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Is Sports Arbitration "Infirm" and "Kafkaesque"? Lance Armstrong Puts Arbitration on Trial

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During a bitter battle with anti-doping authorities, international cycling champion Lance Armstrong publicly campaigned against the anti-doping arbitration process. Armstrong's offensive provides insights into widespread misconceptions about arbitration.

On 20 August 2012, a U.S. Federal District Court dismissed Armstrong's petition to enjoin the U.S. Anti Doping Agency (USADA) from further pursuing allegations that he was part of a doping conspiracy that powered his seven Tour de France victories. The court also rejected Armstrong's attempt to transfer jurisdiction of the dispute going forward to U.S. federal courts from an arbitral tribunal to be constituted under the Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes (the Supplementary Procedures), a modified version of the rules of the American Arbitration Association. Three days after the court put a spoke in Armstrong's wheel, the cyclist announced in a sharply worded statement that he declined to proceed to arbitration to contest the charges against him, brushing off the agency's protracted pursuit of him as "nonsense." He also had less than flattering things to say about arbitration:

> If I thought for one moment that by participating in USADA's process, I could confront these allegations in a fair setting and – once and for all – put these charges to rest, I would jump at the chance. But I refuse to participate in a process that is so one-sided and unfair.

Rejecting outright the legitimacy of any arbitral tribunal, Armstrong offered the public his own final and binding conclusion:

> I know who won those seven Tours, my teammates know who won those seven Tours, and everyone I competed against knows who won those seven Tours. . . . Nobody can ever change that.

In his lawsuit, Armstrong went further, calling the would-be arbitration panel a "kangaroo court" and declaring that "truth is not its goal." The U.S. District Court chastised Armstrong for submitting a brief consisting mainly of "wholly irrelevant" allegations "which, the Court must

presume, were included solely to increase media coverage of this case, and to incite public opinion against Defendants."

Armstrong's court challenge to an as-yet uninitiated arbitral proceeding relied on two lines of argument: first, that he had no valid arbitration agreement with USADA and, second, that because USADA was acting as an agent of the United States seeking deprive him of fundamental rights, arbitration would violate due process.

Because the Supplementary Procedures expressly relegate jurisdictional decisions to the arbitral tribunal, the jurisdictional challenge was bound to fail under the Federal Arbitration Act and U.S. judicial precedent. Armstrong's brief focused on his due process objections. He blasted not only the USADA's past conduct but also the applicable arbitration procedures and the pool of arbitrators, attempting to frame the entire arbitral process as inextricably linked to and controlled by the USADA.

Drawing a line from USADA's alleged past misdeeds, Armstrong contended that the arbitration process does not "afford requisite due process for a situation . . . in which there is no positive test result, and where Defendants have worked in concert with the United States government to investigate the athlete." He objected that his available appeal under the Supplementary Procedures would be to the Court of Arbitration for Sport (CAS), which he called an "infirm forum," in part because it is not obligated to hold a hearing as part of its *de novo* review. He argued that no arbitration panel would be impartial, contending that the pool of arbitrators is selected "by sports governing bodies, without any official participation by athletes. . . . The arbitrators are paid for by the [U.S. Olympic Committee]. As a result, arbitrators are incentivized to side with USADA." Finally, Armstrong appealed to the public interest, arguing that the public

> should be able to trust in the legitimacy of the anti-doping system, and has an interest in ensuring that the system for adjudicating allegations of athletic doping is fair and meets procedural due process requirements.

It is easy to see why the district court judge chastised Armstrong for using the court as a platform for his media campaign against the USADA. Armstrong's pleas echoed arguments that U.S. courts have repeatedly and roundly rejected, but they did make for juicy PR to accompany his decision to very publicly throw in the towel. Armstrong's media blitz was aided by the court's observation that the preliminary notice that USADA provided Armstrong was vague and therefore "of serious constitutional concern." However, USADA's counsel informed the court that during the course of the arbitration Armstrong would receive detailed disclosures and have adequate time to respond. The court rejected Armstrong's speculation that arbitrators who have been nominated by the International Olympic Committee or the U.S. Olympic Committee would somehow be biased in favor of the USADA, a separate organization. Indeed, one might instead wonder whether those committees would not be predisposed to side with a wildly popular athlete who has brought untold glory to their realm of authority. The court agreed that the arbitration process offered an adequate check on any overzealousness by the USADA and was "sufficiently robust to satisfy the requirements of due process." Of course, the only part of the court's opinion that made it into Armstrong's public opt-out statement was the concern expressed about the preliminary notice.

As the judge observed, the highly public nature of this dispute has the potential to tarnish the

reputation of the sport of cycling. It also feeds negative public perceptions of arbitration in the United States, adding to criticisms mainly targeted at consumer and labor disputes. Forbes ran a scathing article by contributor Trevor Butterworth criticizing as "Kafkaesque" the arbitral process that Armstrong would face. The article, which relies entirely on an interview with a former U.S. federal prosecutor, misleadingly contrasts the procedural protections in arbitration with those available to a criminal defendant. It vilifies the arbitral process as making "a meaningful defense all but impossible," because "the protections afforded a defendant in a court of law simply aren't there." The article is filled with statements that are either flatly wrong or grossly misleading, such as:

- *There's no discovery in USADA arbitration.* In reality, Rule 28 of the Supplementary Procedures permits arbitrators to order production of documents and to subpoena documents and witnesses.
- *Unlike in a criminal trial, the USADA would not have to turn over exculpatory evidence.* In fact, exculpatory evidence does not have to be handed over in a civil proceeding in U.S. courts, which is the appropriate point of comparison.
- *The USADA would be able to avoid cross-examination of its witnesses by relying solely on written affidavits.* While it is true that USADA could refuse to present its witnesses for cross-examination, the article falsely implies that the consequence is that the arbitral tribunal would blindly adopt those witnesses' testimony. Tribunals regularly disregard the testimony of witnesses who are not presented for examination.

The Armstrong affair is a case study in arbitration's public relations problem. Even sophisticated media outlets do not understand the process and, apparently, neither do former federal prosecutors. By zeroing in on differences in approach and taking particular procedural features out of context, media reports misrepresent arbitration. While the district court, following clear judicial precedent, rejected Armstrong's challenges, the court of public opinion is less sedate. Unfortunately, a full explanation of arbitral procedure does not make for gripping journalism, so Armstrong's public lambasting of the arbitral process has been effective. A vocal bipartisan contingent of lawmakers in California, a state with a history of cool sentiments toward arbitration, has requested a Congressional investigation of whether the "quasi-judicial" process available to athletes charged with doping is "fair and just."

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