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Advocacy in International Sport Arbitration

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International sport arbitration has special characteristics that make it similar to, yet also unlike, most commercial arbitration, and good advocacy must begin by taking this into account. The skills and techniques described in other chapters of this book are applicable in sport arbitration but the context typically is significantly different and requires additional knowledge.

Often the arbitration involves a dispute between an international sports federation and an individual athlete. At the dawn of the modern sports law era, a scholar-practitioner described such a case thus:

> *Typically the exclusive jurisdiction of sporting authorities is set down in the by-laws of federations which grant licences to compete in the course of a season or admission to participate in specific events. The federation in question has generally existed for decades if not generations, and has, without any outside influence, developed a more or less complex and entirely inbred procedure for resolving disputes. The accused participant, on the other hand, often faces the proceedings much as a tourist would experience a hurricane in Fiji: a frightening and isolated event in his life, and for which he is utterly unprepared. The same may of course be said for most litigants in ordinary court proceedings. The difference is that whereas in the latter context the accused may be represented by experienced practitioners who appear as equals before the court, the procedures devised by most sports federations seem to be so connected to the organisation that no outsider has the remotest chance of standing on an equal footing with his adversary – which is of course the federation itself.*[2]

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2 Jan Paulsson, 'Arbitration of Sports Law Disputes', *Arbitration International*, Vol. 9 Issue 4, 359, 361 (1993).

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 c*ultura 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 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 which they are parties in which doping violations are established. Although prior awards

8 Available at www.tas-cas.org (amended most recently in 2019).

9 ASA Bulletin; see also Massimo Coccia, *The Jurisprudence of the Swiss Federal Tribunal on Challenges Against CAS Awards*, 2013(2) CAS Bulletin, 2. 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 barely more than a decade, 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 sports 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 the *Pechstein* case), BAT's jurisdiction is entirely voluntary in nature, requiring a specific agreement between the parties. Moreover, most BAT cases are decided in equity, not law, because its standard clause provides for deciding disputes 'fairly and honestly'. This requires the arbitrator to focus exclusively on the specific circumstances of the case, 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: indeed, the first principle of the BAT is *pacta sunt servanda*.

In terms of efficiency, 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 and by virtue of a rotational principle. In light of the foregoing, 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 in holding a it.

What is more, reasoned awards are not always provided. Its 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, 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, and the honourability of BAT awards, 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 (186 cases filed in 2018), with 2019 likely to continue the trend. 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