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Compulsory consent in Sports Arbitration: Essential or Auxiliary

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There are a multitude of jurisdictional issues being faced by the newly developed Sports arbitration sector, which has gained popularity primarily since nearly all major Sports Bodies have made it a mandatory part of participating in events. This issue has been a constant bone of contention between athletes, who wish to be given more choice and freedom in the mode of dispute resolution, be it CAS or litigation in National Courts, and the Sports Governing Bodies who clearly favour the Court of Arbitration for Sports (CAS) which has been formed specifically for these disputes due to its expertise.

This roadblock in sports arbitration is premised on the unilateral nature of consent which puts serious strain on the much celebrated party autonomy doctrine. If one traces arbitration to its roots, it is clear that arbitration was meant to be in the nature of a plain and simple bilateral agreement, wherein two parties agree to resolve their disputes outside the normal Judicial remedies available to them by means of a resolution by an independently appointed tribunal. This has led to several questions being raised as to the substantive validity of Sports contracts due to lack of bilateral consent.

With the advent of newer forms of disputes this doctrine has evolved and eroded, in particular in Investment arbitration, where States make an open offer to arbitrate with parties of another State, which is accepted by any party of the other State by merely giving notice of intent to initiate arbitration proceedings. This format of arbitration works even without actual privity of contract, as only States (rather than the parties initiating the arbitration) are signatories to Bilateral Investment treaties

However, can this be eroded to the extent of making consent of one party a foregone conclusion and having an arbitration agreement on the basis of a forced or mandatory agreement between parties? This very issue has led to immense debate in various tribunals while determining jurisdiction and by various National Courts while enforcing awards rendered by them. To understand this issue it is essential to look into the nature of party autonomy and whether its scope is wide enough to allow such arbitral clauses to be enforceable.

The principle of party autonomy and freedom of contract is based broadly on two concepts which are that of mutual agreement and free choice on the part of the parties, which should be unhampered by external control or governmental interference. A host of scholars such as Redfern along with Russell emphasise this and unequivocally state that the element of consent is absolutely

essential in arbitration, as without it there can be no valid arbitration agreement.

However, in contrast, later theories of the nature of arbitration such as the hybrid theory, emphasise both the contractual nature as well as the State support required to allow arbitration. This essentially has led to a conclusion that arbitration agreements are indeed supreme, however State interests are also considered while construing and validating such agreements. The State interest being used in a Sports arbitration scenario is the need to resolve matters expediently, which is similar to the test of sports arbitration under Art. 6 of the ECHR. This coupled with the generally liberal approach often taken towards arbitration issues by National Courts in most jurisdictions, favouring the existence of a valid arbitration agreement despite evidence to the contrary, has led to even mandatory arbitration clauses being deemed functional.

This was observed by the Swiss Federal Tribunal in the *Canas* case which stated, *"competitive sports are characterized by a very hierarchical structure, both at a national and an international level. Established on a vertical axis, the relationships between athletes and the organisations of different sports disciplines are in this way different from the horizontal relations which bind parties of a contractual relationship."* As a result of this, the Swiss Tribunal observed that the athletes had no other choice but to accept arbitration *nolens volens* (whether willingly or not). Thus, sports arbitration only seems a creature of necessity without much jurisprudential basis apart from the urgent need to resolve disputes.

Several decisions in the past have also questioned the validity of 'mandatory arbitration', as this is termed, on the basis of the scope of Art. 6 of the European Convention on Human Rights (ECHR). Article 6 of the ECHR provides for restrictions of access to courts only under limited circumstances which are whether it pursues a legitimate aim that stands in a reasonable relationship of proportionality with the means employed. The scope of this right has been restricted as the European Court clarified in the case of *Waite and Kennedy v. Germany*. In this decision, the Court clarified that mere referral to Tribunals does not of itself create a violation of the "right to Court" granted to ECHR; however, this must be for the pursuit of an important and legitimate aim. This raises the pertinent question whether enforcing such arbitration constitutes a legitimate aim and the means employed by Sports governing bodies are valid.

While one may consider speedy resolution of disputes a valid and legitimate aim in terms of Article 6 of the ECHR, one possible view of this issue could be from a purely contractual perspective, borrowing from the origins of arbitration. In such a scenario, the Governing Sports bodies occupy a position of power and exert undue influence on the athletes and make them sign an arbitration agreement designating CAS as the arbitrating authority if they wish to participate in any events regulated by them. This could arguably render such an arbitration invalid on grounds of substantive invalidity due to the apparent lack of jurisdiction on the parties to the arbitration

This necessity was questioned on grounds of a lack of free consent in the recent *Pechstein saga* where a Court in Munich has held the mandatory submission of disputes between the International Skating Union (ISU) and athletes to the CAS to be anti-competitive under German domestic law. This decision was based on the undue influence the ISU has in the appointment of the CAS Panel of Arbitrators. This issue in the *Pechstein saga* arose primarily due to the "Statutes of the Bodies Working for the Settlement of Sports-related Disputes" (2004), which designates several sports governing bodies as the appointing authority for the panel of arbitrators that serve on CAS.

Under these provisions, the parties can only choose arbitrators from a list made by the International

Council of Arbitration for Sport (ICAS). As per Sec. 6 (3) of the Statute, this body “appoints the personalities who are to constitute the list of arbitrators and the list of CAS mediators and can remove them from those lists”. This is clearly a very important function as these arbitrators are ultimately the judges in all the disputes. This is further complicated by the provisions of Rule 33 of the CAS Procedural Rules, as per which only ICAS appointed arbitrators can sit on the panel and no outside arbitrators can be appointed for CAS arbitrations.

To understand the issue of conflict that occurs and the disadvantage that athletes face when they unwittingly sign “mandatory arbitration” clauses one needs to look no further than how the ICAS is constituted. As per Sec. 4 of the Statute, out of the twenty members of ICAS, four members each are appointed by the International Sports Federations, Association of the National Olympic Committees and the International Olympic Committee. A further four members are appointed by these first twelve members of the ICAS after an appropriate consultation and the last four members are individuals who are independent from those bodies. This seriously raises questions as to the impartiality of the CAS in the minds of all athletes who must have recourse to the institution.

It is clear that Sports arbitration is here to stay, as it should, bearing in mind the unique nature of Sports disputes which are best adjudicated by experts in the field rather than National Courts. However should it be allowed to stay in the current oxymoronic method adopted by Sports Governing Bodies i.e. “compulsory consent”? The issue is further complicated by the nature of CAS and the method of appointment adopted for its panel of arbitrators, which seems to be heavily biased in favour of Sports Governing Bodies, at least from the perspective of any athlete. It is now high time that this debate in National Courts be put to rest by changing the method of appointment under the ICAS rules by reducing the Sports Bodies’ control and bringing in a degree of transparency.

Arbitration like any other form of contract requires mutual consent to have a challenge free resolution. The quickest way to resolve this issue is to create a perception of independence and impartiality to compliment the actual impartiality of the CAS arbitrators, which would help alleviate athletes’ concerns and make what seems to be “compulsory consent” more akin to mutual consent.

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