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Sports Arbitration: How it Works and Why it Works

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This article is a brief consideration of the matter of arbitration in sport - what it means, how it came about, how and why it works, and why it is particularly important as an aspect of sport governance. It is intended to provide the reader with a particular perspective of sport, namely a perspective that will appeal to jurists and their need to define and understand the contextual background to dispute resolution in sport.

The crucial importance of rules, their acceptance by the participants and the uncertainty of outcome in sport is highlighted to introduce the topic. The author then proceeds to a brief description of possible domestic recourses in sport-related disputes, as contrasted with the international sport system imperatives. Through illustrations coming from concrete cases, the author discusses the constitution and the role of organisations such as the International Olympic Committee (IOC), the Court of Arbitration for Sport (CAS), the International Council of Arbitration for Sport (ICAS), and the World Anti-Doping Agency (WADA).

Le présent article se veut un bref examen de l'arbitrage sportif, visant principalement à expliquer comment ce domaine est né, ce qu'il désigne précisément, dans quoi consiste son fonctionnement efficace et pourquoi il s'agit d'un aspect particulièrement important de la gouvernance des sports. L'auteur a pour objectif de fournir une perspective différente des sports, cherchant à donner aux juristes quelques pistes pour mieux comprendre et définir la résolution de conflits en matière sportive.

En guise d'introduction, l'importance vitale des règles, du respect de celles-ci par les participants et de l'incertitude des résultats dans les sports est soulignée. L'auteur procède ensuite à une description rapide des recours domestiques possibles en matière de sports, tout en les contrastant avec les exigences du système sportif international. À travers les illustrations provenant des cas concrets, l'auteur aborde la constitution et le rôle de plusieurs organismes, tels le Comité international olympique (CIO), le Tribunal arbitral du sport (TAS), le Conseil international de l'arbitrage en matière de sport (CIAS) et l'Agence mondiale antidopage (AMA).

I. Introduction

This is a brief consideration of the matter of arbitration in sport – what it means, how it came about, how and why it works, and why it is particularly important as an aspect of sport governance.

By way of "set-up," it is useful to provide a perspective of sport that will appeal in particular to lawyers and their need to define and understand the contextual background to what is being described.

II. Rules

Sport is a multi-faceted phenomenon, unique to mankind.

It is, first and foremost, a form of social conduct, governed by a set of rules, agreed upon by the participants, which frames the conduct expected as a result of those rules. In addition to diversion, sport provides opportunities to enjoy healthy exercise, to improve physical skill sets, to measure performance, to work in team settings, to cement cultural values, and to sublimate what might otherwise be violent tendencies. Sport can be a satisfying and fulfilling experience that enriches the lives of those who take part and even of those who merely watch.

The key to sport – the *sine qua non* - is the governing rules adopted and accepted by the participants. Without such rules, whatever the activity may be, it is not sport. The rules may be sensible or intuitive and they may also be arbitrary. Why does the shot in the shot-put event weigh 16 pounds, as opposed to 5 or 20 pounds? Why are there 3 periods in an ice hockey match and why periods of 20 minutes? Why are there weight categories in certain sports, especially those that are combative? Why are there age limits for certain competitions? Why are there rules about protective headgear? Why are there separate events for men and for women in most sports?

The answers to some of these questions are quite obvious. Others are less so.

The ultimate answer, in some respects, is that it really does not matter. What does matter is that the participants have agreed on the rules that will govern their conduct, and that will determine the outcome of any competition. The rules are, as noted above, a social contract. They reflect the "deal" between the participants.

If this focus on the rules in sport seems excessive, it is because in this form of social behaviour, failure to act in accordance with the rules destroys the purpose and validity of the entire exercise and renders it meaningless.

Those who participate in sport know this as well. They understand the need to establish rules that are clear and enforceable. They fully understand that no one can legislate equal ability or certainty of outcome. Indeed, if every participant was of equal ability and the outcome of any competition was certain, there would be no interest in sport. The objective of the rules is, therefore, to establish the so-called "level playing field," that is to say that every participant will have the same opportunity to compete and to succeed. But the uncertainty of outcome is quintessentially important.

The participants also know that human frailty and human nature are such that there will

inevitably be breaches of the rules in the course of, or in contemplation of, competition, whether the breaches are inadvertent or deliberate. Sport rules anticipate this. If an advantage is gained as a result of a breach of the rules, there are escalating sanctions that apply: temporary removal of a team member, penalty shots, points awarded, games forfeited, disqualifications, and so forth, all based on an agreed proportionality of the offending conduct.

The speed and complexity of many events and sports are such that the rules contemplate the need for impartial officials, who are charged with controlling the competition and identifying any improper conduct on the part of the athletes and even certain team officials. Their role is to ensure that the competition proceeds in accordance with the rules. Their decisions are, in effect, front-line arbitration in real time. Failure to accept the field of play decisions of the designated officials is, itself, a breach of the rules, subject to any built-in appeal procedures in the rules.

Systemically, therefore, the organizational propensity of mankind has led to a structure of sport that is coherent and self-contained, capable of self-regulation, and that provides due consideration for the health and safety of the participants, while, at the same time, recognizing that the nature of certain sports continues to carry elements of risk of serious injury, or worse.

The agreed-upon rules of sport are, however, regularly breached. Within the sport system itself, additional rules have been adopted to deal with such breaches, as already mentioned, and we are all familiar with many of them.

III. Resolution of Disputes

The real question, particularly in the context of an international sport system, is how to deal effectively with the resolution of disputes that are bound to arise where there may be disagreement as to the meaning of certain rules, as to whether there has, in fact, been a breach of the rules, as to the appropriate sanctions when there have been breaches, as to the eligibility of certain competitors, as to matters of corruption on the part of officials and others, and a host of other potential issues.

On a domestic level, there is an obvious and traditional solution. The state courts are in place and well established. They can make orders that are effective within their jurisdictions and whatever finality may be required can be achieved at that level.

The difficulties, in relation to sport, are that the state courts do not have the necessary expertise to deal easily with sport issues, the legal process is unsuited to the need for speedy resolution of sport-related disputes – which often require expedited hearings, even in the middle of sport competitions – and many of the litigants (athletes) do not have the financial resources to undertake expensive legal proceedings. At the other end of the economic scale, however, there are many well-paid professional athletes, and wealthy team owners, who can easily afford expensive legal fees to defend what may, in the end, be little more than their economic interests. Prominent examples of such athletes would include Barry Bonds, Alex Rodriguez and Lance Armstrong.

But the international sport system has other imperatives. Decisions of state courts are effective only in the countries where the judgments are rendered. Those judgments have no standing in other jurisdictions and, to become executory in other jurisdictions, they must be confirmed, homologated or exemplified by the state courts in the other jurisdictions. The practical

effect is that the cases may, for all intents and purposes, have to be re-litigated.

Take the example of an athlete who has been suspended by the international federation governing his or her sport. The athlete is, therefore, unable to compete in any events organized by or under the authority of that international federation. The athlete then applies to the state courts of his or her country for an Order of reinstatement on the basis that the international federation has acted improperly.

Assume the state court rules in favour of the athlete, declaring the athlete eligible to compete and the international federation to have been wrong. Say this happened in Canada. The outcome would be that the athlete would be legally entitled to compete in Canada – but nowhere else – since the Canadian judgment would be effective only in Canada. This type of conundrum has actually occurred, including in the United States, Germany and Denmark.

Reinstatement demands of this nature are often accompanied by claims for damages (loss of income, defamation, damage to repetition, etc.), on which the state courts may also be willing to rule. There was a well-known case in the United States involving a runner (Butch Reynolds) who was declared ineligible by the international federation as a result of doping. He launched proceedings somewhere in the mid-West and obtained – to the surprise of no one familiar with the jurisdiction - a judgment to the effect that he had been improperly declared ineligible and that as a result, he had lost $25 million in prize and sponsorship money. This amount greatly exaggerates any possible amount he might have earned, even if he had competed for an entire lifetime.

The international federation had not bothered to intervene in the proceedings, likely because it did not want to put its jurisdictional authority to discipline its athletes to the scrutiny of a court which might well indulge in home-cooking. But, what eventually caught its attention was the possibility that television rights fees for certain of its events were paid by U.S. entities and these amounts could be garnished by Reynolds, on the basis of the judgment rendered in his favour. Many believe that the only place where international sports federations feel pain is in their wallets. So, it belatedly intervened and had to go all the way to the U.S. Supreme Court to get resolution in its favour regarding its authority to discipline athletes.

From the perspective of an international sport system, this is completely unsatisfactory. There would be endless local proceedings, the risk of conflicting judgments, enormous costs and an overall uncertainty as to which rules and which decisions might apply.

IV. Court of Arbitration for Sport

This type of situation led the International Olympic Committee (IOC) in 1984 to create the Court of Arbitration for Sport (CAS), having its seat in Lausanne, Switzerland. The mandate of CAS was to deal with sports-related disputes, mainly within the Olympic Movement, but it contemplated accessibility by non-Olympic sports as well. Initially, CAS did not deal with decisions rendered by the IOC, which held itself out as the supreme authority of the Olympic Movement, but the IOC later agreed that even its own decisions could also be appealed. That decision led to some organizational and governance changes to make certain that CAS could not be perceived as being under the control of the IOC.

From a governance perspective, CAS is controlled by the International Council of Arbitration for Sport (ICAS). It is a body to which the IOC, the international federations (IFs) and National Olympic Committees (NOCs) each nominate four members. Those 12 members then select four additional members who are considered to be particularly knowledgeable of the concerns of athletes. The 16 members of ICAS then select four additional independent members with wide experience in international arbitration, to be sure that CAS operates at a level of best practices.

ICAS elects a president, who is also the president of CAS. CAS has two divisions, one of first instance (called the Ordinary Division) and a second, Appeals Division. Each division has a president. Those presidents, along with the ICAS President and two Vice-presidents, form the Board of ICAS. ICAS appoints arbitrators for renewable terms of four years. It establishes a list from which the parties are able to select arbitrators and the president of each division is authorized to appoint the chairs of arbitral panels, if the party-appointed arbitrators are unable to agree.

There is a Code of Sports-related Arbitration and Mediation Rules.

A supervisory control over the CAS is exercised by the Swiss Federal Tribunal, the equivalent in Switzerland of the Supreme Court of Canada. That Tribunal has, however, recognized CAS as an independent arbitral tribunal, whose judgments are entitled to deference, and it intervenes only where the rules of natural justice have not been followed, or where there may have been an error as to jurisdiction. It does not substitute its decision on matters within the competence of CAS.

What is particularly appealing about this mechanism in the context of international sport (in addition to the consensual nature of the arbitration process) is that, by reason of the New York Convention, the awards are enforceable in almost all of the major countries. As can be seen from the cases mentioned earlier, this enforceability is an essential element in an international sport system.

The CAS system involves, as mentioned, a closed list of arbitrators, selected and appointed by ICAS, based in part on nominations by stakeholders and in part on recruitment by ICAS among knowledgeable lawyers having both sport and arbitration backgrounds. While the alternative of permitting parties to nominate whomever they may choose, regardless of sport or legal experience is occasionally discussed, there has been no concerted challenge to the notion of a closed list.

A recent decision (15 January 2015) of the Munich Higher Regional Court (U1110/14Kart) may have the effect of throwing sand in the gears of the international system designed within the sports world. Claudia Pechstein, a German speed skater, was found to have doped in relation to a world championship event. She had signed the entry form for the event, which included a declaration that she was aware of the anti-doping rules and complied with them. She also acknowledged that if there was a dispute regarding such rules, an internal disciplinary process would be followed and that if the dispute was not resolved at that level, recourse would be had to CAS. This occurred. She was unsuccessful before CAS. She then appealed to the Swiss Federal Tribunal, which rejected her appeal. New evidence was produced and she again appealed to the Swiss Federal Tribunal, which again rejected her appeal.

Pechstein then turned to the German state courts, which viewed her participation in sport as an economic activity and declared that the International Skating Federation was in a

"monopolistic" position and could not impose the requirements, *inter alia*, of arbitration before CAS, notwithstanding the agreement to do so, including the fact that Pechstein had agreed and had availed herself of the complete process, and despite the fact that Germany was a signatory to and had ratified the International Convention Against Doping in Sport, in which the signatories agreed that recourse to CAS in doping matters was the appropriate process. In the course of lengthy reasons for judgment, the Court made disparaging remarks on the process of appointing CAS arbitrators, particularly those which might be named by athletes. The issue was not whether the CAS arbitrators were eminent jurists, selected for their ability to apply the applicable rules, but seemed to be that arbitrators named by athletes were not to be independent, but almost in-panel representatives of the party which appointed them. While an appeal to the German Supreme Court has been filed, the current decision sits there as one which has the potential to disrupt the entire international sports system.

Even within the closed list of CAS arbitrators, however, there is subset of arbitrators selected who have a particular knowledge of soccer, because CAS has many cases involving the transfer of players between clubs and leagues, which transfers often have significant economic impact. It is helpful, therefore, to select arbitrators who are familiar with the issues and the economics. There is a good argument in favour of having a further subset of arbitrators familiar with doping appeals and the scientific aspects thereof, which can be highly technical. At the very least, however, there may be a need for panels to appoint their own expert to deal with the matters of science and the identification of pseudoscience that may be argued.

Since the international sport system is, for all intents and purposes, universal, ICAS makes an effort to ensure that the closed list of arbitrators includes lawyers from all parts of the world, to increase the confidence of parties that their particular systems and customs will be understood in the event of disputes. This includes ensuring that there is a healthy balance between the civil and common law jurisdictions.

Sport expertise is one of the hallmarks of CAS arbitrations, but this becomes particularly important during competitions, especially major competitions, such as the Olympic Games. CAS establishes what is known as the *ad hoc* Division for the period of the Games, located in the host city. It assigns a certain number of arbitrators to the Division, who are physically present throughout the Games period, along with a designated president of the *ad hoc* Division. As disputes arise, the president establishes panels to hear each case. The special feature of the *ad hoc* Division is that the panels will hear the case and render reasoned decisions within 24 hours of the filing of the request for arbitration – sometimes even sooner, if the dispute may affect who participates in an event, say, the following day.

This expeditious appeal process is combined with the provision of *pro bono* legal services, normally, but not necessarily, by members of the Bar in the host country.

CAS has taken steps to ensure that it keeps up with technological advances, so that, for example, users can file their documents electronically from anywhere in the world. Hearings can also be held anywhere in the world, at the convenience of the parties. Some can be held on the basis of video conferencing. CAS even has a fund designated to provide some financial support for athletes who cannot afford to pay for legal assistance.

In the more-than-30 years of its existence, CAS has developed its own jurisprudence and the basic elements of a *lex sportiva* have begun to emerge. This is helpful in developing a consistent approach to similar problems, one that can be relied upon by arbitrators and which can assist the lawyers advising parties or potential parties to litigation to predict with greater certainty the likely outcome of any litigation.

Each panel has an experienced clerk provided by CAS, to assist in expediting the process and to provide research at the request of the panel as well as what might be referred to as bench memos, to ensure that a particular panel will be aware of previous CAS decisions on the same or similar issues. While arbitral panels are free to decide as they see fit, there is nevertheless some recognition of a responsibility not to be entirely arbitrary, even if the panels do not consider themselves necessarily bound by precedents.

Like other arbitral bodies, CAS has experienced the "Americanization" of litigation, particularly in cases involving doping, which attract far more attention than most other types of appeals. Challenges to the appointment of arbitrators are increasing. Discoveries can be abusive. Experts can become advocates. Evidence can be repetitive and unnecessary. Cases can be flooded with procedural motions. Arguments can be endless and irrelevant. Finding the right balance between efficient management of hearings and effective denial of natural justice requires good judgment and firm management of the process by the Chair of any panel.

There is, therefore, something of a parallel universe regarding sports-related disputes, outside the normal system of state courts.

One aspect of this parallel universe is that administered by the World Anti-Doping Agency (WADA), which was established in 1999, modeled roughly along governance lines similar to CAS. Although WADA was established under Swiss law, its principal office is located in Montreal. It also has regional offices in Tokyo, Lausanne, Johannesburg and Montevideo. WADA has a unique hybrid governance structure, in which 50% of its members are governments and 50% are drawn from the sports movement. It also has a unique revenue structure – also 50-50.

WADA has drafted and adopted the World Anti-Doping Code, which in turn has been incorporated into the rules of the IOC, every Olympic IF and every NOC. It has worked with governments, under the aegis of UNESCO, to put in place the International Convention Against Doping in Sport, which has now been ratified by approximately 180 countries, pursuant to which governments agree, among other things, that the Code will be the basis for their actions against doping in sport.

WADA also ensures that the final arbiter in matters of doping is CAS, and not the state courts in each country. Governments have accepted this position.

How did all this happen? And why would governments surrender their autonomy on the issue of doping?

Ten years after the disqualification of Canadian sprinter Ben Johnson for the use of performance-enhancing drugs at the Seoul Olympic Games, during the Tour de France, the Festina team was discovered by the French police to be in possession of industrial quantities of doping substances and equipment. Riders, team officials and others were arrested. It was a huge scandal.

There was almost universal recognition that cycling was unwilling or unable to control doping in its own sport and that this was likely true in other sports. The same was true regarding countries being willing to administer stringent control over their own athletes. The IOC was seen as too weak to control the Olympic Movement.

It was against that background that the idea of an independent international anti-doping agency was born. The key consideration was that any such agency could not be controlled by any single stakeholder. It also needed to include all of the necessary stakeholders, both sport and government. Governments organized themselves along continental lines. The sport stakeholders, the IOC, the IFs, the NOCs and Olympic athletes were equally represented, and a representative of the International Paralympic Committee was added. The presidency alternates between the sport and government constituencies.

In addition to drafting and adopting the Code, WADA has the responsibility of monitoring compliance with the Code and of reporting on such compliance or non-compliance. The responsible organization, such as the IOC for Olympic eligibility, or the international federation, for other competitions such as world championships, has the obligation to impose sanctions in the event of non-compliance. This may involve suspending a country from participation in a particular sport, or of preventing a country from taking part in the Olympic Games.

When monitoring individual applications of the Code, WADA has an independent right of appeal to CAS if it does not agree with a decision regarding compliance or a particular sanction when there has been an anti-doping rule violation. This is a very important right and, apart from being able to correct mistakes, there is a definite deterrent effect on organizations that might be willing to overlook or under-sanction violators. If those organizational decisions are overturned by CAS, there is a considerable loss of face (failure to be Code compliant, or being guilty of under-sanctioning, unwillingness to impose sanctions, etc.) in addition to the costs of another level of appeal.

Governments seem comfortable with doping cases being decided by CAS. The state courts have crowded calendars at best, with delays measured in years before cases can get to trial, and there is little if any experience with the complicated scientific aspects of doping appeals. Such courts always remain a recourse of last resort for their citizens if there has been a denial of justice or due process, but, absent that aspect, they seem more than willing to not only rely on the CAS expertise, but also to insist that litigants exhaust the obligation to arbitrate before coming to the courts.

A good example of this was Lance Armstrong, who fought to the end to avoid arbitration, only to be told by the courts (even in his home state of Texas) that he was first required to arbitrate. Faced with that judgment, Armstrong folded his litigious tent, not willing to face arbitration in the United States, let alone before CAS, had the initial phase been successful, and has been banned for life from all competition.

He later appeared, as many will recall, on the Oprah Winfrey Show, to acknowledge, without apparent remorse or repentance, that he had used performance-enhancing drugs and methods throughout his entire competitive career. The only thing about which he seemed regretful was that he had finally been caught. He now faces extensive litigation, including the prospect

of treble damages in respect of a $30 million sponsorship of his team by the U.S. Postal Service under U.S. whistle-blower legislation. He has recently been ordered by an arbitral panel to repay to an insurer $10 million in bonus money, for which he had sued and won, in respect of certain performances. The recent arbitration against him was successful, since he had lied under oath about never having used performance-enhancing drugs or methods. What goes around comes around.

The verdict on CAS and the arbitration conducted under its jurisdiction, at least to date, is that they have served the needs of the stakeholders in international sport quite well. The same would be true of the process of mediation in sport, which remains in a state of lesser, but growing, development than arbitration.

V. National Application of Sports ADR

The CAS model solution has been adapted by many countries for resolution of sport-related disputes at the domestic level. In Canada, the forum created for such purpose is the Sport Dispute Resolution Centre of Canada (SDRCC). This organization was established in 2004 and is funded entirely by the Canadian federal government through the Ministry of Canadian Heritage. It has a twelve-person board of directors appointed by the Minister, which is to reflect the diversity of the sport system and must include three athlete representatives, one coach, one representative from a national sport organization and one representative from a Major Games Organization. The SDRCC is intended to provide the national sport community with a national ADR service for sport disputes as well as expertise and assistance regarding ADR.

Typically, the SDRCC becomes involved in disputes regarding team selection, discipline, doping, carding (for purposes of government financial support), eligibility and miscellaneous disputes. Over time, the outcomes have been withdrawal of the request for arbitration (15%), consent settlement (29%), appeal allowed (23%), appeal denied (29%), and jurisdiction denied (4%). Arbitration remains the preferred process (76%), followed by med-arb (14%), mediation (9%) and resolution facilitation (1%). Doping appeals have a somewhat different profile, where 73% of applicants waive their right to a hearing, proposed sanctions are upheld (19%), proposed sanctions are reduced (8%) and findings of no doping violation (1%).

The services provided are efficiently organized by a very capable secretariat, which administers an electronic filing and document management system, organizes hearings, provides assistance to parties unfamiliar with the process, applies a mandatory mediation element as a condition of proceeding to formal arbitration, and ensures that any parties that may be affected by the outcome of the ADR process are advised and given the opportunity to participate. Proceedings are as informal as possible, with very few “in-person” hearings required, such that most cases can be decided on the basis of conference calls or even written submissions. Arbitrators are knowledgeable, efficient and independent, making certain that the parties understand the issues and that they are given every right to present their cases. Decisions are rendered quickly and in terms that allow the parties to understand why they succeeded or failed. A body of jurisprudence has developed over the years, to assist arbitrators in shaping their own decisions and parties to gain a sense of how their particular circumstances may have been dealt with in the past.

The Canadian system has attracted much favourable comment and many countries have used it as the basis for their own models.

VI. Conclusion

The stakes in many sport-related disputes are high, often emotionally or politically charged, require special knowledge to administer and, in many cases, decisions must be rendered in real time. These factors, as well as others, lend themselves to ADR, rather than regular litigation before the state courts. Most attacks on the system of arbitration come from those not satisfied with the outcome of ADR in their particular situations, and which then become wrapped with asserted constitutional, right-to-work or human rights mantras. The great majority of such attacks arise in the context of anti-doping rule violations.