Global Arbitration Review

The Guide to Advocacy

Editors
Stephen Jagusch QC, Philippe Pinsolle and Alexander G Leventhal

Fifth Edition

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Cultura sportiva – and why an outsider isn't necessarily at a disadvantage

Good advocacy in sports arbitration indeed begins with bringing yourself up to speed with the *lex sportiva*. A complementary, and perhaps equally important, task is to become familiar with what might be called the *cultura sportiva* (i.e., in particular, the unwritten codes of conduct and behaviour that characterise sports arbitration and sports arbitration advocacy). While these musings are based exclusively on practice before the CAS, they likely apply to greater or lesser degrees in other sports arbitral bodies.

With a modicum of literary licence (and assuming the risk of over-caricaturing the topic), the culture that I refer to is best observed – or better said, was best observed before the pandemic changed, perhaps forever, entrenched practices involving physical hearings – in the restaurants of Lausanne the evening before a hearing.

At these restaurants, it is commonplace for two or three panels, often with administrative secretaries (or ad hoc clerks, in CAS parlance) and CAS counsel on one or more of these cases to coincide, together with counsel in one or more cases.

This tends to trigger a hearty series of greetings, hugs, back-slapping and kisses among colleagues who usually know one another quite well. Naturally, and despite the congeniality, the arbitrators tend to sit as far from counsel as possible, and any discussions about the cases in hand are, of course, taboo.

The point is that the repeat players – both as arbitrator and counsel – tend to be a rather small number, and, in time, cannot help but become friendly. Counsel unfamiliar with this culture might find this aspect to put them at a relative disadvantage. But this is not necessarily the case: on the one hand, once you've got your first case, you are well on the way to becoming an 'insider' too. On the other, there may even be a competitive edge for the 'outlier', who doesn't consider his or her opposing number a friend to be hugged, back-slapped or kissed on the eve of trial (i.e., the absence of a possible subconscious brake on your interest and ability in 'going for the jugular' and bringing to bear all of your skills and experience to get the best results for your client).

In any case, be alert to these 'cultural' aspects of sports arbitration, as they will surely add a unique flavour to the experience.

– Clifford J Hendel, Hendel IDR

of Arbitration for Sport.[8] The CAS publishes awards rendered in its appellate capacity, unless the parties agree otherwise, and a few awards made in its ordinary jurisdiction (but only if parties agree). These are available electronically and in some CAS print publications, and the Swiss Arbitration Association reports regularly in its Bulletin[9] on Swiss court decisions involving CAS awards and other international sport arbitration matters involving Switzerland. Some anti-doping organisations, such as USADA, publish all arbitral awards to

8 Available at www.tas-cas.org (amended most recently in 2020).

9 *ASA Bulletin*; see also Massimo Coccia, 'The Jurisprudence of the Swiss Federal Tribunal on Challenges Against CAS Awards', 2013(2) *CAS Bulletin* 2; Pascal Pichonnaz, 'Case Law of the Swiss Federal Tribunal on Challenges Against CAS Awards (2015–2019)', 2019 Budapest Seminar, *CAS Bulletin* 68. Some Swiss cases also are reported in the semi-annual electronic CAS Bulletin and online at www.swissarbitrationdecisionscom.

How to advocate in front of the Basketball Arbitration Tribunal

In a mere decade and a half, an innovative arbitral institution created to provide a simple, quick, fair and inexpensive forum for the resolution of contractual disputes in global basketball has established itself as a highly successful and interesting model for the resolution of sports-related contractual disputes. One may even speculate as to whether the next decade will show the model being applied not only to other sports but also to the world of commercial disputes.

Created in 2007 by the International Federation of Basketball, the mission of the Basketball Arbitral Tribunal (BAT) is to provide an effective and efficient dispute settlement mechanism to promote respect for contractual relations between clubs, players, coaches and agents operating in the world of basketball. Key features of the BAT to note include its voluntary jurisdiction, its decision system and the fact that reasoned awards are not always provided.

Unlike most global governing bodies whose statutes essentially impose arbitration agreements on athletes (the controversial 'forced arbitration' or 'arbitration by reference' clauses recently discussed by the European Court of Human Rights in *Pechstein*), BAT's jurisdiction is entirely voluntary, requiring a specific agreement between the parties. Most BAT cases are decided in equity, not law, because its standard clause provides for deciding disputes 'fairly and honestly'. The arbitrator must focus exclusively on the specific circumstances, avoiding the costly and time-consuming need to prove the contents of the law in question. But it does not permit the arbitrator to ignore the parties' intent: the first principle is *pacta sunt servanda*.

BAT cases are always decided by a sole arbitrator, never by a panel of three. They are selected from a bespoke list of just eight arbitration experts by rotation. In light of this, hearings in BAT cases are rare too. Unlike in some other arbitral bodies, the mere request for a hearing by one or another party is insufficient of itself in light of the time and cost involved.

What is more, reasoned awards are not always provided. Their use is limited to cases involving disputes in excess of €100,000 or smaller disputes in which one or the other party requests a reasoned award and pays an additional advance on costs to finance it. In all other cases, unless the BAT itself considers that the issuance of a reasoned award is important for jurisprudential reasons, the parties will receive only the 'dispositive' part of the award. Nonetheless, the BAT will maintain an internal memorandum of reasons, which will pass the same process of internal scrutiny.

Given the essentially written nature of BAT proceedings, the relatively focused and repetitive nature of the disputes, the availability of BAT jurisprudence to counsel and the generally experienced and sophisticated nature of the BAT arbitrators, secretariat and officers, wise counsel will want to make submissions that are clear and convincing, supporting factual assertions by such documentary evidence as is available, and focused on the specifics of the contractual relation at hand.

Nevertheless, the figures speak for themselves: from two cases in its inaugural year (2007), BAT's caseload has increased steadily to approximately 200 cases in recent years. By some accounts, this makes the BAT the second most active sports arbitral body in the world, and one that may serve as a model not only for other global sports governing bodies looking for an agile, flexible, sensible and well-accepted dispute resolution mechanism for contractual disputes, but eventually for adaptation and use outside the sporting context.

– Clifford J Hendel, Hendel IDR