Formula 1 Racing and Arbitration: The FIA Tailor-Made System for Fast Track Dispute Resolution

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SINCE ITS inception in 1950, Formula 1 has been described as the premier world motor-sport series; and it is now probably the most popular annual sporting event in the world. It is currently broadcast in more than 130 countries, with an audience of about five billion viewers during the 1999 season. Formula 1 is also the most sophisticated motor-racing event in the world. It is highly competitive at many levels: among the drivers, the teams, the constructors and even the advertisers sponsoring the teams. Technologically, Formula 1 is at the leading edge of motor-racing, with constructors and teams investing significant resources in research and development, all of which must be carried out within the strict parameters set by the governing body, the Fédération Internationale de l'Automobile (hereinafter the 'FIA').

At track level, the teams and the drivers nevertheless continue to be the main players. Although it is difficult to tell whether the team or the driver has a greater impact on the final race results, success ultimately depends upon building a winning combination of team and driver. It is therefore essential for a team to secure the services of one of the best drivers and for a driver to find a 'seat' with one of the few top teams. This may lead a driver to change teams between racing seasons and occasionally even to sign a contract with another team for the same racing season. In such a highly competitive environment, the importance of each contract between a team and its driver is obvious. All interested parties must be

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able to establish immediately and with certainty whether such a contract is valid and in force; and in cases of several conflicting contracts, which one should prevail. Until the end of the 1990s, these types of contractual disputes were submitted to ordinary State courts. This proved to be highly unsatisfactory, as was demonstrated by the confusion ensuing from a multiparty drama in 1989 involving one driver who signed contracts with three different teams for the same racing season.

As a result of such cases, the FIA and all the teams agreed to establish a dispute resolution system under the name 'Contract Recognition Board' (hereinafter the 'CRB'). The purpose of the CRB system is to provide for the speedy and final resolution of disputes regarding the team for which a particular driver will render his racing services in any given Formula 1 Championship. The CRB system is based upon two fundamental requirements: (1) all driver contracts must be made in writing and registered with the CRB; and (2) all disputes over conflicting driver contracts must be submitted to *ad hoc* arbitration before the CRB. The CRB system first came into operation for the 1992 season, and it has since functioned to the satisfaction of all parties. The CRB does not publish its awards, and its proceedings are both private and strictly confidential. Many disputes are settled before reaching the stage of any award. It is believed that only about five cases have been the subject of final awards on the merits. This is likely due to the structure of the CRB system which greatly facilitates the resolution of many contentious cases at a preliminary phase. The CRB has also had an important 'preventative effect', as intended by its founders, which has further reduced the total number of disputes.

Despite its successful track record of dispute resolution, a Formula 1 racing team has recently challenged the scope of the CRB's jurisdiction in proceedings before the English High Court. In its judgment in *Walkinshaw & Ors* v. *Diniz*,[1] the High Court considered not only the scope of disputes submitted to the CRB but also the very nature of the CRB: do proceedings before the CRB constitute true arbitration? Or are they merely an internal process for deciding the 'rules of the game'? In this article, we will first provide an overview of the CRB system and then offer our comments on the decision rendered by the English High Court in *Walkinshaw & Ors* v. *Diniz*, a decision that we believe is important not only for the future of the CRB but also more generally for defining the legal requirements for sports and other accelerated dispute resolution systems.

I. CRB OVERVIEW[2]

The CRB system is based upon a framework agreement between the FIA and all teams taking part in the Formula 1 Championship. This framework agreement has

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[1] Thomas J, Commercial Court, 19 May 1999 (unreported), 1999 Folio No. 522. *See* transcribed judgment, Appendix, *infra* p. 193.

[2] For a general description of the CRB system see: H. Peter, 'Conflicting Contracts in Sport; Resolution through Central Filing and Ad Hoc Arbitration', in *Arbitration of Sport Related Disputes* (Swiss Arbitration Association, Special Series No. 1, November 1998), p. 63 *et seq.*

established two basic procedures for regulating driver contracts. First, every contract for the services of a Formula 1 driver must be duly registered with the CRB in accordance with certain detailed provisions reviewed below. Secondly, every such contract must contain a standard arbitration clause pursuant to which all conflicts between contracts involving the same driver and the same racing season must be submitted to an *ad hoc* arbitration tribunal sitting in Geneva, Switzerland, namely the CRB, comprising three permanent members drawn from a panel of six members. The FIA ensures that all parties comply with these requirements, and implement any resulting decision of the CRB, through its procedures for licensing drivers to participate in the Formula 1 Championship.

(a) The Arbitration Clause

Under the CRB system, every contract for the services of a Formula 1 driver must contain an arbitration clause pursuant to which the parties agree:

(1) to submit to the exclusive jurisdiction of the CRB in order to determine which team, as a matter of priority, is entitled to the services of the driver; and
(2) that in respect of said issues, the jurisdiction of any competent judicial or other authority as regards interim or conservatory measures is expressly excluded.

The parties' written agreement to such provision is also confirmed in the written and signed application for registration with the CRB Secretariat.

(b) The Arbitral Tribunal

The CRB is composed of three arbitrators or 'board members', each having a different nationality, with three alternate members. All the board members are qualified lawyers of international standing and experience, having no ties whatsoever to any of the parties and no involvement of any kind in Formula 1 motor-racing. They are appointed by the President of the International Court of Arbitration of the International Chamber of Commerce. The CRB meets as often as deemed necessary in Geneva, Switzerland. The CRB has the power to establish its own rules of procedure. To date, the CRB has issued rules addressing numerous procedural matters such as notices, submissions, the taking of evidence and the conduct of hearings (which may be held by telephone or other electronic means).

(c) The CRB Secretariat

The CRB is assisted by a Secretary who by definition is a public notary based in Geneva, assisted by a permanent staff member. Every contract for the services of a Formula 1 driver must be registered with the Secretary. The Secretary provides permanent, professional and specialized services in a neutral and accessible location. Moreover, the Secretary ensures that no third party obtains access to the highly confidential terms of the various contracts between the Formula 1 teams and drivers.

(d) Registration

The CRB system is built upon the requirement to register every agreement that constitutes the contractual basis for a driver to take part in the Formula 1 Championship or for a team to secure a driver's services (including by way of option) for the Formula 1 Championship.

The parties are required to register any such agreement, or any modification thereof, immediately following its execution. At the same time, the parties must also complete and execute a form summarizing certain of the main elements of the agreement: the identity of the parties, the name of the team for which the driver shall race, the duration of the agreement (with options to extend), and the fact that the agreement contains the CRB standard arbitration clause (hereinafter the 'Form'). One of the parties must then deliver a sealed envelope to the Secretary of the CRB. This sealed envelope must contain two further sealed envelopes, one marked 'Contract' containing a copy of all contractual documents (in which any amounts are blanked out) and another marked 'Form' containing a duly executed original of the Form. Immediately upon receipt, the Secretary is required to open the envelope marked 'Form' and enter the information contained therein, as well as the exact date and time of receipt of the Form, into the official contract register. The Secretary is not, however, permitted to open the envelope marked 'Contract'. The Secretary then acknowledges receipt of the envelopes to the parties.

By maintaining an official contract register setting out the information contained in the Forms, the Secretary is able to monitor the possibility of any conflicting contracts. Whenever it appears that a contract has been concluded for the same driver and the same Formula 1 Championship(s) as a previously registered contract, the Secretary is required to notify all relevant parties. Unless resolved within a short time, the question of the priority between two such apparently conflicting contracts is then referred to the CRB.

(e) Meeting of the CRB

Unless one of the parties chooses to waive its contractual rights or all parties agree with the CRB to extend the time-limit, the CRB is required to convene a meeting within three working days after the Secretary first becomes aware of the existence of apparently conflicting contracts. At this meeting, all interested parties have the right to be heard and make submissions in accordance with the directions of the CRB. It is usually a tripartite hearing with the driver, the 'old' team and the 'new' team. The CRB has the power to require the presence of any witness and the filing of any evidence it may deem necessary in order to discharge its duties. The CRB is also entitled to draw whatever conclusions it may deem appropriate from any failure to comply with its directions regarding witnesses and evidence.

(f) Decision of the CRB

Within three days after the meeting with the parties, the CRB must issue a written

decision stating which contract is the prevailing contract. This contract is deemed to take precedence over any other contract in respect of the same period or any overlapping period.

In making this decision, the CRB is required to follow a two-step analysis of the conflicting contracts. The CRB must first determine whether, under the applicable laws, one or more of the contracts is null and void or has been validly terminated or has expired. The CRB also has the power to decide whether any of the contracts has been terminated subject to some form of a payment provided in the contract.[3] If the CRB concludes that one of the contracts has been terminated, it will declare that the other contract is the only one in existence and that it shall therefore 'prevail'. If the CRB determines that there is more than one valid contract and that these are indeed conflicting, it must find that the first contract registered with the Secretary of the CRB is the prevailing contract, regardless of the signature dates appearing on the contracts and any provision of law. The CRB's exclusive reliance on the date and time of registration with the Secretary renders the risk that some parties may back-date contracts largely irrelevant.

The CRB must set out the reasons for its decision. The CRB may only address those matters that are strictly necessary in order to establish which one of the conflicting contracts shall prevail. The CRB is not authorized to deal with any other issue (except costs) in its decision. The decision of the CRB is final and conclusive. Immediately upon issue by the CRB, the decision is notified to the parties, the Secretary of the CRB and the FIA. It is not published by the CRB, although the CRB is authorized to settle the terms of a press release.

(g) Time of the Essence

One of the primary objectives of the CRB system is to provide a final and binding decision on conflicting contracts within the shortest possible time. Consequently, in addition to the very short time limits for convening a meeting and issuing a decision, the rules further provide that the Secretary and the CRB shall take whatever steps may be necessary to enable the CRB to render its decision as soon as practically possible. The first CRB decision was rendered within four working days of the parties' dispute; and subsequent cases have generally been decided within a very short time-period. This procedure is not easy for the parties' legal advisers; but the scope of the parties' dispute is limited before the CRB: it is a contract *recognition* board and not a contract *disputes* board.

(h) Delivery of Licence

Once the CRB has rendered a decision on conflicting driver contracts, the FIA will only deliver a licence authorizing the driver to participate in the Formula 1 Championship for the team that succeeded in the arbitration proceedings before

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[3] In the case, for instance, of so-called exit or buy-out clauses.

the CRB. In addition to providing for the resolution of disputes through such arbitration proceedings, the FIA and the teams taking part in the Formula 1 Championship have established a procedure to ensure ongoing compliance with the CRB system. Within two days after expiry of the time-limit for filing entries in the Formula 1 Championship, the FIA must submit to the Secretary of the CRB a list of the teams applying for entry in the Championship, together with the names of their appointed drivers. The Secretary must, within two days thereafter, deliver to the FIA a confirmation that the teams have in fact secured the services of their appointed drivers under duly registered contracts. In the absence of such confirmation, the FIA will not provide a licence to the driver and consequently, the driver will not be entitled to take part in the Formula 1 Championship.

As a result of the CRB system, each team and driver must meet three basic conditions in order to participate in the Formula 1 Championship:

(1) the driver and the team must be parties to a contract which is registered with the Secretary of the CRB;
(2) this contract must contain the standard arbitration clause of the CRB; and
(3) this contract must not conflict with any other pre-registered and valid contract with another team for the services of the same driver.

II. THE CASE OF *WALKINSHAW* v. *DINIZ*

In 1997, Pedro Diniz, a Formula 1 driver (hereinafter the 'Driver') entered into a contract with the Formula 1 team Arrows (hereinafter 'Team 1') for the 1998 and 1999 Formula 1 Championships. Under the terms of this contract, Team 1 agreed to supply a competitive car that would meet certain guaranteed minimum performance targets. The parties agreed that the Driver would be entitled to terminate the contract unilaterally in the event that these guaranteed minimum performance targets were not met at the end of the 1998 Formula 1 Championship. The parties also agreed that the Driver would be entitled to terminate the contract in any event, provided that he made a substantial termination payment to Team 1 under an exit clause. The contract between the Driver and Team 1 was registered with the Secretary of the CRB; and as also expressly confirmed by the parties, it contained the CRB standard arbitration clause. However, the contract also provided that, subject to this arbitration clause, 'This agreement shall be governed by English law and shall be subject to the exclusive jurisdiction of the Courts of England'.

At the end of the 1998 Formula 1 Championship, the Driver notified Team 1 that it had not complied with its contractual obligation regarding the guaranteed minimum performance targets and that, accordingly, he was exercising his right to terminate the contract with immediate effect. Team 1 disputed that the Driver was entitled to terminate for breach of the performance guarantee. However, Team 1 appeared to accept the termination on the basis that the Driver was liable to make the termination payment required under the exit clause. At about the same time, the

Driver entered into another contract with Sauber, another Formula 1 team (hereinafter 'Team 2') for the 1999 Formula 1 Championship. This contract was delivered to the Secretary of the CRB, who immediately notified the Driver and Team 1 and Team 2 that an apparently conflicting contract (that between the Driver and Team 1) had already been registered for the 1999 Formula 1 Championship.

(a) Proceedings before the CRB

Team 1 then refused to confirm that its contract with the Driver had been terminated; and accordingly the CRB convened a meeting in Geneva of all three interested parties. After reviewing the facts and hearing the parties, the CRB determined that the contract between the Driver and Team 1 had been terminated and therefore the only existing contract was that between the Driver and Team 2. As a result, the CRB found that this second contract was the prevailing contract; and it directed the Secretary of the CRB to amend the official contract register accordingly.

In his submissions, the Driver requested the CRB to make a further finding on the grounds for termination of his contract with Team 1: was he entitled to terminate this contract for breach of the performance guarantee or was he required to make the rather onerous termination payment to Team 1? Due to the fact that the 1999 Formula 1 Championship was about to begin, the CRB's decision on the conflicting contracts was particularly urgent. Accordingly, the CRB provided for a further meeting with additional submissions to deal with the cause and consequences of the contract termination, including (in particular) its disputed jurisdiction to resolve these issues.

For this second meeting, the Driver submitted that the grounds for termination of the contract fell squarely within the jurisdiction of the CRB. The Driver relied on the wording of the CRB rules and the requirement that the CRB resolve any controversy in a speedy and final manner. Team 1 took the position that the CRB had no jurisdiction to address this question because it was not necessary to do so in order to determine whether or not the contract had been terminated. Team 1 emphasized that both parties now agreed that the contract was terminated - the only point on which they differed was whether the Driver was liable for the termination payment. Based upon the choice of forum clause set out in the contract, Team 1 submitted that this question of payment fell within the exclusive jurisdiction of the English courts.

(b) Proceedings before the English High Court

Before the CRB had even convened its first meeting with the parties, Team 1 commenced legal proceedings against the Driver in the English High Court for the termination payment which it claimed was due under the exit clause. The Driver applied to stay these court proceedings on the ground that the parties had submitted the matters in dispute to arbitration before the CRB. Team 1 opposed this application on the basis that the CRB's jurisdiction did not extend to issues such as the cause and consequences of the termination and that the CRB proceedings did not, in any event, constitute 'arbitration'. In the submission of

Team 1, the CRB was merely a body empowered to decide the 'rules of the game', *i.e.* an internal body of the FIA applying technical sports rules.

Thomas J of the English High Court found that the Driver's application gave rise to three issues:

(1) Have the parties agreed to refer the subject matter of the court proceedings to the CRB?
(2) If so, was the reference to the CRB a reference to arbitration or to something else?
(3) If it was a reference to some other form of dispute resolution, should the court proceedings be stayed?

With respect to the first issue, Thomas J held that the parties had not agreed to refer the dispute pending before the court to the CRB. In reaching this conclusion, the parties' intentions as expressed in the contract and related documents were examined. Thomas J found that, if it were necessary to determine whether one contract was terminated in order to decide on the priority between contracts, then such a determination was to be made by the CRB as an incidental issue, as expressly provided in the CRB rules. Otherwise, disputes relating to the 'rights and wrongs of termination' did not fall within the scope of the reference to the CRB. Given that there was no dispute between the parties that the contract with Team 1 had been terminated, Thomas J found that the CRB was not entitled to consider the matter pending before the court. This finding was obviously sufficient to dismiss the application for a stay by the Driver. However, interestingly enough, Thomas J went on to consider the second issue regarding the nature of the CRB proceedings. After a very careful review, he held that the CRB proceedings constitute 'true arbitration'. Having reached this conclusion, it was not necessary to address the third and final issue. For arbitration practitioners, it is clearly the second question that is of particular interest. Accordingly, the following comments will focus on this question about the nature of arbitration.

(c) Applicable Law

Before turning to this question, one preliminary observation should be made about the applicable law. It was common ground in the English court proceedings that the characterization of the dispute resolution mechanism agreed upon was governed by the law of England and Wales.[4] Due to the limited scope of this

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[4] Similarly, with respect to the first issue, it was agreed by the two parties that the arbitrators' 'Kompetenz-Kompetenz' under Swiss law, *i.e.* under the law of the seat of the arbitration, was irrelevant to the English court's determination of the arbitrators' jurisdiction over the subject matter of the court proceedings. Although historically correct under English law before 1997, this position is now almost certainly incorrect under the English Arbitration Act 1996. Pursuant to ss. 9(4) and 2(2)(a) of the Arbitration Act 1996, an English court faced with an application for a stay of proceedings has jurisdiction to rule on the validity and scope of an arbitration agreement, even if the seat of the arbitration is outside England and Wales; but where a party disputing the arbitral jurisdiction is taking part in foreign arbitration proceedings where the tribunal has the power to determine its own jurisdiction (*e.g.* under Swiss law), it should not be able to short-

contribution, we will not delve into this question of applicable law, but will only make the following brief comments. Faced with the defence that the parties had agreed to arbitrate in Switzerland, the English court should have applied Article II(3) of the New York Convention. There are divergent views on the law that governs the validity of an arbitration agreement under this provision, including the question whether an agreement is a true arbitration agreement. There are three main possibilities:

(1) the *lex fori*;
(2) the law determined by the conflict rule of Article V(I)(a) applied by analogy, *i.e.* the law to which the parties have subjected the arbitration agreement or the law of the seat of the arbitration;[5] and
(3) the New York Convention itself, meaning that the term 'arbitration' used in Article II must be interpreted as an autonomous concept[6] and according to general standards.

It is only under the first possibility that one can justify the application of English law; and this possibility is the least appropriate one in connection with the application of an international treaty. Under the other two possibilities, the English court should have applied either Swiss law as the law of the seat of the arbitration[7] or transnational standards based on a comparative review of the notion of arbitration.[8] In our view, this last solution is the most appropriate, because it is the only one that facilitates uniform application of the New York Convention.

(d) 'Arbitration'

Although unnecessary to dispose of the application for a stay, Thomas J - 'in view of the excellence of the arguments presented' - addressed the status of the CRB: is it an arbitral body? Is a reference to the CRB a reference to arbitration? In answering these questions, Thomas J did not rely on the language used by the parties, a language of administration rather than arbitration ('board' instead of 'tribunal', 'board member' instead of 'arbitrator', 'meeting' instead of 'hearing', 'decision' instead of 'award'). Instead, Thomas J preferred - and rightly so - to examine the

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circuit the arbitral process by bringing legal proceedings in the English courts before the arbitrators' ruling on jurisdiction. It cannot do so where the arbitration's seat is in England: see ss. 30, 70(2) and 72 of the 1996 Act (V.V. Veeder, 'La nouvelle loi anglaise sur l'arbitrage de 1996: la naissance d'un magnifique éléphant' in (1997) Rev. de l'Arb. 1997, p. 15; Antonia Dimolitsa, 'Autonomie et "Kompetenz-Kompetenz"' in (1998) Rev. de l'Arb., 1998, p. 329.

5 Swiss Supreme Court, 21 March 1995, ASA Bulletin 1996, pp. 255, 259-261.

6 Albert Jan van den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* (Boston, 1981), pp. 44-49.

7 The parties had not expressly chosen a law to govern the arbitration agreement.

8 At the same point, in addition to English law, the court mentioned the 'general principles ... common to all systems of arbitration'. To this extent, the court actually referred to uniform interpretation. However, in practice, the court then fell back on the standards of the *lex fori*. The result would not have been different in this case, as in all three possibilities one must conclude that a true arbitration was at issue.

substance of the CRB's function. To this end, a number of factors were considered, all of which address the arbitral nature of a dispute resolution process. These factors arose out of the parties' submissions and Mustill and Boyd's definition of an arbitration.[9] For our purposes, these factors may be grouped into four categories:

(1) opportunity to be heard;
(2) impartiality of the decision-makers;
(3) characteristics of the decision; and
(4) basis for jurisdiction.

In its decision, the court considered three different aspects of the opportunity to be heard. First, the court noted that, in an arbitration, each party must have a proper opportunity to present its case, a requirement undoubtedly met by the actual procedure adopted by the CRB. Secondly, the court emphasized that, as a hallmark of any arbitral process, there should be proper and proportionate means for the receipt of evidence. This requirement implies that sufficient time is allowed for the production of expert evidence or for the appointment of a tribunal-appointed expert, if this is necessary for the determination of the issues in the arbitration. It also means that the arbitral tribunal must grant the parties sufficient time for the submission of evidence and oral argument. A specific issue arose here because the Secretary of the CRB had indicated that the meeting would be limited to one day. Such a limitation would have been deemed to be incompatible with an arbitral process. However, the Secretary's statement was remedied by the willingness of the CRB Tribunal to grant additional time if needed, as it did in fact. Thirdly and finally, Team 1 argued that the three-day time-limit for rendering a decision following the meeting further demonstrated the summary nature of the proceedings, which was irreconcilable with arbitration. Thomas J dismissed this argument: all that was required was a speedy decision after the last meeting, not a hurried process before; the CRB rules did not restrict the number of meetings and the CRB was required to hold as many meetings as justice required.

As to impartiality, the court also placed great emphasis on the fact that the CRB consists of lawyers of international standing, who are appointed by the President of the Court of Arbitration of the International Chamber of Commerce and who have no connection with the FIA or Formula 1 racing in general, all factors being a 'very important indication that the process is intended to be an arbitral one'. Similarly, the court noted that, in accordance with a fundamental principle of arbitration, the CRB arbitrators do not engage in unilateral communications with one party.

As to the characteristics of the decision, as another factor pointing towards arbitration, the court relied on the CRB's duty to apply the law. Indeed, although the priority between two conflicting contracts is determined by a strict chronological rule according to which the contract first registered prevails, the CRB decides on the validity of the contracts in accordance with the proper governing

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[9] Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (London, 1989, 2nd edn.), p. 41.

law. In this context, Thomas J quoted from the following definition of arbitration set out in *O'Callaghan* v. *Coral Racing Ltd*:[10]

> The hallmark of the arbitration process is that it is a procedure to determine the legal rights and obligations of the parties judicially, with binding effect, which is enforceable in law, thus reflecting in private proceedings the role of a civil court of law.

In this case, the court had no doubt that the CRB determined a matter that had legal consequences, *i.e.* which contract took precedence. While it was recognized that an arbitral tribunal may apply principles that are not 'strictly legal', the court nevertheless found that the existence of an obligation to apply the law constitutes an important indication that the procedure at issue is an arbitration. A further characteristic of an arbitral decision is that it is binding on the parties and rendered upon a dispute between persons whose substantive rights are at issue. The court determined that this characteristic applies to the CRB decision. The existence of a dispute on the substance of the rights is obvious and the CRB rules expressly provide for the binding nature of the CRB's decision.

Finally, the court considered the importance placed on consent in the definition of arbitration provided by Mustill and Boyd. Among other attributes of arbitration,[11] Mustill and Boyd emphasize that the jurisdiction of an arbitral tribunal must derive from the consent of the parties (or from an order of the court or from a statute), the terms of which make it clear that the process is to be an arbitration. The jurisdiction of the CRB is conferred by the contracts between the FIA and the teams and by those between the teams and the drivers. The fact that there is no bilateral contract between the teams does not matter, nor does - in Thomas J's words - the fact that 'these are contracts of adhesion and the parties have to assent thereto if they wish to participate in Formula 1 racing'.

III. ASSESSMENT OF *WALKINSHAW* v. *DINIZ*

In assessing the decision in *Walkinshaw* v. *Diniz*, we would like to focus on four specific points:

(a) the conclusion reached by the English High Court in the light of comparative law;
(b) the compulsory nature of the arbitration;
(c) due process and the proper means for evidence-taking balanced against the need for speed; and

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[10] English Court of Appeal, 19 November 1998 (unreported).

[11] In addition to its consensual nature, Mustill and Boyd's definition of arbitration includes the following attributes: the decision must be binding; the process is carried on between persons whose substantive rights are determined by the tribunal; the tribunal is chosen by the parties by a method accepted by them; the tribunal must act in an impartial manner respecting an equal obligation of fairness towards both parties; the agreement is enforceable in law; and the decision is made upon a dispute. The court concluded that all of these attributes were present in the case of the CRB.

(d) the split between arbitral and judicial jurisdiction.

(a) Arbitration versus Something Else

By all standards one may apply to define arbitration, the English High Court reached the correct conclusion in *Walkinshaw* v. *Diniz*: the CRB procedure is true arbitration. A brief comparative law study supports this proposition.

In 1993, the Swiss Supreme Court addressed the same issue with respect to proceedings before the Court of Arbitration for Sport (hereinafter the 'CAS'), in *Gundel* v. *The International Equestrian Federation* (hereinafter the 'FEI').[12] Gundel was a horseman and a member of the German equestrian team. By virtue of his licence to compete, he became subject to the rules of the FEI. Under these rules, a competitor who is dissatisfied with a decision of the FEI is entitled to make a final appeal to the CAS, the arbitral institution located in Lausanne, Switzerland. The FEI had disqualified, suspended and fined Gundel following a positive doping test on his horse at a competition. Gundel appealed to the CAS. While the CAS has a set of procedural rules, it does not decide the disputes of this nature itself but rather sets up a panel entrusted with the resolution of the dispute. In the Gundel case, the CAS panel proceeded and eventually confirmed the disqualification, but reduced the period of suspension and the fine. Gundel then applied to the Swiss Supreme Court for the annulment of the CAS decision.[13]

The Swiss Supreme Court held that it had jurisdiction over the application for annulment, provided that the CAS had decided on legal issues and not merely on the application of technical sports rules,[14] and provided that the CAS decision was an arbitral award, as opposed to a decision of a sports body.

The first requirement was clearly met: the suspension, disqualification and fine undoubtedly affected the competitor's legal interests. The second requirement gave rise to more discussion. Following a classical definition, the Swiss Supreme Court defined an arbitral award as a judgment rendered on the basis of an arbitration agreement by a private tribunal to which the parties have entrusted the resolution of a dispute involving an economic interest.[15] A decision by an internal body of a sports federation is not usually considered to be an arbitral award because such an internal body is seen to be a mere emanation of the sports federation rather than an independent judicial authority. Was the CAS such an

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[12] *G* v. *Fédération Equestre Internationale*, Supreme Court, 15 March 1993, RO (Official Reporter) 119 II 271; also reported in *Digest of CAS Awards 1986-1998* (ed. Matthieu Reeb) (Bern, 1998), p. 545, with an English translation, and commented on by Jan Paulsson, 'Arbitration of International Sports Disputes' in (1993) 9 *Arbitration International* 359.

[13] On the basis of art. 190 of the Swiss Private International Law Act.

[14] On the difficulties which this distinction involves, *see e.g.* Margareta Baddeley, 'Une sentence d'un intérêt particulier', ASA Bull. 1997, p. 143, and Gabrielle Kaufmann-Kohler, 'Arbitration and the Games' in *Mealey's International Arbitration Report* (February 1997), pp. 20-29.

[15] The Swiss Supreme Court restated this definition of an arbitral award in connection with an international sports dispute involving a CAS award in an unreported decision of 31 March 1999, and in connection with a domestic arbitration, in a decision of 26 July 1999, RO (Official Reporter) 125 I 389.

independent judicial authority? The CAS was not an emanation of the FEI; nor was it subject to its control.[16] Fifteen arbitrators out of the list of 60 from which the parties could choose were unconnected with any sports body; and the CAS rules provided for the challenge of any arbitrator who lacked the independence required under the Swiss arbitration law. On this basis, the Supreme Court came to the conclusion that the CAS decision was an arbitral award and that it had jurisdiction over the annulment application.

Although the focus of the analysis was different - for the Swiss Supreme Court: independence; for the English High Court: procedural rights - the conclusion was the same. Moreover, if one compares the Swiss Supreme Court's definition of 'award' (together with the emphasis placed on independence and the need for a decision affecting legal rights) with the tests applied by the English High Court, it is quite clear that the definitions of arbitration largely coincide, but with one exception: the weight given to the parties' procedural right to present proper evidence, an issue we will return to later.

A broader comparative law perspective confirms that both the Swiss and English courts were justified in concluding that the dispute resolution procedures under review were arbitral in nature. A number of legal systems distinguish between contractual and judicial arbitration: Italian law does so between *arbitrato irrituale* and *arbitrato rituale*; German law between *Schiedsgerichtsbarkeit* and *Schiedsgutachten*; Swiss law between the same concepts as German law;[17] Dutch law between *arbitrage* and *bindend advies*; French law between *arbitrage contractuel* and *arbitrage juridictionnel*. The test for distinguishing between the two different institutions is the binding nature of the decision that results from the process: contract-like or judgment-like. It is only if the parties intend a decision to be binding like a judgment that it constitutes an award and the process an arbitration.[18] This condition was clearly satisfied in the case of the CRB, as it was for the CAS.

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[16] Other types of connections, such as those previously existing between the CAS and the International Olympic Committee (which had created and financed the CAS) led the Swiss Supreme Court to qualify its decision: CAS proceedings constitute true arbitration at least where the IOC is not a party. This qualification in turn led to a reform of the CAS structure in 1994. *See* Court of Arbitration, Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-related Disputes and Paulsson, *supra* n. 12.

[17] In French, *arbitrage* and *expertise-arbitrage* or *expertise arbitrale*.

[18] For Italian law, Piero Bernardini, *Il Diritto dell'arbitrato* (Rome, 1998), p. 17; for French law, Charles Jarrosson, *La notion d'arbitrage* (Paris, 1987), p. 162 *et seq.*; for German law, Klaus Peter Berger, *Internationale Wirtschaftsschiedsgerichtsbarkeit* (Berlin/New York, 1992), pp. 53–54; for Swiss law, Felix Ehrat, in *Internationales Privatrecht* (ed. Honsell, Vogt and Schnyder) (Basle/Frankfurt, 1996), p. 1415; in connection with enforcement under the New York Convention, Albert Jan van den Berg, *New York Convention of 1958, Consolidated Commentary: Cases Reported in Volumes XXII (1997)- XXIV (1999)* [of the ICCA Yearbook], (forthcoming), which the author was kind enough to make available to the authors of this article.

(b) Compulsory versus Consensual Arbitration

In *Walkinshaw* v. *Diniz*, the English High Court insisted that consent is a necessary basis for arbitration. Curiously, the court went on to hold that it was irrelevant that the parties in that case had no choice but to consent to arbitration or forego participation in the Formula 1 Championship. Consent is the classical foundation of arbitration.[19] In reality, the CRB proceedings are a good illustration of a growing new category of arbitration without consent. Admittedly, the parties had executed a contract embodying an arbitration clause. However, when agreeing to arbitration, they had no choice: the 'acceptance' of arbitration was a condition *sine qua non* for admission to the motor-racing season.

More and more, the classical concept of arbitration based on consent is being supplemented by other concepts of arbitration which largely ignore this requirement. This is so especially in the areas of sport,[20] consumer transactions,[21] and investment arbitrations based on treaties or national statutes.[22] This is only natural, as arbitration becomes the most common method for settling international disputes. One may choose to cling to the dogma of consent and when no true and meaningful consent exists, rely on a fiction of consent. But if we merely preserve the appearance of consent, this justification for arbitration is no longer compelling. Indeed, it may be more accurate and intellectually honest to simply admit that arbitration without consent exists. Having made that admission, one can then investigate the requirements that have come to replace consent. Are there any? What are they? Simply the fairness of the process? Or others? Which ones? It seems clear that this type of investigation is more likely to identify the true forces at play and thus protect the interests of the arbitration users more effectively than insisting on an obsolete dogma.

(c) Due Process versus Speed

The English High Court decision in *Walkinshaw* v. *Diniz* places great weight on the parties' right to present evidence: '[t]he Contract Recognition Board has to hold as many meetings as [justice] required'. Thomas J appears to imply that the

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[19] The Swiss Supreme Court also mentions it as part of the definition of an award. It does not address consent any further because this point was not at issue.

[20] On mandatory sports arbitration and the effects on the validity of the arbitration clause, *see e.g.* Stephan Netzle, 'Jurisdiction of Arbitral Tribunals in Sports Matters: Arbitration Agreements by Reference to Regulations of Sports Organizations', in *Arbitration of Sports-Related Disputes* (ASA Special Series No. 11, 1998), p. 45 *et seq.*, especially pp. 53–54.

[21] Anne Brafford, 'Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary' in 21 *Iowa J. Corp. L.* 331, with numerous citations.

[22] It is true that the arbitration provision in the treaty/statute can be construed as an offer to arbitrate and the initiation of the arbitration as an acceptance. However, this is somewhat strained reasoning and, in any event, 'this puts the requirement of mutual consent in a new light, far removed from traditional contractual conceptions of arbitrations': *see* Antonio Parra, 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment' in (1997) 12 *Foreign Investment Law Journal* 360; Jan Paulsson, 'Arbitration without Privity' in (1995) 10 *Foreign Investment Law Journal* 232.

adoption of a court-like procedure is an indication of the parties' intent to agree on arbitration and not on something else.

(i) How much due process is enough?

In a time-driven arbitration, insistence on a broad opportunity to present evidence begs the inevitable question: how much can one expedite arbitration without risking a violation of due process? The requirement of due process is so fundamental that it has been deemed to be part of transnational or truly international public policy.[23] A survey of over 50 court decisions from countries around the world[24] shows that due process is one of the most common grounds for challenging arbitration awards. All of these cases dealt with alleged violations of due process specifically relating to the right to present evidence, including the right to have an expert appointed by the arbitral tribunal and to state one's case on the expert evidence.[25] In over 10 per cent of these decisions, the courts either annulled the arbitration awards or refused to enforce them.[26] This is a high percentage, considering that the overall ratio of non-enforcement under the New York Conventions lies below 5 per cent.[27] At the same time, almost none of the decisions annulling awards or refusing enforcement comes as a surprise to any experienced arbitrator.

This survey highlights the following main points: courts often insist on an arbitral tribunal's wide latitude to conduct the arbitration.[28] Though they hold that a party is entitled to present witnesses and documents on relevant facts (and to have an expert appointed by the arbitral tribunal if the latter lacks technical knowledge necessary to resolve the dispute),[29] courts are reluctant to interfere with the arbitrator's assessment of relevancy.[30] In addition, courts sometimes insist on the fact that the parties must offer their evidence within the time and in the form

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[23] Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration* (ICCA Congress Series No. 3, 1986), pp. 299–300; Charles Jarrosson, 'L'arbitrage et la Convention européenne des droits de l'homme', (1989) *Rev. de l'Arb.*, p. 600; Bruno Oppetit, 'Le refus d'exécution d'une sentence arbitrale étrangère dans le cadre de la Convention de New York', (1971) *Rev. de l'Arb.*, p. 104; other authors speak of principles fundamental to all systems of justice, universally recognized principles and the like (see in particular Alan Redfern, Martin Hunter and Murray Smith, *The Law and Practice of International Commercial Arbitration* (London, 1991 2nd edn.), p. 293; Matthieu de Boisséson, *Le droit français de l'arbitrage interne et international* (Paris, 1990), p. 676; Catherine Kessedjian, 'Principe de la contradiction et arbitrage', (1995) *Rev. de l'Arb.* p. 382).

[24] Carried out by the first author of this article, so far unpublished.

[25] Be it the evidence of the expert produced by the other party or appointed by the arbitral tribunal.

[26] Under Article V(1)(b) or (d) and V(2)(b) of the New York Convention.

[27] Albert Jan van den Berg, *The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas* (ASA Special Series No. 9, August 1996), p. 25.

[28] *e.g. Generica* v. *Pharmaceutical Basics, Inc*, 125 F.3d 1123, 1130 (7th Cir. 1997), *YB Comm. Arb.* XXIII (1998), p. 1076.

[29] Swiss Supreme Court, 14 November 1991, RO (Official Reporter) 116 11 639 = *YB Comm. Arb.* XVII (1992) pp. 279, 282 = ASA Bull. 1991, pp. 262, 266; Swiss Supreme Court, 11 May 1992, ASA Bull. 1992, pp. 381, 397.

[30] *e.g. The Argo Leader*, S.D.N.Y. 1985, *YB Comm. Arb.* XII (1987), pp. 173, 175; Court of Appeal Paris, 21 January 1997, (1997) *Rev. de l'Arb.* pp. 429, 431, Comment Yves Derains; Court of Appeal Paris, 14 October 1993, (1994) *Rev. de l'Arb.* p. 380, Comment Pierre Bellet.

required by the applicable rules or decided by the tribunal.[31] Courts also take into account not only the particular circumstances of the case, but also the specific type of arbitration involved, for instance GAFTA arbitrations.[32] As a result, some courts have held that the standard for due process is lower for quality arbitrations,[33] which are similar in some respects to sports arbitrations. The similarities are primarily found in the strict time constraints and relatively simple issues that are often to be resolved (Are the goods in acceptable condition? Must the athlete be disqualified?). Blatant violations will not be accepted: hidden evidence, be it documents or expert reports that are not communicated to one of the parties, will result in courts annulling awards or refusing to enforce them;[34] the same is true if a party is not given an opportunity to comment upon an expert report[35] or on documents filed by its opponent.[36] This is equally so if the arbitral tribunal has refused to take evidence which is pertinent and material.[37]

When considering the degree of due process required in any particular case, this survey of court decisions shows that an arbitral tribunal must pay attention to any mandatory rules at the place of arbitration. Although there is broad consensus on the core principles of due process, there are some important differences in its implementation between legal systems.[38]

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[31] Swiss Supreme Court, 21 August 1990, ASA Bull. 1991, pp. 30, 32.

[32] Court of Appeal Hamburg, 26 January 1989, *YB Comm. Arb.* XVII (1992), pp. 491, 496; German Supreme Court, 18 January 1990, *YB Comm. Arb.* XVII (1992), pp. 503, 506; German Supreme Court, 26 April 1990, *YB Comm. Arb.* XXI (1996), pp. 532, 534.

[33] Court of Appeal Paris, 30 January 1992, (1993) *Rev. de l'Arb.* p. 111, Comment Charles Jarrosson, p. 112; Court of Appeal Paris, 16 February 1996, (1997) *Rev. de l'Arb.* pp. 244, 245, Comment Serve Guinchard, entitled 'L'arbitrage et le respect du contradictoire (à propos de quelques décisions rendues en 1996)', it being understood that French case law considers quality arbitrations to be 'à mi-chemin entre arbitrage et expertise'.

[34] Court of Appeal Hong Kong, *Hebei Import & Export Corp.* v. *Polytek Engineering Co. Ltd.*, 16 January 1998, *YB Comm. Arb.* XXIII (1998), pp. 666, 681-682; French Cour de cassation, 16 December 1985, (1987) *Rev. de l'Arb.* p. 390 (witness 'testimonies' not known to either party); *see also* Lalive, *supra* n. 23 at p. 300 with citations.

[35] Court of Appeal Hong Kong, *Apex Tech Investments Ltd.* v. *Chuang's Development (China) Ltd.*, 15 March 1996 (unreported), discussed in Judith O'Hare, 'The Denial of Due Process and the Enforceability of CIETAC Awards under the New York Convention' in (1996) *J. Int'l Arb.* 179, at p. 193 and Neil Kaplan, *A Case by Case Examination of whether National Courts Apply Different Standards when Assisting Arbitral Proceedings and Enforcing Awards in International Cases as Contrasting with Domestic Disputes. Is There a Worldwide Trend Towards Supporting an International Arbitration Culture?* (ICCA Congress Series No. 8, 1998), pp. 187, 205; Supreme Court Hong Kong, *Paklito Investment Ltd.* v. *Klöckner East Asia Ltd.*, 15 January 1993, *YB Comm. Arb.* XIX (1994), pp. 664, 671.

[36] Court of Appeal, The Hague, 28 April 1998, and President Arrondissementsrechtbank, The Hague, 2 October 1997, *YB Comm. Arb.* XXIII (1998), p. 731.

[37] *Iran Aircraft Ind.* v. *Avco Corp.*, 980 Fed 2d 141 (2d Cir. 1992), *YB Comm. Arb.* XVIII (1993), pp. 596, 601-602; Swiss Supreme Court, 22 December 1992, ASA Bull. 1996, pp. 646, 650; *Tempo Shain Corp.* v. *Bertek, Inc.*, No. 96-9471, 2nd Cir., *Mealey's Arbitration Report 1997, A-2.*

[38] The right to an oral hearing is one example. Under art. 24(1) of the UNCITRAL Model Law, a party has the right to an oral hearing if it so requests. Under other regimes, the arbitrators may decide to have a hearing in their discretion (*see e.g.* s. 34(2)(h) of the English Arbitration Act 1996; Swiss Supreme Court decision, 1 July 1991, RO (Official Reporter) 117 11 346). Another difference arises in connection with tribunal-appointed experts. Under some laws, the parties have a right to examine the expert at an oral hearing (art. 26(2) Model Law; art. 1042(4) Dutch Code of Civil Procedure), whilst it is sufficient under others that they have an opportunity to comment on the report.

(ii) How much speed?

Can these due process requirements be waived so as to speed up the course of the arbitration? There is no question that parties can waive their due process rights after the fact. Indeed, it is a generally accepted rule that if a party does not immediately object to a violation of due process, it is precluded from subsequently challenging the award on this ground. However, what if the parties seek to limit due process in advance, *e.g.* by agreeing on procedural rules for an accelerated arbitration which limit their right to present evidence? This is legally doubtful because of the public policy nature of due process. Whatever the general answer, it is clear that a waiver of procedural rights in advance would not be effective in the context of compulsory arbitration; consent and due process are too closely linked. Compulsory arbitration can only be justified if the process imposed by one party on the other is fair, which implies the respect of due process rights.

(iii) Balance and flexibility

Any fast-track arbitration, be it in the area of sport or otherwise, must strike the difficult balance between due process and speed. Any rules for accelerated proceedings must allow for the risk of a decision that will not withstand judicial review. If the relevant evidence cannot be adduced within the short time frame allowed, the rules must provide for some fallback procedure, especially in any arbitration scheme where there is no real consent to arbitrate. For instance, this is true for the CAS Olympic rules, which provide for a resolution within 24 hours, but allow not only an extension of that time-limit, but also a transfer of the case from the fast-track to the regular procedure. Indeed, the arbitrators have a choice between making a final fast-track award or transferring the case:

> Taking into account all the circumstances of the case, including the claimant's request for relief, the nature and complexity of the dispute, the urgency of its resolution, the extent of the evidence required and of the legal issues to be resolved, the parties' right to be heard and the state of the record at the end of the [fast track] proceedings.[39]

In practice, the CAS Olympic arbitrators have not taken advantage of this possibility thus far. However, the very fact of its existence is essential to the fairness of the process.

The insistence on due process should not mislead the practitioner. Like any manifestation of public policy, due process is a variable concept. And, indeed, the courts adjust their standards of review in accordance with the specificities of the arbitration at issue. If a decision is required urgently, the arbitrators have a duty to proceed expeditiously. As a corollary, the parties have a duty to co-operate with the arbitrators in achieving this end. If the parties are entitled to an expert, an expert must be appointed. However, proceedings involving the expert can be condensed into a very short time frame. So, for instance, in Olympic arbitration, the parties are

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[39] *See* art. 20 CAS Arbitration Rules for the Games of the XXVII Olympiad in Sydney.

invited to comment on the choice of the expert within hours, the expert is examined orally, and the parties' comments on the expert evidence are due immediately or shortly thereafter. When giving such directions, it will obviously be up to the arbitrators to decide on the appropriate limits for such accelerated proceedings.

(d) Partial versus Plenary Jurisdiction

The case of *Walkinshaw* v. *Diniz* is a good illustration of the complications that may arise out of split jurisdiction. Under the CRB rules, most disputes involving a conflict between drivers' contracts may have to be resolved through both CRB arbitration proceedings and court proceedings. Needless to say, such a split jurisdiction generates extra expense, delay, and a fair share of procedural niceties. To avoid these unpleasant consequences, the FIA should consider extending the CRB's jurisdiction to the contractual consequences of one contract prevailing over another. This would necessitate some creative rule drafting.[40] The proceedings would have to be divided into two stages. The first stage would deal with contract priority. It would have to be particularly speedy. The second stage would then deal with the consequences thereof and would not necessarily have to proceed on a fast track.

Such an extension of the CRB's jurisdiction would have a number of advantages and no obvious drawbacks. Some advantages are specific to the CRB process; others are general advantages of arbitration over court litigation. Among the specific advantages, one can count:

(1) avoiding the problem of delineating the jurisdiction of the CRB from that of a state court;
(2) avoiding, or at least reducing, the risk of duplicative and conflicting proceedings before an arbitral tribunal and a court, with the attendant costs and time involved in procedural battles on arbitration, *lis pendens* and *res iudicata* defences;[41] and
(3) reducing the costs and duration of the dispute resolution process due to the fact that it is concentrated in one rather than two proceedings.

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[40] At the same time, the FIA may contemplate modifying the 'administrative' terminology used in the CRB rules to replace 'board' by 'arbitral tribunal', 'member of the board' by 'arbitrator', 'meeting' by 'hearing' and so on. This would minimize the risk that courts and parties unfamiliar with CRB proceedings would be misled about the true nature of the process.

[41] This case illustrates a situation of conflict between courts and arbitration, which is occurring more and more as arbitration becomes the preferred mode of settling international disputes and disputes become increasingly complex, involving multiple parties, multiple contracts, and multiple proceedings. The conflict can also arise between two competing arbitrations. As in court proceedings (*see e.g.* art. 21 of the Brussels and Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters), it will become necessary to establish rules for resolving these conflicts, in order to avoid duplicative proceedings and conflicting decisions on the same dispute. On the conflicts between courts and arbitral tribunals seized of the same disputes, *see* François Perret, 'Parallel Actions Pending Before an Arbitral Tribunal and a State Court: The Solution under Swiss Law' in (2000) 16 *Arbitration International* 237. *See also* Douglas D. Reichert, 'Problems with Parallel and Duplicate Proceedings: The Litispendence Principle and International Litigation' in (1992) 8 *Arbitration International* 237; Michael E. Schneider, 'Multi-Fora Disputes' in (1990) 6 *Arbitration International* 101.

With respect to general advantages of extending the jurisdiction of the CRB, it would:

(4) ensure confidentiality,[42] which is not a minor benefit when dealing with highly sensitive commercial matters;
(5) allow flexibility in the management of the dispute resolution process;
(6) guarantee the quality of justice due to the experience and qualifications of the arbitrators, which is not necessarily available in court proceedings; and
(7) permit the development of uniform practice due to the permanent nature of the CRB.

In conclusion, viewed from a broader perspective, the CRB system illustrates a characteristic peculiar to the evolution of contemporary disputes resolution procedures. It is a good example of a growing trend towards the creation of tailor-made mechanisms meeting the specific needs of a given trade, industry or other activity.

The CRB provides a fully integrated, self-enforcing system for dispute avoidance and dispute resolution, one which is tailored to the distinct requirements of the activity giving rise to the dispute. As such, the CRB could well serve as a model in all other sports disciplines where athletes often move from team to team. In the first instance, the system seeks to prevent disputes by requiring contract registration. To the extent that disputes do arise, it greatly simplifies their resolution by setting rules on contract priority. As a result, the CRB Tribunal is able to rule on disputes over contract priority with the greatest speed and certainty possible. Traditional dispute resolution procedures, including arbitration, would not allow for the decision-making speed required by the time constraints of competition. The CRB system ensures prompt compliance with the CRB Tribunal decisions through the licensing procedures of the FIA, a *supra partes* body, without the need for recourse to the courts. All of this results in a unique dispute resolution procedure that can keep pace with the demands of the speediest participants in the Formula 1 Championship.

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[42] Admittedly with the exceptions known in arbitration: *see e.g.* L. Yves Fortier, 'The Occasionally Unwarranted Assumption of Confidentiality' in (1999)15 *Arbitration International* 131; Jan Paulsson and Nigel Rawding, 'The Trouble with Confidentiality' in (1995) 11 *Arbitration International* 303.

Appendix A

IN THE HIGH COURT OF JUSTICE 1999 Folio No. 522
CHANCERY DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Wednesday, 19th May 1999

Before:
MR. JUSTICE THOMAS

B E T W E E N:

THOMAS DOBBIE THOMSON WALKINSHAW & Ors. Claimants

- and -

PEDRO PAULO DINIZ Defendant

MR. M. LITTMAN Q.C. and MISS M. ALLAN (instructed by Messrs. Edward Lewis) appeared on behalf of the Claimants.

MR. I. GLICK Q.C. (instructed by Messrs. Kingsford Stacy Blackwell) appeared on behalf of the Defendant.

JUDGMENT
(As approved by the Judge)

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ARBITRATION INTERNATIONAL, Vol. 17, No. 2

MR. JUSTICE THOMAS: There is before the court an application by the defendant, Mr. Diniz, to stay these proceedings brought against him by the Claimants ("Arrows") under s. 9 of the Arbitration Act 1996 on the basis that the parties had agreed to refer the matters in dispute to arbitration under the contract between them.

The contract between Mr. Diniz and Arrows and the Formula One 1997 Concorde Agreement.

On 24th October 1997 Arrows, owners and operators of the Arrows Formula One racing team, entered into a contract with Mr. Diniz, a professional Formula One racing driver, under which Mr. Diniz would drive for them during the 1998 and 1999 Formula One World Motor Racing Car Championships.

Formula One World Motor Racing Car Championships are governed by the 1997 Concorde Agreement. That is an agreement to which all Formula One racing teams and the Federation Internationale de l'Automobile are parties. The structure of the arrangements are such that agreements are also made between drivers and each team individually, and the agreement to which I have referred between Mr. Diniz and Arrows was one such agreement.

That agreement set out the respective obligations of the parties. Among the obligations of Arrows was the provision of a car, and a spare car, to a standard warranted under clause 7 of the agreement. The termination provisions of the agreement were contained in clause 9. Two of those provisions are relevant. Clause 9 reads:

> "9.2 This agreement may be earlier terminated, by means of a 15-day prior notice, via telefax, in the following events ..."

I need not set out (a). I set out (b):

> "by the Driver, upon failure of the Team to fulfil its obligations undertaken in clause 3; or in the event the Team has not met the minimum performance standards set out in Clauses 7.1, 7.2 and 7.3 above."

Clause 9.5 provided:

> "9.5 Either party may terminate this Agreement for any reason at the end of the 1998 season upon giving to the other not less than 7 days notice in writing before the end of the 1998 Formula One season, subject to paying to the party receiving the notice the sum of US $7,000,000 upon the termination of this Agreement."

To enable Mr. Diniz to compete in Formula One racing the contract had to be registered by a body called "The Contract Recognition Board" (established under the terms of the 1997 Concorde Agreement) by sending to that body the contract and the contract registration form.

The Concorde Agreement also required each contact between the driver and his team to contain a provision for the resolution of conflicts by the Contract Recognition Board. This provision was incorporated into the contract between Mr. Diniz and Arrows by the first part of clause 11. Clause 11 read as follows:

> "11.1 The Parties hereto expressly agree that this Agreement is (or as the case may be, forms a part of) a Contract as defined by Clause 6(I) of Schedule 11 to the Concorde Agreement so that the Parties hereto hereby agree with each other to respect the terms of the said Schedule and in particular Clause 7 thereof which provides for the resolutions of conflicts by the Contract Recognition Board sitting in Geneva,

Switzerland. Accordingly the Parties hereto expressly submit to the exclusive jurisdiction of any competent judicial or other body as regards interim or conservatory measures in that respect.

11.2 Subject to Clause 11.1 this Agreement shall be governed by English Law and shall be subject to the exclusive jurisdiction of the courts of England."

Clause 11.1 is the clause which was required to be inserted into the agreement by the terms of the 1997 Concorde Agreement. It will be necessary later to refer in more detail to the terms of Schedule 11 to the Concorde Agreement. I am told by the parties that this can be considered as a self-standing document without reference to the 1997 Concorde Agreement itself. That document was not before the court and is a document of immense commercial confidentiality.

I should record at this stage that it is the contention of Mr. Diniz that the Contract Recognition Board is an arbitral body and not, as Arrows contend, merely a body to decide on the "rules of the game".

In accordance with those provisions, on 11th November 1997 the agreement between Mr. Diniz and Arrows was registered by the Contract Recognition Board.

The termination of the agreement between Mr. Diniz and Arrows.

On 6th October 1998 Mr. Diniz gave Arrows notice that Arrows had not complied with the minimum performance guarantees and warranties in clause 7 of the Agreement and that he was exercising the rights under clause 9.2(b) to terminate it at the end of the 1998 season. That season ended with the Formula One race in Japan on 1st November 1998. On a day later, 7th October 1998, a press release was issued by the Sauber Formula One Racing Team to announce that Mr. Diniz would join their team as a driver for the 1999 season.

On 13th October 1998 Arrows wrote to Mr. Diniz stating they rejected his claim to be entitled to terminate under clause 9.2(b) for breach of the performance guarantees under clause 7. The letter continued,

"Nonetheless, your fax, coupled with the fact that you appear to have agreed to drive for Sauber next year instead of Arrows, leaves me with no alternative but to accept that you have given formal notice in writing, as you are entitled to do under Clause 9.5 of the Agreement, to terminate it.

There are two consequences of early termination of the Agreement; first, all sponsorship agreements generated by you, including the Parmalat sponsorship, are also terminated (Clause 9.3) - although all outstanding payments still have to be met; and secondly, termination under Clause 9.5 is subject to the party giving notice - you - paying the party receiving the notice - us - the sum of US $7 million upon termination of the Agreement. Since both your notice and the termination of all sponsorship agreements generated by you take effect at the end of the season, please advise me as soon as possible of the arrangements you are making for this sum to be remitted."

There could, in my view, be no doubt, after receipt of this letter, that the agreement was terminated and that neither Mr. Diniz nor Arrows were seeking to continue the agreement for the 1999 season.

On 20th October 1998 Mr. Diniz entered into a contract with PP Sauber Limited of St. Helier Jersey ("Sauber") for the 1999 season with an option for a further year. The period of that contract, in accordance with its terms, began on 21st November 1998. That

agreement is governed by Swiss law with an ICC Arbitration clause with the seat of arbitration in Geneva. It contains, as is to be expected, a provision identical to Clause 11.1 of the agreement between Arrows and Mr. Diniz.

On 12th November 1998 Mr. Diniz sent a further letter to Arrows stating that he had not terminated under clause 9.5 and relying on a further breach of clause 7 of the agreement as additional grounds for his termination under clause 9.2(b).

On 17th November the solicitors for Arrows made it clear in a further letter to Mr. Diniz that the agreement had been terminated and demanded payment of the sum of US$7 million due under clause 9.5. That letter was acknowledged on 20th November 1998 by Herbert Smith, solicitors on Mr. Diniz's behalf. They did not dispute that the agreement was terminated but denied liability to pay US$7 million. Again, the demand made by Arrows was only consistent with Arrows accepting that the agreement had been terminated.

The involvement of the Contract Recognition Board

On 27th November 1998 Sauber apparently sent the contract between them and Mr. Diniz, and the registration form, to the Contract Recognition Board as they were required to do so that the contract could be registered. This was apparently received by the Contract Recognition Board secretariat on 30th November 1998. Under the terms of Schedule 11 it is the function of the Contract Recognition Board to determine priority as between any contracts for the services of the same driver that cover the same period of time.

In accordance with the terms of clause 7.3 of Schedule 11, the Secretary of the Contract Recognition Board, on receipt of Sauber's form which showed that Mr. Diniz' services as a driver covered the same period as that in the contract between Mr. Diniz and Arrows, registered the contract and the form, but gave Sauber notice, on 8th December 1998, of apparently conflicting contracts. He asked the parties to inform the Secretariat if they wished for a meeting with the Contract Recognition Board to resolve the conflict between the two contracts. At some date between 8th and 15th December 1998 negotiations took place between Arrows and Sauber. They were not successful. On 15th December 1998, in accordance with the time limit specified by the Secretary of the Contract Recognition Board, Sauber gave notice of its desire for a meeting with the Contract Recognition Board.

The issue of proceedings in England and Wales by Arrows

On 16th December 1998 Arrows issued these proceedings. The writ was endorsed with a statement of claim which was concisely and clearly drafted by Miss Monique Allan. It stated, after setting out the exchange of correspondence on 6th and 7th October, quite unambiguously, the following:

> "8. By virtue of the aforesaid termination the sum of US$7 million became due on 1 November 1998 and is owed by the Defendant to the Plaintiffs pursuant to Clause 9.5 of the Contract.
>
> 9. Further or alternatively, in breach of Clause 9.5 of the Contract the Defendant has failed to pay the Plaintiffs US$7 million or any sum.
>
> 10. In the premises, the Plaintiffs have suffered loss and damage in the sum of US$7 million.
>
> 11. Further the Plaintiffs claim interest on US$ 7 million. . . ."

The prayer continued:

"... AND the Plaintiffs claim:

(i) US$7 million; further alternatively,
(ii) damages; further,
(iii) interest ..."

The only basis for the claim of US$7 million made in that statement of claim was that the agreement between Mr. Diniz and Arrows had been terminated. Again, there could be no doubt that Arrows accepted that the contract between Arrows and Diniz had been terminated. The write was sent to Mr. Diniz' solicitors, Herbert Smith, who replied on 18th December 1998 that they did not have instructions to accept service.

The convening of a Contract Recognition Board meeting

Under the provisions of clauses 1 and 2 of Schedule 11 to the Concorde Agreement, the members of the Contract Recognition Board who were to determine the question of conflicting contracts were to be qualified lawyers of international standing, suitably experienced in the law of contract, and were to be appointed by the President of the Court of the International Chamber of Commerce. In accordance with those provisions, the President of that Court appointed Professor Avvocado Gabriel Crespi Reghizzi of Milan, Maître Yves Derains of Paris and Mr. V.V. Veeder Q.C. of London as the three members of the Board. Maître Derain subsequently resigned and in his place the President appointed Maître de Boisseson, also of Paris. The three members of the Board are all lawyers of the highest international standing and distinction. By the terms of clause 4 of Schedule 11, the Contract Recognition Board was to meet for these purposes in Geneva.

On 21st January 1999 the Secretariat of the Contract Recognition Board informed Arrows, Mr. Diniz and Sauber that a meeting of the Contract Recognition Board would be held on Friday, 12th February 1999 in Geneva. It requested that the parties send a complete file of their position and supporting documents to the three members of the Contract Recognition Board by 5th February 1999.

The parties all made submissions in accordance with this direction. Arrows made their submissions on 5th February 1999. They challenged the jurisdiction of the Tribunal and made it very clear that they would not accept the jurisdiction of the Contract Recognition Board to decide the issue which was the subject of the proceeding in this court. It will be necessary to refer to sub-paragraphs of that submission in due course.

They also made allegations of bias against the Contract Recognition Board and failures in its procedure, but I should record that no suggestion of bias of any kind was pursued before me.

Mr. Diniz also made submissions. He also contended that the agreement had been terminated and contended that that had happened under clause 9.2(b). However, it was said on his behalf in para. 3 of the submission, as follows:

"In addition, and without prejudice to the aforesaid, in any event [Arrows] and [their] lawyers have respectively, in [their] fax dated October 13, 1998 and in theirs dated November 17, 199[8] (...) confirmed that the Agreement was terminated, although they disagree in respect of the basis of such termination. They indeed allege (which is totally [denied] by Diniz) that this is on the basis of clause 9.5 of the Agreement, stating that the consequence thereof would be the obligation of Diniz to pay a certain amount. They themselves therefore accept that such payment would be the consequence and

> not the cause of the termination. This in other words means that, in any event, even if the termination is based on such clause 9.5, the Agreement is already terminated. Accordingly [Arrows] themselves are not claiming that they are entitled to - or willing - the driving services of Diniz during the 1999 season. There is therefore no conflict whatsoever in respect of the team for whom Diniz should drive in 1999. The only valid agreement in respect of his services is that entered into with Sauber. [Arrows] only allege that, without prejudice to the already effective termination of the Agreement, they are entitled to a certain payment. Diniz, again, disagrees, but, assuming that the CRB would not admit that the Agreement has been terminated based on clauses 9.2(b) and/or 1.3 thereof, this is a matter which will be discussed in front of the ordinary competent courts where [Arrows] have indeed already started litigation against Diniz."

There could be no doubt from that submission that Mr. Diniz accepted that he understood that Arrows accepted that the contract had been terminated, and there was no contention on the part of Arrows that it subsisted or that he was required to drive for them after its termination.

On 12th February 1999 the Contract Recognition Board met in Geneva. Arrows did not attend. They had put in a further submission on 11th February on the merits subject to that clear reservation on the jurisdiction of the arbitrators. They had also notified the Contract Recognition Board that they would not attend. On 17th February 1999 the Contract Recognition Board issued its decision. The operative order is set out in para. 46 in the following terms:

> **"I – The Two Issues:** We decide finally that the TWR/Arrows Contract of 24 October 1997 was validly terminated before 30 November 1998 in accordance with its terms and its applicable law; that the Sauber Contract dated 20 October 1998 is valid and in force for the 1999 season; that it is the prevailing contract; and that it was validly registered by the CRB Secretariat on 30 November 1998.
> **II – The CRB Registry:** We direct the CRB Secretariat forthwith to modify the CRB register to reflect this decision, i.e. to remove the registration of the TWR/Arrows Contract as applying to any period after 30 November 1998 and to accord the Sauber Contract the status of the prevailing contract.
> **III – Other Matters:** In this decision, we do not decide the two matters described in paragraph 45 above, for which we have directed a further meeting with further submissions from the Driver and TWR/Arrows, as set out in paragraph 37 above."

Paragraph 45 stated:

> "45. In this decision, we have expressly left over the factual question of which contractual term was invoked validly to terminate the TWR/Arrows Contract, namely whether it was Clause 9(2)(b) or Clause 9(5): see paragraphs 33–37 above. We have also expressly left over the question of our jurisdiction in the limited sense described in paragraph 37 above."

In order to understand this reservation, it is necessary, briefly, to refer to other paragraphs of the decision. In para. 32 the Board said:

> "In our view it is plain that the TWR/Arrows Contract has been validly terminated. Until the written submissions made by TWR/Arrows in these proceedings, that was clearly the position of both the Driver and TWR/Arrows, as expressed in writing by Mr. Walkinshaw, Simmons & Simmons and the writ's learned pleader. Moreover, in our view, that was indeed the legal position judged objectively from the contemporary

documents. Against that weight of material, the written submissions from TWR/Arrows in these proceedings, to the effect that the TWR/Arrows Contract remains extant, count for nothing: see paragraphs 32 and 33 of Kingsford Stacey Blackwell's letter of 5 February 1999. Accordingly, we decide that the TWR/Arrows Contract was terminated before 30 November 1990, either by virtue of Clause 9(2)(b) or 9(5)."

They decided that, as a matter of fairness, they would adjourn the matter to allow Arrows to attend and make submissions as to whether they had jurisdiction to decide the issue, and they gave further direction for the hearing of that point. They said, in paras. 34, 35 and 36:

"34. As a matter of fairness to TWR/Arrows, given the sum of money apparently turning indirectly on the answer to this issue [a reference to whether the contract had been terminated under clause 9.2(b) or clause 9.5] we think it is wrong to proceed in TWR/Arrows' absence without giving it another opportunity to attend a further CRB meeting where it could present evidence and argument in support of its case, provided that no irreparable prejudice from such a delay is thereby inflicted upon the Driver or Sauber.

35. As to wasted or duplicated costs associated with a second meeting, we consider that the Driver and Sauber can be protected by a suitable order for costs in this decision. As to the imminence of the first race of the 1999 season at Melbourne on 7 March 1999, we consider that the Driver and Sauber can be sufficiently protected by a decision that recognises the early termination of the TWR/Arrows Contract, without also deciding which contractual term was in fact invoked to produce such termination. Whereas the registration of the Sauber Contract as the prevailing contract is of urgent interest to the Driver and Sauber, the same cannot be said of our decision as to which of two contractual provisions brought about the early termination of the TWR/Arrows Contract.

36. Accordingly, we decide finally that the TWR/Arrows Contract was validly terminated in accordance with its terms before 30 November 1998. We therefore also decide that the Sauber Contract is the prevailing contract; and we direct the CRB Secretariat to [do so]."

Although they had set out, in para. 33 which I have not read in full, what must be treated as their preliminary view that the Contract Recognition Board had jurisdiction to decide whether the TWR/Arrows contract was terminated under clause 9.2(b) or clause 9.5, they set out in para. 37 their directions in respect of the issue that they consider they should determine, namely whether they had jurisdiction to determine the question whether the termination was under clause 9.2(b) or clause 9.5 and the merits of that dispute, assuming that they came, subsequently, to the view that they had jurisdiction.

Following that decision Arrows' solicitors asked the Contract Recognition Board if they would decide the issue of jurisdiction first and then determine, at the subsequent hearing, the issue of the merits. The CRB refused.

Service of these proceedings on Mr. Diniz and the application to stay.

At no time after Herbert Smith had stated that Mr. Diniz had not given them instructions to accept service, did the solicitors appointed by Mr. Diniz indicate a contrary position. Orders were therefore made by a Master enabling Arrows to serve a concurrent writ in Monaco. In view of the delay that such service might entail (as Monaco is not a Convention country) a further order was made for a further concurrent writ to be issued

enabling Arrows to serve it on Mr. Diniz in Melbourne, Australia, where, as was referred to in the decision of the Contract Recognition Board, he was to compete in the Australian Grand Prix.

On 3rd March 1999 the writ was served on Mr. Diniz in Melbourne. On the same day his solicitors entered an acknowledgement of service of the writ that had been sent for service to Monaco. His solicitors, when they entered the acknowledgement of service, stated that he would be applying for a stay and, on 26th March 1999, issued this application to that end. As son as Arrows learned Mr. Diniz intended to apply to stay these proceedings, they asked the Contract Recognition Board to adjourn the hearing for 90 days. The Contract Recognition Board sought representations from the parties on that issue and, having considered them, declined to do so. Its decision was communicated to the parties on 19th March 1999 with reasons. On 22nd March 1999 the Secretariat gave notice that the Contract Recognition Board hearing would take place on 26th May 1999 at Geneva, and directed that any further written material should be supplied to the Tribunal by 21st May 1999.

An application was made to this court on 31st March 1999 for transfer of these proceedings to this court and on 21st April 1999 an order was made that the application for a stay be heard on 17th May 1999 (Monday of this week).

The issues before the court

The issues that are before the court on the application can be summarised as follows. (1) Is the matter the subject of the proceedings a matter which under clause 11 of the agreement between Mr. Diniz and Arrows the parties have agreed be referred to the Contract Recognition Board? (2) If so, is the reference to the Contract Recognition Board a reference to arbitration or some other form of consensual dispute resolution? (3) If it is another form of consensual dispute resolution, should the action be stayed?

It was agreed that I should determine those issues first and stand over the application Arrows had intimated they would make for an injunction against Mr. Diniz continuing participation in the proceedings before the Contract Recognition Board, assuming that they were successful in resisting a stay. I therefore turn to consider -

Issue 1 - Is the matter the subject of these proceedings a matter which, under clause 11 of the agreement, the parties agreed be referred to the Contract Recognition Board?

A number of considerations were common ground.

- Clause 11 of the agreement between Mr. Diniz and Arrows is governed by the law of England and Wales.
- Schedule 11 was probably governed by Swiss law. However, there was no evidence that the law of Switzerland relating to the construction of agreements differed from the law of England and Wales, and therefore the court should determine all issues of construction on Schedule 11 applying the principles of law of England and Wales.
- Although under Swiss law the arbitrators have power to determine their own jurisdiction, that was not relevant to this court's determination of that same question.

Having set those matters of common ground out, I now turn to consider the first issue.

The scope of the reference.

The claim before this court is a claim asserted on the basis that the contract between Mr. Diniz and Arrows has been terminated. It is on this sole basis that the claim for the payment of US$7 million is made. No assertion is made that Mr. Diniz is not free to drive for Sauber. The only issue therefore before the English court is whether the agreement was terminated on the basis of clause 9.2(b) or clause 9.5. If the court determines the issue in favour of Arrows, then it will give a judgment entitling Arrows to recover US$7 million from Mr. Diniz unless some point is taken in these proceedings on the nature of the sum claimed.

Under the terms of the agreement between Arrows and Mr. Diniz unless the claim falls within clause 11.1, the claim is subject to the exclusive jurisdiction of this court under the provisions of clause 11.2. Clause 11.1 provides that the parties must respect the terms of Schedule 11 and in particular clause 7 which provides for the "resolutions of conflicts by the Contract Recognition Board".

It is clear from the terms of schedule 11 that the object of the Contract Recognition Board is to resolve conflicts between contracts that cover the same period of time. The reference in clause 11 of the agreement between Mr. Diniz and Arrows to "conflicts" is therefore a reference to competing or conflicting contracts. Clauses 7.1 and 7.10 of Schedule 11 make this clear.

> "7.1 Subject to Clause 10.3 if Contracts are concluded for the services of the same driver in respect of the same period of time (or overlapping periods of time) the question as to priority between such Contracts shall be exclusively finally and conclusively determined by the Board in the manner set out in this Clause 7."
> "7.9 The Board shall within three days from the last day of a Conflicting Contract Meeting issue a decision (a "Decision") stating which Contract is the prevailing Contract (a "Prevailing Contract") which takes precedence over any other Contract in respect of the same pier of any overlapping period. Without prejudice to Clauses 7.10 and 7.14 the Decision shall not deal with any other issue (other than costs)."

The concluding words of clause 7.9 are very important in stating that, subject to clauses 7.10 and 7.14, the decision of the Contract Recognition Board is not to deal with any other issue. It makes the narrow task of the Contract Recognition Board very clear. There are, however, the two specific sections mentioned in the clause and I consider each in turn.

- Clause 7.10 enables the decision of the Contract Recognition Board to specify the modification required to the register of contracts. That is purely consequential to the decision on priority and it does not in any way expand the jurisdiction of the Contract Recognition Board.
- Clause 7.14 provides as follows:
  "7.14 A Decision may be conditional upon the payment of Compensation being made within the time limit specified by the Decision, which time limit shall be consistent with that specified by the Contract concerned."

This clause is not material in this case. No assertion has ever been made by Arrows that the termination of the contract with Mr. Diniz was conditional upon the payment of the US$7 million or other compensation by him. Since 13th October 1999 they have always contended, as the matters I have set out make clear, that they regard the contract as terminated. Mr. Diniz has never appeared to dispute this.

Thus, in my view, there are no relevant exceptions in this case which permit the

Contract Recognition Board to decide any issue other than which contract takes precedence, and that is all they are entitled to do under clause 7.9.

This is another important consideration. It is common ground that the Contract Recognition Board has no power whatsoever to make an award or make any other dispositive order as between the driver and his Team, for the payment of compensation, damages or the US$7 million referred to in clause 9.5 of the agreement between Mr. Diniz and Arrows. Even the limited power under clause 7.10 is a power only to make a decision on which contract takes precedence conditional on the payment of compensation; it goes not further than that. Thus the Contract Recognition Board has no power to make any award or other dispositive order in relation to the sole claim made by Arrows against Mr. Diniz which is for the payment of US$7 million due on termination.

It must therefore follow that it cannot have been agreed by the parties that the claim itself was to be referred to the Contract Recognition Board as the Contract Recognition Board has no power to make an award or other dispositive order in favour of Arrows on the subject matter of the claim. The most that could happen would be for this court to impose a temporary stay while the issue as to whether the termination under clause 9.2(b) or 9.5 was decided by the Contract Recognition Board. If that issue was decided in favour of Arrows, then this court would, as the court having exclusive jurisdiction between Arrows and Mr. Diniz, have to make the dispositive orders. Furthermore, if some challenge was made to the validity of the provision requiring payment of US$7 million and the claim of Arrows had to proceed in damages, then it would seem that that again was an issue which would have to be determined by this court.

I cannot see how in these circumstances it could have been contemplated by the parties that this was the way in which a dispute between the driver and his team was to be resolved when the team was claiming a sum due under the contract. They would have given the body who was to adjudicate upon that claim the power to make a dispositive order. They would not have split the claim between two bodies. The fact that they did not give any power to the Contract Recognition Board to make a dispositive order or award is in my judgment a very clear indication that they did not intend such a claim to be referred to the Contract Recognition Board. There is therefore, in my view, a further reason why there cannot have been referred to the Contract Recognition Board the claim for US$7 million because the Contract Recognition Board has no power to order the sum to be paid, and by the terms of the Contract Recognition Board's jurisdiction, the Board is only to decide the issue of competing contracts and the issue of priority between them.

However, it is contended that despite the fact that the Contract Recognition Board has no power to make an award or other dispositive order on the claim by Arrows, the determination of the issue upon which the claim depends was within the scope of what had been referred; this contention relies heavily upon clause 7.11 of the agreement. This provides:

> "7.11 In making its Decision the Board shall first determine the question as to whether under the proper law(s) of the contract applicable to the Contracts concerned one or more of the said Contracts is null and void, has been validly terminated in accordance with its terms, including a termination subject to the making of a payment of compensation pursuant to and of an amount determined by the Contract ("Compensation"), or has expired. If the Board determines that one or more of the said Contracts is not null and void, has not been validly terminated or has not expired, then, for the purposes of Clauses 7.12 and 7.13 such Contract or Contracts shall be considered valid and in force."

It is argued on behalf of Mr. Diniz that the requirement that the Contract Recognition Board should decide whether the contract has been terminated in accordance with its terms means that the issue of whether the termination is under clause 9.2(b) or 9.5 has been referred to the Contract Recognition Board. I do not agree.

The Contract Recognition Board's function is to decide as between the driver and the two teams with which he has a contact which is the contract that takes precedence; if it is necessary to determine whether a contract has been terminated to reach that decision, then plainly that issue would have to be determined by the Contract Recognition Board. In such a case, as was rightly accepted by Mr. Littman Q.C., who appeared for Arrows, the issue that arises is an incidental and necessary issue in the course of the Contract Recognition Board deciding the matter of priority referred to them. A finding by them on the question of termination could then take effect as an issue estoppel between the parties in any other proceedings.

But if there is no issue that a contract has been terminated, then it is not necessary for the Board to determine that issue, and it cannot, in my judgment, fall within the scope of the matters referred. Clause 7.9 makes it quite clear that the Contract Recognition Board is only to determine the issue of precedence between contracts and no other issue, other than those under clauses 7.10 and 7.14. If the fact of termination is not in issue and clause 7.14 does not apply, then, in my view, the issue as to whether the termination was under clause 9.2(b) or clause 9.5 is not within the scope of matters which the Contract Recognition Board is entitled to decide and is not within the scope of the matters referred or incidental or necessary to a decision on the matters referred.

Although that is a view that I have reached on the clear language used in Schedule 11 and clause 11 of the contract between Mr. Diniz and Arrows, it also appears from the clear commercial purpose of the schedule in the contract. The reference to the Contract Recognition Board provides a means of deciding a tripartite dispute rapidly, so the parties and the Federation know who is entitled to the services of the driver. Clause 7.9 requires a rapid decision on this issue and the procedure are designed to enable this to be done. It is not a procedure for determining bilateral disputes between two parties relating to the rights and wrongs of a termination. Had it been, the Contract Recognition Board would have been given dispositive powers to make an order between the two parties for the payment of compensation or damages.

I have therefore reached the clear conclusion that the matter the subject of the claim is not within the scope of the reference to the Contract Recognition Board and the Contract Recognition Board are not entitled to consider the matter unless it is necessary or incidental to the decision on the matter referred.

Was it necessary for the Contract Recognition Board to decide the issue on whether termination was under clause 9.2(b) or 9.5 as part of the reference to them?

In my view the answer to this question is quite clearly no. It was not necessary or incidental to any decision on the matter referred.

In the first place it was clear that both Arrows and Mr. Diniz treated the contract as terminated; the letters of 13th October 1998, 17th November 1998, the writ and the subsequent contention of the parties leave this in no doubt whatsoever. There were paragraphs in the submissions made by Arrows' solicitors on 5th February 1999 that have become relevant. Those read:

> "32. The issues to be decided in the English Proceedings concern the validity and/or termination of the driver contract between Arrows and [Mr. Diniz], and whether, if terminated, it is subject to compensation and, if so, how much.

> 33. These are the same issues which fall for determination by the [Contract Recognition Board] under clause 7.11 ...
> 34. A Decision of the Meeting of the [Contract Recognition Board] under Clause 7.11 ... will constitute an interference in the legal rights of the Parties to the Arrows' driver contract with [Mr. Diniz]. This may give rise to a claim by Arrows against the [Contract Recognition Board]."

These paragraphs merely refer to the pleading. They mischaracterised it. There can have been no doubt in anyone's mind that the contract was terminated and that paragraphs in the submission to which I have referred went far too wide and were in error. It cannot possibly have put the termination in issue. Indeed, this was the conclusion of the Contract Recognition Board in their decision at para. 32, to which I have already referred. They indeed said that the written submissions from Arrows count for nothing.

Secondly, and more importantly, the decision of the Contract Recognition Board itself shows that the issue which they have to determine could be decided without reference to whether the termination was under clause 9.2(b) or 9.5. That is clear from para. 46 of the decision which I have set out. There can, in my judgment, be no possible argument that a decision on the question of whether termination was under clause 9.2(b) or 9.5 was incidental or necessary for a decision on the issue referred to the Contract Recognition Board. The Contract Recognition Board have themselves, by their final decision, proved that it is not necessary to that decision or incidental to it. They have been able to make their decision without deciding the point.

Thus, in my judgment, there was no issue that arose on termination which could have been incidental or necessary to the matters that the Contract Recognition Board had to decide and therefore there was no reference to them of any such issue. Therefore, even if they had purported to decide that issue by a Decision on 17th February 1999, they would have acted, in my judgment, beyond their jurisdiction.

In any event have the Contract Recognition Board by their decision determined all they have to decide so that there is no outstanding matter to be referred to them?

In my view, the answer to this question is also clear. The Contract Recognition Board has decided the issue of which contract takes precedence or priority. That was their sole function and even if, contrary to the view I have expressed, they ever had jurisdiction to decide the issue on whether the contract between Mr. Diniz and Arrows was terminated under clause 9.2(b) or 9.5, they have reached a decision on the priority between the contracts and they are, in the traditional words, "functus officio" - possibly a more apposite term than saying their function was spent.

It was argued that the only reason that the Contract Recognition Board did not determine that issue was because Arrows did not appear and did not present the argument. Thus it is said it would not be fair to give Arrows an advantage from the adjournment of that question which had been made purely for their benefit.

However, once the Contract Recognition Board had determined to give their decision on the only question which was for them - the question of priority or precedence - their power to make any decision necessary or incidental to that issue (assuming, contrary to my primary conclusion for these purposes that they had such a power) then their power to determine that other question came to an end by their own decision. It is quite clear that their decision is a final one. That is clear from para. 46 and was publicised to the world by the press release made by the Formula One Federation.

I therefore conclude that the matter the subject of this claim has not been referred to

the Contract Recognition Board and determine that it is not within the jurisdiction of the Contract Recognition Board to make a decision on the question of whether the termination was under clause 9.2 or 9.5. That is a matter which falls within the exclusive jurisdiction of this court.

Issue (2):

Is the reference to the Contract Recognition Board a reference to arbitration or to some other form of consensual dispute resolution?

As I have decided that the Contract Recognition Board has no jurisdiction to determine the matters the subject of the proceedings in this court, it is not strictly necessary for me to decide the question whether the reference to the Contract Recognition Board is a reference to arbitration. But in view of the excellence of the arguments presented to me, I will express my views on the question.

It was the contention of Arrows that the Contract Recognition Board is not an arbitral body and a reference to it was not a reference to arbitration; the function of the Contract Recognition Board was merely to supervise the rules of the game or a sport. They relied on a number of matters which can be grouped under three principal headings.

(1) The language in schedule 11

As Mr. Littman Q.C. pointed out, there is no reference in Schedule 11 to the word "arbitrator" in connection with the Contract Recognition Board or to the Contract Recognition Board acting as "arbitrators". On the contrary, the reference is to the language of administration - "Contract Recognition Board", "conflicting contract meeting" and "decision". In contrast, clause 15.1 of schedule 11 provided:

> "15.1 All disputes arising in connection with this Schedule 11 (other than a dispute in respect of matters to be determined by the Board pursuant to clause 7) shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce in force at the date hereof, by one or more arbitrators appointed in accordance with the said rules.
> 15.2 Arbitration shall take place in Lausanne (Switzerland)."

These are powerful arguments, particularly as the schedule is a document which was clearly drafted with the greatest care by lawyers. But in my view, terminology, though a pointer, can be no more than that. It is necessary to examine the substance of whether the Contract Recognition Board's function was an arbitral one or some other function.

(2) The duty of the Contract Recognition Board to apply the law

Although an arbitral tribunal can, as a matter of the law of England and Wales, apply principles that are not strictly legal principles (see s. 46 of the Arbitration Act 1996), it may be an indication of whether the process is an arbitral one if the decision maker is free to make a decision on a non-legal basis. It is contended by Arrows that this was so, and they relied on clause 7.13 of schedule 11. That clause provided:

> "7.13 If pursuant to clause 7.11 the Board shall determine that more than one Contract is still valid and in force then irrespective of the dates of signature appearing on such Contracts or any formalities (other than Registration pursuant to clause 6.5) which may have been carried out in respect thereof or any other matter whatsoever, the

> Contract whose date of Registration is the earliest shall be the Prevailing Contract regardless of any provision of any law whatsoever."

However, this provision was merely setting out the simple rule to be applied if there were two valid contracts. In all other respects it is quite clear that the Contract Recognition Board was to apply the proper law of the contract. (See, in particular, clause 7.11 set out above.) The position is quite unlike that in O'Callaghan v. Coral Racing Limited (C.A. 19th November 1998 (New Law Online Case transcript)) where the Court of Appeal held that in a gaming agreement, a reference of disputes to the Editor of the Sporting Life was not an arbitration clause since, as Hirst L.J. at p. 7 of the transcript,

> "To my mind the hallmark of the arbitration process is that it is a procedure to determine the legal rights and obligations of the parties judicially, with binding effect, which is enforceable in law, thus reflecting in private proceedings the role of a civil court of law."

In that case the procedure was devoid of legal consequence because the gaming transaction was null and void under the Gaming Act of England and Wales. Therefore the Editor of Sporting Life could not determine any matter which had legal consequences. Here, clearly, the Contract Recognition Board determined a matter that had legal consequences - which contract took precedence - and did so in accordance with the law and of the specific rule (which I have set out) if all else failed.

(3) The procedure adopted

Although it is accepted that the procedure before the Contract Recognition Board contemplated meetings attended by the parties and their lawyers (see clause 7.6 of schedule 11) and the Contract Recognition Board having power to order the presence of witnesses and the filing of evidence (see clause 7.7), it was argued that the procedures were not the procedures that were characteristic of arbitration. This can be examined under a number of headings:

(a) There was nothing which stated that the Contract Recognition Board were bound to give the parties appearing before it a full opportunity of presenting their case

In my view, it is a characteristic of arbitration that the parties should have a proper opportunity of presenting their case. Although there is nothing expressed in schedule 11, it is quite clear from the procedure adopted by the Contract Recognition Board in this case that their procedures enable the parties to make proper representations and to have a full opportunity to present their case.

(b) It is a fundamental requirement of an arbitration that the arbitrators do not receive unilateral communication from the parties and disclose all communications with one party to the other party

I accept that that is a fundamental requirement of an arbitration, as it goes to the very integrity of the arbitrators and their impartiality.

In this case, when Arrows applied to the Contract Recognition Board on 29th January 1999 for copies of communications between the Contract Recognition Board and Sauber and copies of the documents submitted by Sauber, a member of the staff of the Secretariat of the Contract Recognition Board replied:

"The Secretariat is not prepared to send copies of any correspondence because it is confidential and because we consider it irrelevant to your purposes."

In my view, there can be no doubt that a refusal by the Contract Recognition Board to provide communications between it and one of the parties would have been a strong indication that the process was not an arbitral one, as secret communications between one party and the tribunal are inimical to the arbitral process. However, the refusal to provide documents was made by a member of staff of the Secretariat. His letter made it clear that the request had to be addressed to the Contract Recognition Board members themselves. I have no doubt, given the procedures adopted in respect of other matters, and the high standing of the Contract Recognition Board members, that if an application had been made by Arrows to them, they would not have refused provision of these documents.

(c) There should be proper and proportionate means for the receipt of evidence

I accept again that the hallmarks of an arbitral process are the provision of proper and proportionate procedures for the provision and for the receipt of evidence. Arrows submitted that the procedures laid down in schedule 11 and the decision of the Contract Recognition Board shows that there was no proper or proportionate procedure for the proper receipt of evidence. They pointed, in particular, to the fact that the Contract Recognition Board had said that it would hear the argument on jurisdiction and the merits of the dispute as to whether Arrows were in breach of clause 7 and the performance warranties within one day starting at Noon, though they did indicate that it might be necessary for further time. The Secretary made it clear what his view was in his letter of 19th April 1999:

"As to all such issues, it is a matter for each party to decide what written evidential material it seeks to adduce before the CRB within the confines of the CRB's orders; the CRB has of course power to extend the hearing if justice so required it; but at present the CRB considers it more than fair to TWR/Arrows that this second oral hearing should be limited to one day. No previous oral hearings of the CRB, which have involved disputes much more complicated than this dispute, have ever lasted more than one day. This dispute has of course extended into two days as a result of TWR/Arrows' failure to attend the first hearing."

It was submitted, powerfully, by Mr. Littman Q.C. that this attitude of the Secretary made it clear that the procedure was a summary one wholly at variance with an arbitral process. For example, there was no contemplation of the receipt of expert evidence or even the appointment of a tribunal-appointed expert which is obviously necessary for the determination of the issue as to whether Arrows were in breach of the performance warranties and Mr. Diniz entitled to terminate under clause 9.2(b).

Although the letter from the Secretary is somewhat peremptory and surprising in its tone, the Contract Recognition Board itself (as opposed to its Secretary) does appear to have sought to give the parties proper time in all other respects. For example, it adjourned its decision in February; it sought submissions from the parties when an adjournment was requested. I am not persuaded that this single and somewhat peremptory letter from the Secretary, although possibly indicating the adoption of a procedure inconsistent with a proper arbitral process, enables the procedures to be characterised as those that did not have arbitral characteristics. It is important that it was not the decision of the Contract Recognition Board itself.

It seems to me that there is no evidence to suggest that the Contract Recognition Board itself considered that the resolution of the dispute required the hearing to be completed in

a day, or would refuse to hear expert evidence, whether appointed by the parties or by the Contract Recognition Board itself. On the contrary it seems to me clear beyond doubt that if time was required the Board would take the time and arrange for the receipt of expert evidence. They clearly would have afforded proper and proportionate means for the receipt of evidence.

(d) The time within which a decision has to be rendered

It was submitted that the requirement that the Contract Recognition Board render its decision within three days of the final conflicting contract meeting showed that it was a summary procedure inconsistent with arbitration. I do not agree. There is no restriction on the number of conflicting contract meetings that can be called. If justice so required, the Contract Recognition Board has to hold as many meetings as is required, whatever the Secretary may have said in his letter of 19th April 1999. All that is required is a speedy decision at the end of the final meeting. Such a requirement is plainly consistent with an arbitral or judicial process and not inconsistent with it.

In addition to those matters, there are three further factors relating to the tribunal that are important.

(e) The identity of the chosen tribunal

The Contract Recognition Board chosen to determine the issues must, as I have stated, consist of three lawyers of international standing. In my view, this is a very important indication that the process is intended to be an arbitral one.

(f) The choosing of the Panel by the President of the Court of Arbitration of the International Chamber of Commerce

This is a further factor pointing towards the fact that the process is intended to be arbitral.

(g) The exclusion of those connected with the Federation

Clauses 2.4 and 2.5 of schedule 11 excludes from participation in the Contract Recognition Board that is to determine a matter referred to it those connected with the Federation or with Formula One Motor Racing. This shows, again, an intention to make the tribunal impartial, consistent with the arbitral process.

Finally, there are the considerations set out in The Law and Practice of Commercial Arbitration in England written by Lord Mustill and Mr. Boyd Q.C. At p. 41, they set out the following attributes which they consider must be present.

> "(i) The agreement pursuant to which the process is, or is to be, carried on ("the procedural agreement") must contemplate that the tribunal which carries on the process will make a decision which is binding on the parties to the procedural agreement.
> (ii) The procedural agreement must contemplate that the process will be carried on between those persons whose substantive rights are determined by the tribunal.
> (iii) The jurisdiction of the tribunal to carry on the process and to decide the rights of the parties must derive either from the consent of the parties, or from an order of the court or from a statute the terms of which make it clear that the process is to be an arbitration.
> (iv) The tribunal must be chosen, either by the parties, or by a method to which they have consented.

(v) The procedural agreement must contemplate that the tribunal will determine the rights of the parties in an impartial manner, with the tribunal owing an equal obligation of fairness towards both sides.

(vi) The agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law.

(vii) The procedural agreement must contemplate a process whereby the tribunal will make a decision upon a dispute which is already formulated at the time when the tribunal is appointed."

Each of those attributes was, in my view, present and I take each in turn.

(i) It is clear that a decision reached by the Contract Recognition Board in respect of which of the conflicting contracts had priority would be legally binding as between the parties to the decision. Paragraph 7.13 of schedule 11 supports this view.

(ii) The Contract Recognition Board's procedure involves the tripartite determination of that question.

(iii) Jurisdiction has been conferred by the parties by contracts signed by the Formula One racing teams with the Federation and the contracts between each driver and each team. It is common ground that the fact that there is no bilateral contract between the respective teams does not matter; the agreements bring about multilateral contracts as occurred long ago in another well known sporting case, "The Satanita" [1897] A.C. 59. It is nothing to the point that these are contracts of adhesion and the parties have to assent thereto if they wish to participate in Formula One racing.

(iv) The Contract Recognition Board is, as I have set out chosen by a method to which the parties consented in the agreement.

(v) For the reasons I have given I consider the agreement contemplates that the Contract Recognition Board will determine the matter impartially and owes equal obligations of fairness to both parties. For the reasons I have given the Secretariat's refusal to provide communications between it and one of the parties (which would be a clear instance of a lack of impartiality) was contrary to the procedure contemplated by the agreements. Furthermore a refusal to give proper time for the presentation of evidence would have been contrary to the procedure of fairness contemplated by the agreements. I have already set out my reasons why I consider that the Secretary's letter of 19th April 1999 did not touch on the procedures contemplated by the agreement or on what happened in this case as regards the Contract Recognition Board itself.

(vi) The agreements plainly contemplated that the agreement to have the Contract Recognition Board decide matters was intended to be enforceable. The parties, for example, expressly excluded their rights to resort to the courts for interim measures. (See clauses 7.2 and 10.01 of the schedule 11.)

(vii) It is clear that the Contract Recognition Board was appointed to try the issue which was formulated at the time the particular Board of three was appointed, namely which of the contracts took precedence.

Having considered each of these detailed matters it is necessary to ask the general question: was the procedure intended by the agreements, looked at generally, an arbitral process or simply some other form of consensual dispute resolution to determine the rules of the game?

Clearly many sporting events have procedures that are not arbitral. No general view can be taken and it is necessary to look at the features of the procedures in each case. In this case, standing back and looking at the arrangements as a whole, I am of the firm view that what was intended and contemplated was an arbitration confined to the question of conflicting contracts. Lawyers of distinction were to be chosen as members of the tribunal;

evidence was to be received; procedures and hearings necessary for the fair determination of that issue were contemplated and a decision with reasons was required. (See clause 7.17 of the schedule.)

Although I have reached the view (both from detailed consideration of the matters I have set out, and by more general considerations) quite independently, I am very glad that it is also the view of the Contract Recognition Board. Although it could be said of the Contract Recognition Board that they were bound, in any event, to say that, I consider that the decision reached by lawyers of such considerable international standing and distinction is entitled to the highest respect. It is a great comfort to me that their views coincide with my own.

There are before the court opinions of Swiss lawyers on the question of whether the procedure is an arbitral one. However, they conflict and the parties were content that I should decide this issue on the basis of the law of England and Wales and in accordance with the general principles of impartiality and fairness that are common to all systems of arbitration. I therefore conclude, on this second issue, that the procedure was an arbitral one and the Arbitration Act would have been applicable to it.

I therefore turn to issue 3.

I can deal with this shortly. In my view it would not be helpful for me to express a view on what conclusion I would have come to if I had decided the claim had been referred to the Contract Recognition Board but they were not an arbitral body. The exercise of my discretion to grant a stay under the inherent jurisdiction of the courts, (see Channel Tunnel Group Limited v. Balfour Beatty [1993] A.C., 334) would, to an extent, have depended on the view I would have formed about the nature of the Contract Recognition Board. As I have not formed any view on their function other than that their function was an arbitral one, it would, in my view, not be helpful to express a view on this third issue.

For those reasons, therefore, I refuse a stay. The proceedings against Mr. Diniz must continue before this court which the parties have agreed has the exclusive jurisdiction to determine them.

Editors' Postscript:

There were two further judgments in this action delivered in the English Commercial Court. On 4 May 2000, Mr Justice Longmore struck out the Claimants' claim as being misconceived, but allowed them to re-plead their case as a claim for damages for Mr Diniz's alleged wrongful repudiation of the parties' contract. On 2 February 2001, following an eight-day trial, Mr Justice Tomlinson dismissed the Claimants' re-pleaded claims. The learned Judge also considered the CRB proceedings in relation to three issues: (i) the Claimants' claim for damages on the basis that Mr Diniz had wrongly invoked the CRB's jurisdiction in breach of the parties' qualified exclusive jurisdiction clause in favour of the English High Court; (ii) Mr Diniz's claim on the CRB's second award dated 11 May 2000 for his costs incurred in the CRB arbitration proceedings; and (iii) the Claimants' contention that the CRB's first award dated 17 February 1999 operated as an estoppel preventing Mr Diniz from denying that the parties' agreement had been terminated under Clause 9.5, thereby entitling the Claimants to payment of US$7 million from Mr Diniz. As to (i), there was no breach by Mr Diniz and no proof of any damages; as to (ii), the CRB's order for payment of Mr Diniz's costs was enforced; and as to (iii), there was no estoppel. (Mr Justice Thomas delivered no separate reasons for his anti-arbitration injunction consequent upon his refusal to stay the English litigation; and the CRB made its second award on costs by express further agreement of the parties.)