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Performance-Enhanced Arbitration? The CAS Ad Hoc Division

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For those of us in the arbitration world, the closing ceremony which took place on 12 August 2012 not only marked the end of the London Olympic Games. It also signalled the conclusion of the jurisdiction of the Court of Arbitration for Sport's ('CAS') Ad hoc division (the 'CAS AHD') (as it will not be in operation during the Paralympics).

First introduced for the Olympic Games in Atlanta 1996, the CAS AHD aims to 'provide all participants in the Games with free access to justice within time limits that keep pace with the competition'. To that end, during the Olympics, a panel of arbitrators relocate to the host city and are on call 24 hours a day with a view to rendering decisions within 24 hours of a request for arbitration being filed.

As the world begins to reflect on the 'legacy' of London 2012, it is timely to consider whether other international arbitration institutions can learn from the example set by the CAS AHD, the only institution which aims to constitute a tribunal and render a final award within 24 hours. This is of particular relevance in the context of emergency arbitrators, an area of international arbitration procedure which is very much in its infancy, and which aims to cater for disputes of a time-sensitive nature as an alternative to seeking the assistance of the courts.

The CAS Ad-Hoc Division

The CAS AHD's purpose is to resolve sports-related disputes which arise during the Olympic Games. Such a Tribunal was also put in place for the Commonwealth Games, the UEFA European Football Championships and the FIFA World Cup. It is made up of twelve arbitrators who are selected by the International Council of Arbitration for Sport based on their expertise in arbitration and sports law. During London 2012, the CAS AHD heard issues concerning the qualification and ranking of athletes, anti-doping scandals, and appeals against the decisions of individual sporting federations.

The Rules and Jurisdiction

The International Council of Arbitration for Sport adopted the current version of the CAS Arbitration Rules for the Olympic Games on 14 October 2003 (the 'AHD Rules'). The AHD Rules provide that the seat of the AHD is Lausanne, Switzerland, and the governing law of any arbitration is Chapter 12 of the Swiss Act on Private International Law of 18 December 1987.

During London 2012, CAS AHD was operational, and therefore had jurisdiction, from ten days

preceding the Opening Ceremony until the date of the Closing Ceremony on 12 August 2012. The jurisdiction of the CAS AHD arises from the entry form signed by every participant in the Olympic Games, which contains an express agreement that 'any dispute arising on the occasion of or in connection with my participation in the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration' (Rule 59). Rule 61 of the Olympic Charter, by which all athletes are bound, also contains the same wording.

The CAS AHD panel has full control over the evidentiary proceedings, and if it considers itself to be sufficiently well-informed, can decide not to hold a hearing and to render an award immediately. In one case during London 2012, with the consent of the parties, it even decided to bifurcate the proceedings, as one party had not received all of the relevant documents by the time the hearing started (CAS OG 12/03 concerning Denis Lynch).

Decisions are final, and there is no right of appeal, except to the Swiss Federal Tribunal (which is rare in practice). However, the panel in question can either make a preliminary decision alongside a referral to the standard CAS procedure, or decline to make an award altogether and refer the dispute to the CAS Procedure. As such, the CAS AHD does not have exclusive jurisdiction, and its jurisdiction overlaps with that of CAS during the period of the Olympic Games.

A 'Legacy' for Arbitration?

Expediency is clearly at the heart of the rules and organisation of the CAS AHD. During a major international sporting event such as the Olympic Games, this is clearly necessary – the issues brought before the CAS AHD can affect whether or not athletes have the right to participate in events, and, given the inflexible nature of the timetable, the decisions it makes are extremely time-sensitive. The decisions rendered can also have significant financial implications for athletes, whose sponsorship deals may be dependent on achieving a certain medal position.

In the context of international arbitration however, the fact that the CAS AHD is able to both constitute a tribunal and render a final decision within 24 hours is striking, and one wonders whether it would be possible for other international arbitration institutions to learn from the example set by the CAS AHD procedure, especially in relation to the emergency arbitral procedure, a fairly new development in international arbitration. Indeed, whilst the CAS AHD has been in operation since Atlanta 1996, international arbitration institutions only started to adopt provisions relating to emergency arbitrators in their rules as recently as 2009.

Emergency arbitrators, who are appointed by an institution to grant preliminary, and often time-sensitive, relief before the constitution of the tribunal, are often faced with issues which require expediency. Although emergency arbitrators are usually appointed within a narrow time-frame, the time within which they must render a decision varies depending on the applicable institutional rules from 5 days after receipt of an application (the SCC and ACICA Rules) to 15 days (the ICC and PRIME Rules), to no time limit at all. Although there are not yet many examples of how the emergency arbitrator procedure will work in practice, in its annual report for 2011, SIAC (whose rules do not lay down a time limit for the rendering of a decision) cites the following example of the appointment of an emergency arbitrator:

> 'The application related to a cargo of coal sitting in a Chinese port and which was

> rapidly deteriorating as the long holiday period loomed. The Applicant contacted us in the morning indicating their intention to file the application, filed their papers at 2pm and by 5pm an arbitrator of neutral nationality (a very experienced shipping lawyer) was appointed. The arbitrator gave his preliminary directions that same evening, a hearing was scheduled for the next day, and an order made.'

Likewise, of the four emergency arbitrator applications brought before the SCC, two were decided within the 5 day limit, one within 6 days and the other within 12 days. This compares with a decision relating to a sailing case which was rendered by the CAS AHD within 3 hours and 45 minutes of it being filed (relating to the decision to terminate the Women's Elliott 6m class semi-final races due to lack of wind).

Therefore, as far as expediency is concerned, whilst other international arbitration institutions have in the recent past recognised the importance of rendering a decision quickly, they are still a long way behind the 24 hour period adhered to by the CAS AHD, especially as the emergency arbitrator is appointed before the tribunal is even constituted and does not produce a final award.

Of course, there are a number of factors which place other international arbitration institutions at a disadvantage when compared to the setup of the CAS AHD:

- The CAS AHD arbitrators all re-locate to the host city and are available 24 hours a day. Further, they all specialise in sports and arbitration. As such, the tribunal can be constituted immediately and there is no need to take account of any travel arrangements or discussion regarding the potential location of the hearing.
- The arbitrators can choose not to hold a hearing at all. This lies in stark contrast with the obligation in many of the institutional rules for the emergency arbitrator to establish a procedural timetable (although denial of a party's right to a fair hearing would be a ground of appeal to the Swiss Federal Tribunal).
- In comparison to disputes brought to other international arbitration institutions, there is likely to be less documentary evidence relied upon by parties involved in disputes brought to the CAS AHD and the disputes are unlikely to have a protracted history.
- The facilities and services of the CAS AHD are free of charge. Further, during London 2012, pro bono advice was available for all athletes. As such, the process is not slowed down by party delay regarding the payment of fees or advances on costs.
- The fact that every athlete signs the same arbitration clause means that, to a certain extent, any issues concerning interested third parties are less problematic, as all the athletes have already consented to the procedure and have agreed to be bound by the decisions of the CAS AHD. Nonetheless, given that it is likely that other athletes will be affected by many of the awards made (such as in disqualification proceedings), the CAS AHD tends to serve notice on any third parties as a matter of good practice.

It must be acknowledged that procedural obstacles such as the payment of fees are unlikely to be surmounted in international arbitration: by its nature, international arbitration, unlike disputes arising in major sporting events, it is a private process for the resolution of disputes concerning private entities, in which there is insufficient public interest to generate funding. Likewise, the unique context of all potentially affected parties having signed the same arbitration clause, and

again, being available in the same city, is unlikely to be replicated outside of major sporting events.

On the other hand however, it is not unthinkable that institutions could require arbitrators to be on call in a number of key arbitral seats in order to speed up the constitution of a tribunal in the event of an emergency. Even taking into account the strains on arbitrators' time, some sort of 'emergency arbitrator rota' could be put in place to combat such issues. Necessity may mean that parties forego the right to have the dispute heard by an arbitrator of their choosing, but this would be in favour of a much more efficient and inexpensive process. Institutions could even make such a rota public in order to allow parties to make a more informed decision. Such a scheme would also allow certain institutions to set themselves apart from the others. Further, once a tribunal has been constituted, a procedural timetable, along with a hearing, may not always be necessary: arbitrators could be pressed to render decisions more promptly without sacrificing the fairness of the procedure. Such improvements will undoubtedly make international arbitration a viable alternative to approaching the courts in an emergency situation and allow it to really 'keep pace with the competition'.

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