

Stepping into a Niche: Exploring the World of International Sports Arbitration

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As two young female practitioners with barely any experience in sports, both, on and off-the field, the idea of getting involved in the practice of sports law and arbitration was certainly not par for the course. Yet, it was everything about sports law and arbitration – ranging from the concept of strict liability in doping, the interplay between human rights and eligibility, the Olympic ideals and sportsmanship, as well as the overlapping nature of the various tenets of the law that brought about our desire to learn more about this burgeoning area of dispute resolution.

Being the only official alternative hearing centre for the Court of Arbitration for Sport (“CAS”) in the ASEAN region, the AIAC has led the way in the promotion and development of sports dispute resolution in Southeast Asia. And so, straight from the AIAC’s sports-desk, we give you a play-by-play of what we consider to be the key characteristics of international sports arbitration that distinguish it as a unique field of arbitration.

What makes sports law and sports arbitration distinct?

Sports law was traditionally viewed as representing nothing more than an amalgamation of various areas of the law that were relevant to the sporting context. In recent times, however, sports law has grown into a developing area of law in its own right. It is now recognised as a specialised practice, encompassing not only the relevant substantive laws applicable to the sports industry, but also regulations and judicial decisions that govern sports federations and athletes at both domestic and international levels.

As Rigozzi and McAuliffe noted, the practice of sports arbitration is very much distinct from general and commercial arbitration practice. Unlike commercial or non-sports-related arbitral awards, awards rendered by CAS are in most instances made public. This is in contrast to the principle of confidentiality that is the cornerstone of commercial arbitration proceedings. Interestingly, the publication of CAS awards has been positively welcomed for promoting greater transparency and consistency between decisions and awards in the sporting world, resulting in the emergence of a harmonised body of sports regulation and jurisprudence – known as the *lex sportiva* – which sports arbitration users can rely on. It has also, in turn, provided for a more uniformed application of the formal rules and equitable principles in sport – known as the *lex ludica* – across different sports and geographical boundaries, with sports arbitrators regularly referring to past awards rendered by other arbitrators and governing bodies in similar matters which, whilst not binding in nature, are highly persuasive.

Although CAS awards are publicly available, CAS proceedings are mostly held behind closed doors unless the parties agree otherwise, or, at the sole request of the athlete in disputes relating to misconduct. It has, accordingly, always been possible for CAS hearings to be held in public; the first taking place in 1999. Apart from general public interest, the rationale for public hearings, as stated by the European Court of Human Rights (ECtHR), is to inculcate greater trust in the independence and fairness of the decision-making process. Despite this, the recent public hearing of disgraced Olympic champion Sun Yang's CAS appeal, which was made available for live-streaming around the world, was only the second of CAS' kind. That said, a public hearing would undoubtedly be a rare sight in commercial arbitration proceedings, let alone a widely televised one.

Another distinct feature of sports arbitration is the expedited nature of its proceedings during major sporting events such as the Olympic Games *vide* CAS' Ad Hoc Division. Given the scheduled nature of sporting events, and the fact that,

at times, participation in championships is dependent on the outcome of disputes arising from preceding matches and tournaments, the arbitration rules applied by CAS' Ad Hoc Division require awards to be rendered in under 24 hours – giving new meaning to the phrase “time is of the essence”.

Unlike commercial arbitrations, all CAS arbitrations are seated in Lausanne, by default, without reference to the choice or preference of the disputing parties. This has the effect of compelling any party seeking to challenge or enforce a CAS award to do so only at the Swiss Federal Tribunal pursuant to Swiss Law. This process was somewhat questioned in the *Pechstein saga*, although resulting in the ECtHR maintaining the status quo.

A further intriguing aspect of CAS arbitrations is the fact that parties may only nominate an arbitrator from CAS's closed list of arbitrators. Although highly controversial, many have justified this restrictive system as a means of ensuring that matters are determined only by sports law specialists. In contrast, parties in commercial arbitrations have the freedom of nominating an arbitrator of their choice.

Why sports arbitration is an area to look out for?

Since the establishment of CAS in 1983, sports arbitration has developed into a specialised area of arbitration practice that has grown in both repute and standing; its success and utility are evident from the rapid increase in the number of CAS cases in recent years. As a result of this, the need for specialised practitioners in the sports law and sports arbitration sectors are expanding. Given the unique nature of sports dispute resolution, many commercial arbitration practitioners may find themselves stumbling into the world of sports arbitration one way or another. Although this often happens much later in their careers, it should in no way deter interested young arbitration practitioners from pursuing a career in this field.

The Development of Sports Law and Sports Arbitration in Malaysia

Over the years, there has been a growing trend towards the development of sports law in Malaysia. The amendments to the Sports Development Act in 2018 saw the

establishment of the Sports Dispute Committee, an entity entrusted with the statutory responsibility of resolving sporting disputes. Recognising that there are limitations to the structure, scope and application of the Sports Dispute Committee, including, in particular, its neutrality and independence (or perceived lack thereof), the AIAC strives to continue its engagement with all relevant stakeholders to push for a more globally recognised and harmonious platform for the resolution of domestic sporting disputes. In tune with the international recognition of arbitration as the preferred and oft-adopted mechanism for the resolution of sporting disputes, the AIAC has, in the pipeline, a proposal for the establishment of a national sports arbitration tribunal, modelled along the procedures and set up of CAS. Although such national CAS-like tribunals are not new, the AIAC envisions its model to be a cost-effective and accessible forum not just for domestic athletes, but also international athletes in the ASEAN region and beyond.

Sports dispute resolution in Malaysia remains at its infancy; but the commitment and the optimism shared amongst sports stakeholders to develop this area further is assuring. To that end, the AIAC has been relentless in empowering athletes and sporting organisations through capacity-building initiatives and knowledge-sharing efforts.

Conclusion

The world of sport bridges cultures, provides entertainment, and creates emotional attachments and affiliations; be it to a favourite player, team or club. Like everything in this world, there will always be two sides to the game; the beautiful and the ugly. When a sporting dispute arises, if mishandled, the entire sanctity of the game can be brought into disrepute. However, if handled correctly through the right amount of diplomacy and impartiality, the honour and goodwill of the game can be safeguarded. In this respect, sports arbitration has, to some extent, provided a modicum of relief to disputing parties through harmonisation of the law and better access to remedies. With changes to the governance of sport imminent, the time is now upon aspiring and veteran sports arbitration practitioners alike to be on the ball and to study the impact that these developments will have on the *lex sportiva* and *lex ludica*, which may place sports arbitration further apart from the common commercial arbitration practice.