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Provisional and Conservatory Measures – an Under-Utilised Resource in the Court of Arbitration for Sport

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ABSTRACT

This Intervention provides an introduction to the role of the Court of Arbitration for Sport, outlining the composition of the various entities that comprise it, an overview of its role and the rationale for its existence. It goes on to examine the forms of preliminary relief that CAS is able to offer and consider the extent to which that relief is legally enforceable. It ends with a recommendation that interested parties endeavour to make greater use of those preliminary relief mechanisms.

KEYWORDS

Sport - Arbitration – Dispute Resolution – Preliminary Relief – Provisional and Conservatory Measures

INTRODUCTION

Sport is now a global business, worth more than 1 3% of world trade. In the enlarged European Union, now comprising 25 Member States, it accounts for around 2% of their combined Gross National Product. It is hardly surprising, therefore, that sports disputes are on the increase – where there is money to be made and lost, litigation is never far away. And, like other industries, the settlement of sports disputes by alternative dispute resolution (ADR) processes is also on the ascendancy, including mediation (Blackshaw, 2002; Gardiner, 2006) - in other words, without resort to the courts.

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This is not only for the same reasons recognised in 2 other industries, namely, that litigation is slow, expensive, arcane and unpredictable; but also because there are special reasons peculiar to the sporting world. Sports persons and bodies prefer not 'to wash their dirty linen in public' but settle their disputes 'within the family of sport'. In other words, in private and amongst others who understand what makes sport special. In addition, the dynamics of sport require quick and informal settlement procedures. For example, a dispute may arise in relation to the commercialisation of a major sports event, like the Olympic Games or the FIFA World Cup, and the parties in dispute cannot afford to wait months - or perhaps even years - to settle their disputes through the courts, by which time the event will be long over and forgotten and the sporting and/or business opportunity lost. Traditional arbitration also now suffers from the same ills, having become procedurally complex, inflexible, costly and lengthy.

However, in 1983 a special body for settling all 3 kinds of sports-related disputes, called the Court of Arbitration for Sport (CAS), was set up with the intention of making the CAS 'the supreme court of world sport'. A year later, the CAS opened its doors for business and so has just celebrated its twenty-first birthday. During this time, the CAS has lived up to the expectations of its founders and is proving to be a popular, fair, effective, relatively inexpensive, confidential and quick forum for the settlement of sports disputes. According to Reeb (2005) "more and more people are taking their disputes to the Court of Arbitration for Sport without a second thought. It is true that the number of cases was expected to rise, especially since FIFA decided to allow appeals to the CAS in 2002. However, rather than a linear increase, the number of cases registered by the CAS has exploded (271 in 2004 compared to 109 in 2003)." This increase is due in part to CAS' being able to hear all kinds of disputes directly or indirectly relating to sport - including commercial ones, such as disputes over sponsorship, merchandising and agency contracts – in addition to those that arise as a direct consequence of 'on-field' activities.

THE INTERNATIONAL COUNCIL OF ARBITRATION FOR SPORT (ICAS)

The ICAS is the supreme organ of the CAS. Its 4 main function is to safeguard the independence of the CAS and the rights of the parties appearing before it. Thus, it is responsible for the administration and financing of the CAS. The ICAS has 20 members, who, on appointment, must sign a declaration in which they undertake to exercise their functions in a personal capacity, with total objectivity and independence. The members

comprise 5 athletes; 5 representatives of the IOC; 5 representatives from both the Association of Summer Olympics International Sports Federations (ASOIF) and the Association of Winter Olympics International Sports Federations (AIWF); 5 persons from the Association of National Olympic Committees (ANOC); and 5 independent persons. ICAS members are appointed for four-year renewable terms. ICAS, like CAS itself, is a Swiss Foundation based in Lausanne, Switzerland. The ICAS appoints the CAS arbitrators and mediators and approves the budget and the accounts of the CAS.

THE ORGANISATION OF CAS

The CAS, also known by its French acronym TAS (Tribunal Arbitral du Sport) - the official languages are French and English - is based in Lausanne, Switzerland, and has permanent branches in Sydney and New York, thereby facilitating access to CAS for parties residing in Oceania and North America (Reeb 2002, pp. 23-25). Because CAS is based in Switzerland, with its seat in Lausanne, the CAS is generally governed by Swiss Law. It has its legal seat in Lausanne for all purposes, even when it hears cases outside Switzerland. The legal and practical significance of this is apparent from the judgment of the New South Wales Court of Appeal in *Angela Raguz v Rebecca Sullivan* [2000] NSWCA 240. In that case, a legal challenge against a CAS arbitral award was dismissed on the ground of lack of jurisdiction because the Court upheld the choice of Lausanne, Switzerland as the seat of arbitration under the CAS Code of Sports-related Arbitration. The CAS Court Office, headed by the Secretary General and assisted by several Counsel and secretaries, supervises the arbitration and mediation procedures and acts as a Registry; it also organises the 'Ad Hoc' Divisions (see below) and deals with other administrative matters.

During the Olympic Games, the CAS operates an 'Ad Hoc' Division (AHD), which was established in 1995 and was in operation at the 1996 Atlanta Olympics, resolving disputes relating to the Games within 24 hours and free of charge. The AHD was again in session for the 2006 Winter Games in Turin. The AHD decides cases "pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate." All athletes participating in the Summer and Winter Olympic Games have to submit their disputes to the CAS AHD. The CAS now has a minimum of 150 arbitrators from 37 countries, who are specialists in arbitration and sports law. They are appointed for 4-year renewable terms and must sign a 'letter of independence' confirming that they will act impartially. The CAS also has a permanent President, Judge Keba Mbaye of Senegal, who is a

former member of the International Court of Justice at The Hague. He is also President of ICAS. CAS arbitrators, who sit on panels comprised of one or three members, are not generally obliged to apply the doctrine of *stare decisis* but usually do so in the interests of legal certainty (*UCI v J. 7 NCB*, CAS 97/176 Award of 28 August, 1998).

The procedure to be followed in CAS Arbitration cases is set out in the Code of Sports-related Arbitration, the latest edition of which dates from January 2004. And the applicable law for determining the dispute is Swiss law, unless the parties agree on another law. The parties may also authorise the CAS to decide the dispute 'ex aequo et bono'.

Since May 1999 the CAS has also offered mediation. While it is expressly excluded for doping cases, mediation is very appropriate for settling the commercial/financial consequences that often follow, especially where the athlete concerned has been subsequently exonerated. In retrospect, Dianne Modahl (*Modahl v British Athletic Federation* [2001] All ER (D) 181) would probably have been better advised to try to settle her claims for compensation against the British Athletic Federation through mediation rather than through the courts (Blackshaw, 2001). The CAS also offers 'Advisory Opinions' on potential disputes. Although not legally binding they are useful because, in practice, they are a quick and relatively inexpensive way of clarifying legal issues and thus avoiding lengthy and expensive litigation.

CAS PROVISIONAL AND CONSERVATORY MEASURES

However, one service - and, indeed, an important one in practice given the exigencies of sport - offered by the CAS is less well known and, to date, relatively under-utilised: that is the possibility of the granting of provisional and conservatory measures in appropriate cases.

Article R37 of the CAS Code of Sports-related Arbitration (2004) empowers the CAS to offer the parties in dispute certain protective measures (known as 'provisional or conservatory measures') within a very short timeframe. Article R37 goes on to provide that no party may apply for such measures "before the request for arbitration or the statement of appeal, which implies the exhaustion of internal remedies, has been filed with the CAS." If an application for provisional measures is filed, the opponent is given ten days in which to respond or within a shorter time limit where the circumstances of the case so require. In cases of 'utmost urgency', para. 3 of Article R37 says that the CAS may issue an order on "mere presentation of the application, provided that the

opponent is heard subsequently.”

Article R44.4 of the Code provides in addition for expedited measures to be ordered by the CAS, with the consent of the parties. This is a measure which is very valuable in relation to sporting disputes, where deadlines and time pressures often apply. For example, a sports person or a team who has been denied eligibility to compete in a particular sporting event that is soon to take place, need to have their dispute settled very quickly if the possibility of competing is to remain open and not lost through any delay. 11

Again, article R48 of the Code also allows a party to obtain a ‘stay of execution’ of the decision appealed against, provided a request to that effect is made at the time of filing the statement of appeal with the CAS and also reasons are given in support of such request. This measure is particularly apposite in appeals against suspensions for doping offences. But it has also been invoked in a variety of other cases, including a decision to have a football match played on neutral territory to avoid a risk of terrorism in the host club’s country. If the request is not made at the time of filing the appeal, it is lost; the assumption being that there is no urgency, otherwise this would have been pleaded at the outset. 12

Article R37 of the Code does not specify or limit the kinds of preliminary measures that the CAS Arbitrators can issue in a given case. But traditionally in arbitral proceedings, these measures tend to fall into three categories: 13

measures to facilitate the proceedings, such as orders to safeguard vital evidence;

measures aimed at preserving the *status quo* during the proceedings, such as those that preserve the object of the proceedings; and

measures that safeguard the future enforceability of the decision, such as those concerning property.

For example, in the infamous ‘*Skategate*’ case during the 2002 Salt Lake City Winter Games (*Canadian Olympic Association v ISU*, CAS OG 2002/4) an order was imposed on the judges not to leave the Olympic village before the CAS Ad Hoc Division had investigated the circumstances in which the disputed medal had been awarded. In doping cases, orders have been made to preserve samples taken during a disputed doping control. 14

However, preliminary measures can never exceed 15

the object of the dispute. Thus, such measures cannot be issued against anyone who is not a party to the dispute; or anyone else who is not bound by the arbitration agreement signed by the applicant seeking the preliminary measures.

Furthermore, under the terms of Article R37 of the Code, in appeal proceedings the parties by agreeing to the CAS Procedural Rules “waive their rights to request such measures from state authorities” - in other words, from the local courts. However, such implied waiver does not apply to parties in cases under the CAS ordinary arbitration procedure (para. 2). Thus, in such proceedings, the parties can apply for similar measures from the competent local courts. However, it should be noted that in the well-known Stanley Roberts case, a Munich Court (*Oberlandesgericht*) reviewed the matter of the above-mentioned waiver from the point of view of paragraph 1033 of the German Code of Civil Procedure, holding that the competence of CAS, did not preclude the Court from granting provisional measures (*Roberts v FIBA, SputRt* (2001), OLG Munich, 26 October, 2000). At pp 64, 65 the court stated (in translation):

Even though FIBA [the International Basketball Federation] contends that CAS, as an institutional arbitral tribunal, is capable of issuing a decision within 15 days, this very time-limit cannot always guarantee a sufficient protection, as for instance in the case of a directly upcoming competition. Considering that, as shown by daily practice, the state courts are in a position to issue preliminary orders within a timeframe of a few hours, it is out of the question that the interim measures orders by an arbitral tribunal are less effective in terms of enforceability than those ordered by state courts.

Further, the American swimmer Gary Hall obtained a temporary restraining order from the US District Court for the District of Arizona enabling him “to participate in any activities of FINA [the International Swimming Federation] or any of its member federations including international competition, as a competitor until further notice of this court” despite the fact that he had already submitted an appeal, together with an application for provisional measures, to CAS against the decision of FINA to suspend him for doping (CAS 98/218 *Hall v FINA*, CAS Digest II, p. 325).

Again, under Article R37, provisional and conservatory measures may be made conditional on the provision of security by the party seeking them (para. 4). Such security is often a financial guarantee to be given by the applicant seeking such measures against any possible loss suffered by the party subject to the restraining measures in case the applicant is not ultimately successful in

the proceedings. This happens in civil litigation quite often when an interim injunction is awarded by the court.

The criteria for granting CAS preliminary measures 20 are not stated in article R37 of the Code, but are spelled out in the equivalent article dealing with the granting of such measures by the CAS Ad Hoc Division operating at the Summer and Winter Olympic Games. This is article 14 of the Arbitration Rules for the Olympic Games; and provides, in paragraph 2, that, when deciding whether to award any preliminary relief, the following considerations shall be taken into account:

whether the relief is necessary to protect the applicant from irreparable harm;

the likelihood of success on the merits of the claim; and

whether the interest of the applicant outweigh those of the opponent or other members of the Olympic Community.

It is not clear whether these considerations are 21 cumulative or alternative, but, in practice, CAS Arbitrators have wide powers in relation to procedural matters. Also, reference may be made to the following view, with which the writer would entirely agree, expressed by an Ad Hoc Panel sitting at the Salt Lake City Winter Olympics: "... each of these considerations is relevant, but any of them may be decisive on the facts of a particular case" (CAS JO-SLC 02/004, COA v ISU, CAS Digest III, pp. 592 & 593).

In other words, CAS Arbitrators must take all the 22 circumstances of the particular case into account, including the above criteria, when deciding whether or not to grant any preliminary relief.

ENFORCEMENT OF CAS PROVISIONAL AND CONSERVATORY MEASURES

Another important issue that needs to be 23 addressed is the extent to which any preliminary measures granted can be legally enforced either by the CAS Arbitrators themselves or with the assistance of the state authorities.

This is a controversial subject that would merit a 24 lengthy article in its own right. Suffice to say that, in practice, the measures carry a high degree of moral authority and, therefore, National and International Sports Federations tend to comply with them; and through their own internal regularity mechanisms also tend to ensure that

sports persons under their jurisdiction also comply. Apart from this, failure to comply will weaken the position of the defaulting party in the subsequent proceedings. So it is in that party's interest to conform.

As for non-voluntary enforcement by state courts, 25 that is a matter of local law. For example, Swiss Law provides for 'judicial assistance' under the provisions of article 183(2) of the Swiss Private International Law Statute of 18 December, 1987, which states that, if the party concerned does not comply voluntarily, "the arbitration tribunal may call upon the assistance of the competent judge." Under Article 183 (3), the judge may "make the entry of provisional or conservatory orders subject to the receipt of appropriate security." Additional judicial support in Switzerland is available under Article 185 of that Statute.

Judicial support becomes more problematic when 26 the provisional measures are to be enforced outside Switzerland. For example, in Germany this is not a legal problem because Article 1041(2) & (3), ZPO allows German courts to authorise the enforcement of provisional measures ordered by an arbitral body with its seat outside Germany. But in Italy it is a problem, because Art. 818, CPCl. of Italian law does not recognise the jurisdiction of arbitral bodies to grant provisional measures in the first place and will not, therefore, enforce them. As was stated above, legal enforcement of CAS Preliminary Measures depends upon the corresponding provisions of the applicable local law.

CONCLUSION

It is clear that the CAS during its twenty-one years 27 of operations has been successful in being able to grant parties in dispute valuable, relevant and generally effective kinds of final relief in a wide range of sports-related disputes, and also interim protection and relief at an early stage in the proceedings. Such preliminary measures are particularly apposite and effective when taking into account the special characteristics and dynamics of sport, where parties in dispute are often faced by sporting deadlines, particularly in eligibility and selection disputes. CAS preliminary measures not only deserve to be better known, but also more widely and willingly used by the sporting community to ensure that fairness - an essential element in sport -- and justice, are not only done, but seen to be done both on and off the field of play.

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