Kluwer Arbitration Blog

Australian Arbitration Week Recap: Blood, Sweat and T … ribunals

Jamie Calvy, Sharon Ndjibu (Clifford Chance) · Thursday, October 12th, 2023

On the third day of Australian Arbitration Week, Clifford Chance's Perth office hosted a panel discussion on "Australian sports tribunals and lessons learnt from international sports arbitration". The session was moderated by Jamie Calvy (Senior Associate, Clifford Chance) with a panel comprising:

- Stephen Meade (General Counsel, Australian Football League);
- John Boultbee AM (Inaugural CEO, National Sports Tribunal); and
- Venetia Bennett (Barrister and Arbitrator, Francis Burt Chambers).

Sports Arbitration Fundamentals

Stephen Meade opened the session by discussing the advantages of the Australian Football League ("AFL") having its own tribunal processes, including that its tribunals are familiar with the nuances of the Australian rules of football. Venetia Bennett briefly discussed some limitations for in-house sports tribunals (although was, perhaps rightly, of the view that there were few!) and noted that these tribunals do not have the power to compel documents or evidence from witnesses not subject to the sport's rules, which may inhibit justice.

Concerning the National Sports Tribunal ("NST"), John Boultbee noted that "sporting disputes" is a term that is not defined in the National Sports Tribunal Act 2019 (the "Act"), despite the Act's objects referring to the NST's jurisdiction to resolve "sporting disputes". Consequently, this has caused some difficulties in determining whether the NST's jurisdiction extends to some disputes. Mr Boultbee also noted that the NST does not have jurisdiction for on-field disputes or to award damages, but that the latter limitation is subject to a consultation process with stakeholders, including the Federal Government, to determine whether there is scope for the NST to award damages in the future.

Concerning international sports tribunals, Mr Meade noted that the involvement of an international body in a domestic sport, like Australian rules football, means that referrals to the Court of Arbitration for Sport ("CAS") are of limited attraction to the AFL except for instances in which the AFL is required to do so, such as anti-doping matters as prescribed by the World Anti-Doping Code (the "WADA Code").

Precedent in Sports Arbitration (*Lex Sportiva*)

The panellists engaged in an interesting discussion on precedent in sports arbitration. The persuasiveness, or binding nature, of a decision ultimately depends upon the jurisdiction in question and also the nature of the dispute. Additionally, there was a debate on whether the significant public interest in sport is an effective sword to the shield of confidentiality in arbitration.

Mr Meade kicked things off by explaining that in-house tribunals often maintain an informal precedent bank of previous decisions that are available to tribunals. With regards to the NST, decisions can be published if agreed between the parties or if the NST considers the decision to be of 'precedential value'. Given the NST's modest age, Mr Boultbee noted that essentially each decision has had precedential value. At the international level, not all CAS decisions are published, and the panel acknowledged that its database for decisions is not user-friendly.

If a sporting body is involved in a CAS decision, it has access to those decisions regardless of whether they have been published or not. An athlete does not have the same access to previous decisions, and neither do solicitors and counsels. Ms Bennett highlighted the injustice in this approach, and the need for wider access to the CAS' decisions.

The panellists also discussed whether a hierarchy of precedent should be established, with the CAS' or NST's decisions applicable to national or even in-house sports tribunals. Mr Meade highlighted that the nuances of Australian rules football meant that he did not see a future where the CAS' or NST's decisions would be applied by AFL tribunals. Separately, Mr Boultbee explained that he was working on a project with the CAS and other national sports tribunals around the world that will look at sharing decisions and precedents for use by the sports industry and the NST.

The panellists also discussed confidentiality in sports arbitration more broadly. Ms Bennett noted that although preservation of confidentiality is valuable as a hallmark of arbitration generally (including sports arbitration), the non-publication of decisions hinders the development of precedent in an industry that is under intense public scrutiny, and that there are significant benefits to both sports and athletes in having consistent decisions across a sport or arising from similar policies. Ms Bennett noted that the WADA Code has in the past been updated to reflect landmark decisions in anti-doping, and the same can be said of other sports' rules. Mr Boultbee's view was that when a matter is heard and clear reasons are given, it is in the public interest that this decision is published for all to see as opposed to unfounded media speculations being the source of information. He added that even if a decision is made publicly available, confidentiality can be protected in a number of ways. Redaction of athlete and commercially sensitive information has been used to preserve confidentiality in decisions published by the NST.

Appropriate Issues for Sports Arbitration

The panellists also discussed arbitrability and whether key issues in the sports industry are capable of being arbitrated, or whether they belong in the public realm. The panel discussed anti-doping, concussion, safe-guarding and transgender participation in sports.

Of note was the panel's discussion on concussion. Mr Meade acknowledged that the NST's limitation in not having the jurisdiction to award damages meant that sporting bodies tend to face claims in the courts. Further, plaintiff law firms often want to maximise media coverage as a way to leverage a favourable outcome. Mr Boultbee added that negligence claims cannot currently be brought before the NST as the remedy of compensation is the essence of the dispute. Ms Bennett also noted that concussion cases often involve complex issues of proportionate liability and that an arbitration agreement between a sporting body and club, or a club and player, will not include all wrongdoers. The current law in Australia means that a third-party wrongdoer cannot be added to arbitration proceedings, unlike the position in litigation, which may make arbitration unattractive for concussion cases. However, this may change following the High Court's consideration of *Tesseract International Pty Ltd v Pascale Construction Pty Ltd (Case A9/2023)* later this year.

The panel considered there to be benefits in sport-specific issues, including transgender participation in sport, safe-guarding and governance issues, being arbitrated by expert sports tribunals, but noted the importance of developing transparent precedent in this area given the public importance.

Future Considerations

Mr Boultbee emphasised that more selection/eligibility criteria and disciplinary disputes were being heard by the NST in Australia, potentially signalling a decline in Australian disputes of this nature being referred to the CAS. Coupled with significant global sporting events being held in Australia in the near future, the panel predicted that referrals to the NST would continue to increase.

There was a sense of optimism around developing precedent in sports arbitration and there are certainly many projects on foot that signal the importance of ensuring access to decisions in sports arbitration such that critical issues in sport are dealt with transparently and uniformly across Australia, and internationally.

More coverage from Australian Arbitration Week is available here, and further publications by the Kluwer Arbitration Blog on sports and arbitration are available here.

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