ryan (as nominee of Kilmacud Crokes GAA Club) and (Respondents) Micheál O Dubhshláine agus Liam O'Neill (mar iondaithe ar son Chomhairle Laighean) and John Bailey and John Costello (as nominee of Coiste Chontae Baile Atha Cliath) and Liam O Maolmhichíl, DRA 1/2005*. The issue was not the sending off or subsequent suspension but concerned the interpretation of the rules which provided that a player faced an automatic four week suspension together with (if it fell outside the said four weeks) 'the next game in the Competition in which the suspension was incurred'. Vaughan was deemed to be debarred from playing in the next game in the Competition. The DRA deemed the interpretation to be incorrect and Vaughan's was declared not to be debarred.
- ²² See (Claimants) *Mark Vaughan and Thomas Lyons and Larry Ryan (as nominee of Kilmacud Crokes GAA Club) and (Respondents) Micheál O Dubhshláine agus Liam O'Neill (mar iondaithe ar son Chomhairle Laighean) and John Bailey and John Costello (as nominee of Coiste Chontae Baile Atha Cliath) and Liam O Maolmhichíl, DRA 1/2005*, at paragraph 39.
- ²³ Including rugby union, cricket, tennis and football.
- ²⁴ In 2013 a specialist child protection investigation and adjudication service for sport was established, called the National Safeguarding Panel (NSP). This operates under the umbrella of Sports Resolutions UK.
- ²⁵ Sports Resolutions UK refer to this as Full Arbitration Procedure, section 3.
- ²⁶ See Rules 19.2 to 19.9 for more details including situations where the Secretariat intervenes due to lack of agreement between the parties and decides the number of the arbitrators depending on the circumstances of the case.

Where the parties agree that the dispute is to be heard by a three-person panel, each party appoints one arbitrator with the third person, the Chairperson, appointed by the JSI Registrar.

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