Arbitration and the games : or the first experience of the olympic division of the Court of arbitration for sport

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Arbitration And The Games Or The First Experience Of The Olympic Division Of The Court Of Arbitration For Sport

By

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1. Goal: Fair, Fast And Free

For the first time in the history of the Games, the Olympic Division of the Court of Arbitration for Sport (CAS), officially named ad hoc Division, was in session last summer from July 19 to August 4, 1996 in Atlanta. The aim of this report is to give an account of the activities of this Division and, consequently, of a new development in sports law. As the author played an active part in putting together and launching the Olympic Division and subsequently acted as chairperson, she will abstain from making assessments which involve value judgments and — it goes without saying — from disclosing information specific to certain procedures which must remain confidential.

COMMENTARY

In creating the Olympic Division, the CAS was pursuing the objective of providing athletes and other participants (Federations, National Olympic Committees, officials, trainers, doctors, etc.) with a body able to resolve disputes occurring during the Games in a final manner within time limits appropriate to the pace of the competition. In order for the decisions to be final, a "real" arbitration tribunal was required, i.e. an independent tribunal following the fundamental principles of procedure. In order for decisions to be made quickly, it was necessary to have an appropriate procedure and organisational structure as well as arbitrators who knew the subject. Furthermore, in order for the body to be accepted by the sporting community, it was desirable that it reflected the diversity of this community and included former athletes. Finally, the free nature of the procedure and the existence of a legal aid fund could only serve to further improve the attractiveness and the quality of the services thus offered to the sporting community.

Amended version of an article published in French in the Bulletin of the Swiss Arbitration Association (ASA) 1996, p. 433, under the heading "Atlanta et l'arbitrage ou les premières expériences de la division olympique du Tribunal Arbitral du Sport."

In other words, if we were to use media-speak, the goal was to offer a fair, fast and free method of resolving disputes.

2. Structure

The structure put in place to reach this goal included twelve arbitrators (judges, practising lawyers and law professors), all of whom had experience in sport (some were even former athletes themselves, such as the American lawyer who won a medal for wrestling at the Barcelona Olympics, and the German dressage champion Rainer Klimke, also a lawyer, who has six Olympic gold medals to his credit). In addition to Americans, one Canadian and some Europeans, the Division included one member from Australia, one from Senegal and one from China.

The Division was headed by a President who is the author of this report, and a Co-President, Judge Raghunandan S. Pathak, the former Chief Justice of India and former judge at the International Court of Justice in the Hague. The Division was assisted by a court office run by the CAS Secretary General, Jean-Philippe Rochat, a lawyer practising in Lausanne, Switzerland.

The arbitrators and Presidents were selected by the International Council of Arbitration in Sport (ICAS) under the aegis of which the CAS operates. ICAS is composed of 20 members which are appointed by the International Sports Federation (IFs), the Association of National Olympic Committees (ANOC), the International Olympic Committee (IOC), and co-opted from amongst people representing the athletes' interest, and from among individuals who are independent of any sports organisation but closely related to international arbitration practice.

When the members of the Olympic Division were selected, the ICAS took into consideration the geographical distribution, the absence of links between the candidates and the sporting bodies likely to appear as parties before the Division, and the qualifications and experience of potential members in sport and arbitration law as well as straightforward sport. To ensure the absence of links, the selection was based on a detailed questionnaire which included a statement of independence.

The structure also comprised an Honorary Board made up of personalities, such as the U.S. athletes Edwin Moses and Evelyn Ashford, the President of the American Arbitration Association William Slate, and the Chief Judge of the U.S. Court of Appeals for the Eight Circuit Richard Arnold, whose support enhanced the credibility of the Division due to their top level functions and achievements in the fields of sports and law.

3. Legal Framework

3.1 Jurisdiction

As regards the individuals and organizations taking part in one way or another in the Olympic Games, the jurisdiction of the CAS stems from the following provisions:

- firstly, since 1995 the Olympic Charter has contained an Article 74 under which "any dispute arising on the occasion of or in connection with the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-related Arbitration";

- in addition, the entry form for the Atlanta Games signed by all athletes, judges, trainers, medical staff, etc included an express acceptance of the jurisdiction of the CAS;

- also, a large number of IFs provide for the jurisdiction of the CAS in their bylaws or regulations.

These provisions stipulate the jurisdiction of the CAS in general without specific reference to the Olympic Division. All the disputes which occur during the Games and which are connected with their operation fall within the scope of the jurisdiction of the Olympic Division (as opposed to the two other CAS Divisions, i.e. the Ordinary Arbitration Division dealing with disputes arising out of commercial contracts related to sport and the Appeals Arbitration Division dealing with challenges of decisions of sports federations or other bodies). This definition of the scope of jurisdiction of the Olympic Division excludes in particular pre-Olympic qualification disputes.

Consequently, the Olympic Division may be called upon to resolve all forms of disputes if they occur between the opening and the closing of the Games. In most cases, as the Atlanta sampling illustrates very well (see below Chapter 6), these are disputes involving the challenge of a decision taken by a sports body (IOC, IF, National Olympic Committee or NOC). The Division's jurisdiction could, however, also encompass "first instance" disputes, for example a tort action brought by an athlete against the organizing committee or the IOC.

Apart from an issue of arbitrability, to which we will come back (see below Chapter 6.4), jurisdiction has not been an issue before the Olympic Division and no defense of lack was raised.

3.2 Applicable Procedural Rules And Seat Of The Arbitration

For the Atlanta Games, the ICAS had enacted procedural rules governing the activities of the Olympic Division (hereinafter referred to as the "Rules" and reproduced in Section A of this publication). These rules are an integral part of the CAS Code of Sports-related Arbitration. The other rules contained in the Code of Sports-related Arbitration, which cover the CAS's usual arbitration activities, i.e. ordinary arbitration and so-called appeal arbitration, do not in principle apply to the Olympic Division procedure; they may provide guidance in the event of a loophole in the Rules, but only to the extent that the rule appearing in the other parts of the Code is reconcilable with the specific constraints of the Olympic procedure, in particular the vital importance of speed.

The Rules provide that the seat of the Olympic Division and of each "Panel" of arbitrators (the Panel represents the arbitral tribunal in the strict sense of the word) should be set by the President of the Division. To ensure the uniformity of the procedural system for all types of CAS arbitrations (whether ordinary, appeal or Olympic arbitration and in this last category wherever the Games take place), Lausanne was chosen as the seat of the Division and of the Panels of arbitrators, since it happens to be the usual seat of the CAS and of the panels sitting in all other CAS arbitrations. The decision relating to the location of the seat is reproduced in the appendix.

Because the place of arbitration was deemed to be in Switzerland despite the fact that the hearings took place at the venue of the Games, the Atlanta arbitrations were governed by Chapter 12 of the Swiss Federal Act on Private International Law of December 18, 1987 ("PIL Act"), which applies to all arbitrations having their seat in Switzerland and in which at least one party is not a Swiss domiciliary. Consequently, the awards issued by the Olympic Division could have been challenged (on very limited grounds such as lack of jurisdiction or violation of due process) by way of an action for vacation before the Swiss Supreme Court, which has jurisdiction over such actions under the PIL Act. In fact, no action for vacation was filed.

3.3 Rules Applicable To Merits Of The Dispute

The Rules provide that the arbitration panel resolve the dispute "pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate."

The applicable regulations include primarily the IOC Medical Code relating to doping and the IF regulations regarding the practice of each sport and the organization of events.

The phrase about the rules the application of which is "appropriate" is familiar to international arbitration specialists (see, for example, Art. 13.3 Arbitration Rules of the International Chamber of Commerce). It can be seen as a reference to the conflict rule of proximity or closest connection (which is, in particular, embodied in Art. 187 Swiss PIL Act).

As regards general principles of law, these cover a vast area. More than principles relating to international contract law (e.g. party autonomy, pacta sunt servanda, good faith, legitimate expectations of the parties), these are principles of public and criminal law which are called upon to play a role in the decisions of the Olympic Division (nulla poena sine lege, proportionality of sanctions, good faith in administrative matters, principles of interpretation of regulatory texts, etc.)

4. Course Of The Arbitration

Now that the legal framework is set, this paragraph will briefly deal with the contents of the Rules, the actual implementation of which will be covered later (see below Chapters 5 and 6).

The arbitration procedure is triggered when an application is filed with the Court Office of the Division, preferably on a standard form prepared for this purpose (see below Chapter 5). The President of the Division then forms a Panel of three arbitrators and appoints the President of the Panel. To save time and to reduce the risk of arbitrators being challenged, the Rules do not grant the parties the right to choose their arbitrator.

In addition to the pre-Olympic selection carried out by the ICAS when the Division is formed, the independence of the arbitrators assigned to a given dispute is further ascertained at the time the Panel is selected taking account of the identity and the nationality of the parties. The arbitrators then sign a new specific statement of independence. The Rules provide also for a challenge mechanism falling within the powers of the President of the Division.

The President of the Division, or the Panel if it has already been set up, can grant a stay of the execution of the decision being challenged or other provisional relief ex parte. When granting such relief, the Panel must consider whether the relief is necessary to protect the applicant from irreparable harm, whether the applicant is likely to succeed on the merits, and whether the interests of the applicant outweigh those of the opponent or of other members of the Olympic community.

While allowing the Panel broad discretion to shape the procedure and, in particular, the evidentary proceedings as it sees fit considering the needs of a specific dispute, the Rules provide that, in principle, the Panel calls one single hearing, during which each party presents its case (with or

without the assistance of counsel or other persons) and produces all its evidence (witnesses, documents, experts).

After the hearing, the Panel renders a decision within 24 hours following the filing of the application, except if the President of the Division exceptionally grants an extension. As a rule, the decision (rendered by majority or, failing a majority, by the President of the Panel) contains brief reasons. It is forthwith served on the parties.

Depending on the circumstances of the case, the decision may consist of a final award or of an order referring the dispute to usual CAS proceedings, i.e. either ordinary or appeal arbitration. This second alternative may be appropriate for complex disputes which need not be resolved before the Games end. The Panel can also combine these two alternatives and issue a final award on part of the dispute, while referring the unresolved part to usual CAS arbitration. The referral decision may include an order for preliminary relief pending the outcome of the usual CAS arbitration. The Rules provide for the practicalities of the transfer from the Olympic to the usual arbitration procedure. Among these practicalities, one notes that, in the interest of efficiency, the same arbitrators continue to be entrusted with the case and that the parties waive the right to appoint an arbitrator, to which they may be entitled under the rules applicable to the usual arbitration procedure.

5. Practical Organization

To implement the procedural steps just set out, in particular to resolve cases within 24 hours, it was vital to introduce a suitable practical method of operation and to anticipate a number of tasks which are ordinarily carried out if and when they arise during the arbitration. For example:

- a dozen standard forms were available for notices, procedural order, awards, etc; they just needed to be completed with the appropriate information in a specific case, thus saving substantial drafting time;

- a list of scientific experts in the area of doping had been drawn up beforehand, having checked the availability, qualifications and any conflicts of interest on the part of these experts;

- a list of lawyers specializing in sports law in attendance in Atlanta had been prepared for the attention of the parties who requested it (which was the case on several occasions);

- interpreters and stenotypists, as well as volunteers from the American Arbitration Association were available practically around the clock;

- all the members of the Division could be reached at any time through beepers;

- daily Division meetings made it possible to keep all members informed of the cases in progress and to debate general procedural and substantive questions in such a way as to develop a common approach even before problems arose;

- computer-based legal research resources were available (Swiss Supreme Court cases on CD ROM, computerised access to all CAS cases, possible use of the research services of a local law firm), in addition to more traditional resources such as pre-established legal files on important topics;

- the Olympic Division was also ready to react very promptly to any interference of local courts in the arbitration process, e.g. by way of a TRO enjoining the CAS from proceeding on a given application. For that purpose, well in advance of the Games, it had retained the Atlanta firm of Alston & Bird, who had familiarized itself with the workings of CAS and prepared model pleadings. Fortunately, those pleadings turned out not to be necessary.

Another important practical aspect in the Olympic context was confidentiality and press relations. This aspect was the subject of guidelines drafted by the President of the Division, the contents of which can be summarised as follows:

- in CAS arbitration, except where there is an agreement amongst the parties to the contrary, the awards in appeal arbitrations (appeals from decisions of sporting bodies) are not confidential (Article R59 of the Code of Sports-related Arbitration applied by analogy to the Olympic Division; it should, however, be noted that for "first instance" or ordinary arbitration the rule is the opposite, in accordance with Article R43);

- to avoid the risk of members of the Division making statements, which might not be adequate considering their function, the arbitrators, the President, the Co-President and the staff of the Division undertook not to make any declarations to the media during their stay in Atlanta. Only the Secretary General, who was appointed spokesperson of the Division, was authorized to express himself in public;

- what was the spokesperson entitled to disclose? During the course of an arbitration, he could confirm that a claim had been filed, state the identity of the parties and the arbitrators, give indications on any provisional relief ordered and announce the 24 hour time limit set for the award. On the other hand, he was to refrain from making comments about the contents of the proceedings, particularly about the evidence. At the end of the dispute, he could state the holding of the award and give a summary of the reasons.

In fact, the Division has also always issued press releases immediately after a decision had been served on the parties.

6. Cases Submitted To The Olympic Division

The Olympic Division handled six arbitrations, two of which were consolidated. The following developments set out the main aspects of these six proceedings.

6.1 US Swimming v. FINA

In an application filed on Sunday July 21 at 6.10 p.m., the US Swimming Federation challenged a decision of the International Swimming Federation (FINA) allowing the Irish swimmer Michelle Smith to participate in the 400 meter free style heat which was to take place the next morning. The US Swimming Federation contended that she had been entered too late.

The Panel of arbitrators was immediately set up and included Jan Paulsson (Sweden), Hugh Fraser (Canada) and Luc Argand (Switzerland). The summonses for the hearing scheduled at 11.00 p.m. on the same night were finally delivered in the evening, after various attempts, at the swimming venue, where competitions were in progress. Apart from the parties, the arbitrators summoned the

German delegation which supported the US position before FINA, the Irish delegation whose athlete was at issue, and the IOC.

The hearing, recorded by a court reporter who produced an immediate transcript, lasted until 0.30 a.m. At 2.00 a.m., seven hours after the application was filed, the arbitrators issued their decision. They dismissed the application, because late event-specific entries were frequent occurrences at the Games for all sports and because FINA's regulations did not impose a stricter regime of adherence to event entry deadlines. The panel immediately served the holding of its award on the parties and followed up with the reasons in the course of the next morning, still within the 24 hour time-limit.

As a result, Michelle Smith took part in the 400 meter freestyle qualifying heat on the same day. She did even better than that because she then went on to win the gold medal in this event.

6.2 Andrade / White / Little v. NOC Cape Verde

On the evening of July 26, Andrade, the first Cape Verde athlete to qualify for the Olympic Games, lodged an application on his own behalf and on behalf of his trainer and his medical advisor, requesting the cancellation of a decision made by the Cape Verde NOC which had excluded the claimants from the Games for disciplinary reasons. This exclusion prevented Andrade from taking part in the 110-meter hurdle heat which were taking place two days later.

The Panel was composed of Michael Beloff (United Kingdom), Christopher Campbell (USA) and Mingzhong Su (China). In the evening of July 26, the Panel granted a stay of the execution of the exclusion decision and consequently ordered the IOC to provisionally reactivate the claimants' credentials without which the latter would no longer have had access to the Olympic Village. These provisional measures were enforced the same evening.

The hearing took place the day after. In the afternoon, the Panel made its decision (holding and reasons), which granted the application and declared the exclusion decision invalid and of no effect, because the NOC had not followed the procedure provided in the Olympic Charter, which procedure makes the exclusion subject to the approval of the IOC Executive Committee. The claimants were therefore restored to their position as members of the Cape Verde delegation.

6.3 Andrade 2

The same case was the subject of a second set of proceedings initiated late in the evening of July 31. By then, the Cape Verde NOC had obtained the approval of the IOC Executive Committee and made a new exclusion decision.

The case was assigned to the same panel of arbitrators. This time, due to the late hour and the urgency, the stay was granted by the President of the Division and the related measures (reactivation of credentials, escorted access to the Olympic Village) were implemented immediately.

The hearing took place the next day. As the decision was not particularly urgent, it was delivered, along with the reasons, the day after that. The arbitrators again granted the application. Although the IOC approval had this time been secured, neither the NOC nor the IOC had heard the parties before excluding them. Or, in the terms of the award:

> "While this Panel does not consider that natural justice or due process requires the full panoply of a trial procedure to be deployed

> before such [exclusion] decisions are taken, it considers that any person at risk of withdrawal of accreditation should be notified in advance of the case against him and given the opportunity to dispute it, in accordance with elementary rules of natural justice and due process. [. . .] It is not without significance in this context that the sixth principle of the Olympic Charter stresses the importance of "fair play" which, in the view of the Panel, is as pertinent to the disciplinary process as it is to competitive sport."

Having said that, the Panel did not rule on the merits of the NOC's grounds for exclusion. Indeed, it took the view that it was not appropriate for it to substitute its own assessment for that of the national delegation, whose powers in matters of exclusion arose out of the Olympic Charter.

6.4 Mendy v. AIBA

On July 31 at 4.20 p.m., the French boxer Christophe Mendy lodged an application challenging the decision of the International Amateur Boxing Association (in French, Association Internationale de Boxe Amateur, AIBA), which confirmed his disqualification for punching his opponent below the belt during a quarter final match in the heavyweight titles. The French Boxing Federation supported Mendy's application. The result of the arbitration had an impact on the participation in the semi-final and the outcome was therefore urgent.

At the time when the case was tried, the competitions were in progress and the representatives of the federations were not free to attend a hearing. Making use of the procedural flexibility available under the Rules, the Panel (composed of Luc Argand, Switzerland; Youssoupha Ndiaye, Senegal; and Jan Paulsson, Sweden) decided therefore not to hold a formal hearing. With the parties' consent, they heard the parties separately, one of them just by telephone. They then watched the video recording supporting the application during their deliberation.

This accelerated procedure made it possible to give a decision 3 hours and 40 minutes after the application had been filed, the reasons being notified the morning of the day after, again within the 24-hour time limit.

This case raised an issue of arbitrability, which the respondent did not put forward, but which the arbitrators addressed ex officio. Indeed, the dispute hinged on the application of a purely technical sports rule: was the punch a low blow or not? For years, the Swiss Supreme Court (before which an award could be challenged) has consistently held that the application of a technical rule, or a game rule as opposed to a rule of law, cannot be reviewed by a court or arbitral tribunal, because the game rules are outside the reach of the law (see in particular the Swiss Supreme Court cases published in Arrêts du Tribunal fédéral 120 II 369/370, 119 II 171/280, 118 II 12/15-16).

The scope of the game rule not subject to court review has dwindled away over the years. In addition, recent scholarly writings have challenged the very distinction between the rules of the game and the rule of law (in particular M. Baddeley, L'association sportive face au droit, Basle and Francfurt 1994, pp. 337-378; P. Jolidon, Ordre sportif et ordre juridique, A propos du pouvoir juridictionnel des tribunaux étatiques en matière sportive, Revue de la Société des Juristes Bernois 1991, p. 234). According to these writers, top competition sport is not a game at all any more. It is an unremitting battle for enormeous stakes in some cases. "Sport is war" was the headline in an edition of a major European monthly paper before the Atlanta Games (Le Monde Diplomatique,

Manières de voir n° 30, mai 1996). And war cannot — must not — be outside of the reach of the law.

In addition, the Swiss Supreme Court's position is an isolated one in comparative law. If the CAS intends to be accepted as the body for resolving sports disputes throughout the world, it cannot base its decisions exclusively on comparatively unusual Swiss legal rules.

This thinking lead the Panel to decide that the dispute was arbitrable despite the fact that it involved the application of a technical rule. Therefore, the arbitrators considered that they had jurisdiction over the Mendy application.

Even though it had jurisdiction, the Panel held that it should exercise a definite restraint in assessing the application which the sports referee had made of the technical rule. Indeed, the sports referee is closer to the facts and more familiar with the day-to-day handling of the technical rules. He is thus in a better position to decide on the application of a technical rule than the legal arbitrator. Hence, it makes sense that the referee's view prevails, unless there is a gross violation of the athlete's rights, or in the Panel's words "an error of law, a wrong or a malicious act." The precise meaning of these terms will obviously require refinement in the future.

6.5 Korneev And Russian NOC v. IOC; Gouliev And Russian v. IOC

On July 29, 1996, two Russian athletes, the swimmer, Korneev, and the wrestler, Gouliev, filed applications challenging an IOC decision, whereby they were stripped of their medals following a positive drug test. The test had revealed that they had taken bromantan, a still relatively unknown substance, which the IOC Medical Commission had classified as a stimulant as defined by the Medical Code and therefore as a banned substance. Before the Olympics Division, the Russian NOC alleged that it had recommended the use of this product to all its athletes in order to strengthen their immune system which was particularly put to the test by the humid and hot Atlanta climate, and not for the purpose of enhancing their performance.

Subsequently, other Russian athletes tested positive to bromantan, which lead to further sanctions by the IOC. The sanctions were not, however, brought before the Olympic Division, the Korneev/Gouliev proceedings apparently being considered to be test cases which would in practice dispose of the further sanctions as well.

As the two applications raised the same issue, the proceedings were consolidated. After a first hearing of the parties, the arbitrators (Vince Bruce, Australia; Gérard Rasquin, France; and Barbara Shycoff, USA) appointed a scientific expert not without having given the parties a prior opportunity to comment on the person and the assignment of this expert. The expert produced a report within 24 hours and was then heard on two occasions over the following days. During these hearings, where interpreters were used in three languages and which generated hundreds of pages of transcripts, the Panel also heard the witnesses called by the parties. In parallel, it set the parties various time limits to produce documentary evidence, such as scientific reports and notes, and minutes of the sessions of the IOC Medical Commission.

Having completed such fact finding, the arbitrators held that the scientific evidence on record did not support the conclusion that bromantan had been used as a stimulant with a sufficient degree of certainty to justify such a serious sanction as the withdrawal of an Olympic medal. In fact, the expert was not able to rule out the possibility that the product had been absorbed for the sole purpose of strengthening the athletes' immune system. The Panel thus gave the athletes the ben-

efit of the doubt, but not without restating the overriding importance of the fight against doping and the principle of strict liability for doping offenses, a principle which is well established in the case law of the CAS.

Despite the complexity of the scientific problems raised, the decision was rendered on the last day of the competitions. The uncertainty about the final winners of the medals was thus lifted before the closing of the Games.

7. Conclusion: What Lessons Are To Be Learned?

When the Games came to an end, the members of the Olympic Division returned home at the four corners of the earth. Did they return having achieved their "fair, fast and free" goal? Apart from some practical improvements to the mechanism for the future Olympics, what lessons can be learned from their experiences? At a time when many litigants complain about slowness and cost of traditional justice, including arbitration, when alternate methods of settling disputes are used increasingly, can we transpose the concept of the Olympic Division or some of its aspects to other areas? Fascinating issues, to be sure. The author of these lines will, however, leave it up to others with more distance to give answers. ■