Have the Wheels Already been Invented?

The Court of Arbitration for Sport As A Model of Dispute Resolution

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The sports community faces the same problems that any other community faces when dealing with a dispute: how to resolve the matter in a way that is efficient and cost effective, and seen by interested parties to be fair. It faces those problems, however, in a context in which both the parties to the dispute and interested third parties are likely to view any resolution through the jaundiced eye of partisanship. The cries of anguish that issue from the crowds at every sporting event, convinced that an injustice is perpetrated by each referee's call (and many non-calls), are only the most audible indication of the difficulty of adjudication in the context of intense competition. In addition, there is often a need for a very rapid response. If the eligibility of an athlete is challenged on the eve of a competition, the question must either be decided very quickly or the competition will be seriously disrupted and distorted. Even when the context does not require an immediate decision, athlete careers are frequently so short that justice delayed is justice denied. In addition, the disputes are often about arcane matters, only poorly understood by persons outside the sports community, and take place against the background of legal norms that are relatively undeveloped. When we add to this that they can also involve very substantial amounts of money, and access to competitions that may define an athlete's sense of self, the potential intensity of the conflict becomes clearer.

The nature of many disputes in sports, moreover, precludes the easiest and happiest forms of dispute resolution. In general, they must be decided. They cannot merely be settled. There are few win/win situations, and a not inconsiderable number of lose/lose ones.

When these disputes take place not against the background of local or national competition, but international competition, each of the difficulties noted above is made more intense by the overlay of differing cultural and legal expectations, and increased levels of suspicion of the motives and good faith of others. Few competitors, and few of their supporters, are prepared to believe that anyone else's domestic adjudicatory process, whether in the courts or in some non-judicial forum, will produce fair or consistent results. They are certainly right to be skeptical. The handling of athletic disputes in domestic courts has not been among the greatest of judicial success stories. The individuals who run international sport have been vocal and open in their contempt for the interference of domestic tribunals, especially those of the United States, in the running of what they regard as their internal affairs.

Sixteen years ago, the IOC attempted to address these problems by creating the Court of Arbitration for Sport, or CAS. CAS was designed to be an international arbitral body capable of resolving disputes in the field of sports. It consists of two "divisions": the Ordinary Arbitration Division, which handles matters of first instance, and the Appeals Arbitration Division, which deals with appeals from the decisions of federations, associations and other sports bodies. Sixty "well-known jurists who also have a good knowledge of sports related issues" were appointed to serve as potential arbitrators. Both CAS and the arbitrators were, according to the pronouncements of the IOC, "completely independent from the IOC, in the exercise of their duties". If the IOC was impressed with the independence of CAS, others were not. Despite the pronouncement of independence, there were powerful indicia of dependence. The IOC had created CAS, it selected half of CAS's members, it administered and supervised CAS, it provided all of CAS's "running costs", and CAS was physically located on the grounds of the IOC in Lausanne, Switzerland.

In 1993, the question of CAS's complete independence was challenged in court. The Swiss Federal Tribunal in the *Gundel* decision held that CAS did, in spite of the entanglements, offer "the guarantees of independence upon which Swiss law makes conditional the valid exclusion of ordinary judicial recourse," but noted that the close ties between the IOC and CAS left open the question of whether it was sufficiently independent to serve as a valid arbitral body in a case involving the IOC. This opinion spurred a restructuring designed to make CAS more independent of the IOC. The critical reforms were the creation of ICAS, the International Council of Arbitration for Sport, to supervise and regulate CAS, the insulation of CAS from direct IOC supervision, and the change in the method of selection and an increase in the number of potential arbitrators. Under the reformed system, there are 150, 30 chosen from among those proposed by the IOC, 30 from among those proposed by the IF s, 30 from among those proposed by the NOCs, 30 chosen after "appropriate consultations with a view to safeguarding the interests of athletes, and 30 chosen from among persons independent of the bodies responsible for proposing arbitrators.

In 1996, CAS added two additional courts, one at the National Dispute Resolution Center in Sydney, Australia and the other in Denver, Colorado, substantially increasing its potential attractiveness to non-European athletes.

The reformed CAS appears to address many of the most pressing problems surrounding the resolution of athletic disputes, and it has aroused considerable interest that it may provide a workable forum for adjudicating these disputes. It was recently proposed, for example, that the USOC externalize the adjudications process relating to doping by turning it over entirely to CAS.

In the remaining time, I want to raise the question of whether it will be possible to use CAS in this way and whether, given its current structure and modes of operation, such use would be desirable. As with most discussions of alternatives to current methods of dispute resolution, the answer depends in large measure on what one takes to be the baseline. It is easy to fall into the trap of comparing ideal litigation

with actual arbitration, or the theoretical benefits of arbitration with the evident short comings of litigation. Here the analysis is complicated by the fact that to date there have been relatively few reported decisions from CAS, and even fewer involving difficult, contentious issues. That said, for those of you who like to look at the end of books first, my answer to the first question will be a qualified yes, and the answer to the second is that there will be some significant benefits and some significant problems.

1. The first issue to be faced is whether it is possible consistent with US law to require resort to CAS. At present, the answer is likely to be both no, but there is reason to believe that Congress may be willing to change the law. Although the language of the Amateur Sports Act is not entirely clear, the Act it is likely to be interpreted to require that arbitration of sports related disputes be AAA arbitration. If there is sufficient support for CAS in the American sporting community, it seems likely that the Act wouldl be amended to permit the parties to agree to CAS arbitration.

2. The second issue is assuming that the Amateur Sports Act permits the use of CAS arbitration will CAS arbitration be available to deal with such disputes? Within the field of sport, CAS has very broad jurisdiction to hear cases in which the parties have agreed to submit their disputes to CAS.

Until relatively recently, there was a substantial likelihood that the US courts would refuse to enforce pre-dispute arbitration agreements by denying a recalcitrant party access to the courts. The dramatic shift in attitude in the US courts toward arbitration and toward the enforceability of contracts to arbitrate makes it almost certain that they would be enforced today. Even adhesive contracts imposed on persons with no realistic alternatives but to sign them will be treated a enforceable agreements to arbitrate, at least in any situation in which the arbitration process meets at least minimal standards of due process.

As a practical matter, getting the signed agreements from participating may be an administrative headache for the various federations. Attempting to solve the administrative problems may in turn raise legal issues. Will, for example, an agreement entered into on-line, but that is not followed up with a hard copy signature page, constitute a valid agreement enforceable agreement to arbitrate. There will also be serious questions about the enforceability of agreements entered into by or on-behalf of minors in those jurisdictions that do no by statute specifically provide that they are enforceable. Assuming that there are no problems relating to minors and the administrative problems associated with actually getting valid signatures on the agreement to arbitrate, these agreements should be legally enforceable.

3. Assuming that CAS accepts the case will the Swiss courts treat CAS as a valid arbitral body? In light of the reforms, the answer is almost certainly yes. The *Gundel* case went a long way toward recognizing CAS as a valid arbitral body even under the old structure. It is difficult to believe that the reforms will not have removed their remaining doubts.

4. Assuming that the Swiss courts treat CAS as a valid arbitral body, will the US courts enforce the arbitral decisions without subjecting them to judicial review? Under the New York Convention, and the developing interpretation of arbitration law in the US, the answer is again almost certainly yes.

Thus we have in CAS a body able to render enforceable arbitral decisions.

Will this body deliver on the promise of speedy, cost effective justice, that is both fair to the parties and seen by the parties to be fair? No one knows. The record to date is too incomplete.

Is the structure of the organization such that it seems likely that it will? Here the answer seems to be mixed. There are some hopeful signs, and some reasons for concern.

The usual claims for arbitration are that it will be quick and relatively inexpensive. The CAS rules do, in fact, encourage quick resolution. They provide for relatively short time periods for the formation of the panels and for the rendering of opinions. There are a number of procedural devices that make it possible to deal with matters expeditiously. CAS has created special ad hoc bodies, such as the one at the Atlanta Olympics, where the need to timely adjudication was particularly acute. Nothing guarantees that there will not be delays, but the structure favors quick resolution.

Similarly, the costs of proceeding through CAS seem reasonable for most situations. There will, however, be ones that raise serious concerns. CAS does not provide counsel for those unable to provide counsel for themselves, although at Atlanta it did encourage volunteers to provide free services. It also permits on a discretionary basis the apportioning of costs among the parties in accordance with their ability to pay. Whether this is enough to insure fairness is open to question, but then it should be born in mind that many of these same criticisms could be leveled at the courts as well. What may of more moment than the equitable concerns is the legal validity of any agreement to arbitrate that does not address them. Where employees are forced as a condition of employment to submit disputes with their employer to mandatory arbitration, the United States Court of Appeals has held that the employer must pay the costs of the arbitration in certain circumstances. It seems likely that the courts might hold federations that impose a requirement that competitors agree as a condition of participation to mandatory arbitration would be subject to a similar due process requirement, at least in any situation in which an athlete would be denied access to CAS because that athlete did not have the resources to bring the case.

Much of the attractiveness of CAS turns on the fact that the arbitrators are all persons ostensibly with expertise in sport. The value of expertise is immediately and intuitively obvious. Anyone who has ever litigated or arbitrated a case can tell horror stories of attempting to convey complex information to judges or arbitrators who are incompetent and uninformed. Expert panels can much more quickly focus on the

issues genuinely in dispute, thus reducing costs and delay. They do not need to be brought up to speed. Many matters that would need to be explained to non-experts either will not need to be explained at all, or will be able to be explained much more efficiently.

Expertise is, however, a problematic concept. What constitutes expertise is left to the nominating bodies and ICAS. Nowhere is it defined. Nor is expertise, however defined, in one aspect of sport necessarily easily transferrable to another. A person expert in the organization of the International Olympic Committee may have no greater ability to deal with the science underlying a claimed challenge to a doping violation than any random member of the judiciary. Some may have less.

Experts are easily confused with persons who merely have a vested interest, and the unhappy history of expert courts in this country ought to serve as a caution. President Taft created the Commerce Court for reasons that closely track those being given in favor of CAS - that it would permit the rapid and uniform resolution of often arcane regulatory disputes involving the Interstate Commerce Commission, a rapid and uniform resolution not available through the regular courts. Two and a half years later, the experiment was abandoned. The concentration of one type of dispute in a single body, it turned out, favored capture and corruption more than efficiency. One of the expert judges was discovered to have been accepting bribes from the railroads, and Congress or the Supreme Court ended up reversing virtually all of its decisions. The point here is not that CAS will so quickly fall prey to the same problems. The point is rather: 1) that expertise is not so easily established when we are dealing with an organization with as broad a mandate as CAS , that is for any relevant decisional group it may not be all that expert and 2) that expertise does not necessarily promote fairness.

These complaints notwithstanding, it seems likely that CAS arbitrators will have sufficient familiarity with sport related issues that they will be especially adept in dealing with cases that do not raise fundamental, structural questions. Was the handling of a particular urine sample compromised? - where the only question is one about establishing whether the taking of the sample conformed to standard procedures. Was the taking of a substance not specifically banned and about which there was lack of data about the performance enhancing effect grounds for stripping an athlete of an Olympic medal? Here the importance of familiarity with the usual ways of doing things, of the conventional understandings of athletes is enormously important. Where the dispute does raise fundamental, structural questions, familiarity with and allegiance to the usual way of doing things is likely to be a hindrance. For example, if the question is whether existing tests for endogenous substances are adequate to constitute adequate proof of doping, then the question of meaning of expertise - and of genuine independence from the bodies with a vested interest in the regulation of sport - becomes more pressing. To date, the reported decisions from CAS are reasonably comforting in their balance.

On the other hand, to date CAS has not ruled on hard questions that might affect the interests of federations, NGBs, NOCs or the IOC. One example of the

experience to date may be illustrative of the current state of our information. In 1997, CAS reversed the decision of FINA to suspend for two years a water polo athlete who took a prescription drug to control asthma. Under FINA's rules, the athlete was entitled to take the drug, but was required to declare that he had done so. Operating under a misapprehension, caused in part by the failure of the IF to keep its various NGB s informed of changes in the rules, the athlete failed to report that he had used an inhaler to control asthma and was suspended from competition for two years from July 26, 1995 to July 26, 1997. The IF represented to CAS that it did not regard the athlete as a cheat. Rather. It believed that he had made a good faith mistake, but that it had no flexibility under its regulations to impose a lighter sanction or no sanction at all. CAS upheld the finding of a doping violation, but noted that it had greater authority with regard to the imposition of penalties and "cancelled" the sanctions - or presumably only the three and a half months that were remaining of them. It is comforting that an athlete who took a substance that he was entitled to take, and whose only violation was the good faith failure to report the taking of it, and whose position was supported by both his national federation and the IF, could have the equity of his position vindicated. It was not a hard case. Whether the only partial independence of CAS will permit it the independence to take on the hard case and to protect athletes in accordance with the "fundamental principles of law" that govern CAS proceedings remains an open question. Given the continuing control, albeit indirect, that the IOC exercises over CAS, there is strong reason to believe that such cases are not likely to get the serious review that they would get from a court or from a more independent, general body like AAA.

Searching review is, of course, only one value. Especially when we are talking about matters in international sports, the need for confidence in the consistency and uniformity of decisions may be equally pressing. What does CAS promise here? By centralizing decisions in a single body, and removing those decisions from both domestic and sport based tribunals, it may be possible to achieve greater uniformity. It should be noted, however, that not all federations are currently prepared to accept the jurisdiction of CAS either on matters of first instance or on appeal. Thus, even if CAS were to achieve consistency among those matters submitted to it, it could not deal with matters excluded by federations from its purview. What about consistency among those matters submitted to it.

There are a large number of potential arbitrators, drawn from around the world, and coming out of distinctly different legal traditions, who could be called on to decide any given case. It strains credulity to believe that they are likely to decide cases similarly. Moreover, like most arbitral bodies, CAS is not bound by precedent. Even if it were, it would be difficult for subsequent panels follow the lead of earlier panels, because of the incompleteness of the reported cases. This is admittedly a more pressing concern for persons trained in the Common Law, and especially those trained in the United States. Civil Lawyers have learned to live with sparse case reports. But if it is a more obvious concern for those us trained in the Common Law, it is a more general problem as well. As Craig Masback has noted, there is a pressing need in international sports for what he has called a *lex sportiva*, a stable body of law that is

transparent and consistent. Both the transparency and the consistency will certainly lead to greater confidence in and acceptance of decisions - especially those rendered by a body that is foreign to the participants, applying principles of law unfamiliar to them, and imposed on them by the very bodies that they are now in conflict with.

Has the wheel already been invented? Yes and no. The reformed CAS constitutes an important innovation in the search for a reliable, efficient forum for the resolution of sports related disputes. It has many of the positive features of sport specific arbitral bodies and has gone further than previous organizations to create the kind of externalization and independence that will be necessary to achieve credible results. It remains, however, closely tied to the IOC , the NOCs and the federations. These ties will inevitably raise questions about the independence of CAS, particularly among those forced to resort to it.

The procedures established by CAS, like those of most arbitral bodies, have all of the advantages that come with greater informality and all of the disadvantages of them as well. There are questions about whether CAS has the authority to reach the full range of remedies available through the courts.

There is a wheel out there. How good it is remains to seen.