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# Arbitration in the Realm of Sports Law

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DEEPANSHU VERMA<sup>1</sup>

## ABSTRACT

*Sport is a massive industry, accounting for more than 3% of global trade. The English courts have long recognized that sports-related issues are best handled preferably through the use of a quasi-independent, arbitral-based disciplinary process. Sport, in particular, exemplifies the advantages of alternative dispute resolution (ADR) over judicial proceedings. When opposed to litigation, Arbitration is time-tested and cost-effective. Arbitration is a private and confidential process designed for rapid, practical, and cost-effective resolutions. Sports arbitration is a growing discipline of alternative dispute resolution that incorporates new ideas and techniques to meet the unique needs of sports conflicts. Under Indian law, sports arbitration is still a relatively new concept. The Court of Arbitration (CAS) has had its global forum mostly ignored in India. Section 34 of the Arbitration and Conciliation Act, 1996 allows Indian courts to overturn a foreign arbitral tribunal's decision. As a result, even a sports arbitral award must be inspected by Indian courts before being enforced in India. Even if an award is not contrary to public policy, the right to challenge it under section 34 of the Act for any other reason cannot be taken away. The Article explores the framework of the Court of Arbitration (CAS) in light of relevant rulings and takes into consideration the presence of Arbitration pertaining to matters of sports law in India.*

## I. INTRODUCTION

Halsbury's Laws of England define Arbitration as "the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of the law by one or more persons (the arbitral tribunal) instead of by a court of law."<sup>2</sup>

Arbitration functions as an alternate dispute resolution mechanism, whereby a mutually selected arbitrator is appointed to resolve the dispute without litigation and is subject to being included in the contract as a clause to be referred to in case of a dispute arising. The arbitral tribunal so formed to determine the outcome of the dispute, and the composition of such tribunal can vary from a sole arbitrator sitting, two or more arbitrators, with/without a chairman, and various other combinations. An arbitrator enjoys

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<sup>1</sup> Author is a LLM Student at O. P. Jindal University, India.

<sup>2</sup> HALSBURY'S LAWS OF ENGLAND (Butterworths 1991).

immunity from liability for any act done or omitted in the course of acting as an arbitrator unless the arbitrator acts in bad faith

Arbitrations are commonly divided into two types:

- i. Ad hoc arbitrations, where the arbitral tribunals are appointed by the parties or by an appointing authority chosen by the parties.
- ii. Administered arbitrations, where the Arbitration is administered by a professional arbitration institution providing arbitration services, for instance, ICC in Paris or the American Arbitration Association in the United States.

A decision of the arbitrator is legally binding on both the parties, and an arbitral award can be effectively enforced in other nations with the aid of the provisions of the New York Convention of 1958<sup>3</sup>. While it places its reliance on consent as the main character of the practice, the practice is based on neutrality. It maintains the confidentiality of the procedure by preserving the respective goodwill and reputation of the parties and also being quick in terms of solving the dispute, which is not the case in traditional litigation. The arbitration procedure allows the arbitrators and the parties to work with significant freedom and flexibility. Parties can choose their arbitrators, the place of Arbitration, and even the language of the proceedings.

<sup>3</sup> New York Convention, The New York Convention, <https://www.newyorkconvention.org> (last visited January 9, 2022).

However, the parties are still bound not to deviate from the principles of fairness and equality, the right to be heard, and the right to be represented by a lawyer.

## II. COURT OF ARBITRATION FOR SPORT (CAS)

Sports law is exceedingly diversified, and it is also not only international but "global," it is made up of rules set not just by governments but also by national and international sporting organizations.<sup>4</sup> Constituted in 1984 by the International Olympic Committee (IOC), the Court of Arbitration for Sport (CAS) is based in Lausanne, Switzerland. It is a private international arbitral institution subject to Swiss law. It constitutes a developing body of private international sports law. The Code of Sports-related Arbitration, known as the 'CAS Code', sets forth the rules governing the organization of the CAS and all jurisdictional and procedural matters under the Court of Arbitration for Sports.

Further, it also provides that an award by the Court of Arbitration for Sport is final and binding on the parties. A decision of the CAS is considered as an arbitral award under Swiss law under Article 190(2) of the Swiss Federal Code on Private International Law. However, it's unclear if the award would be enforceable in India if it went against the country's national policy.<sup>5</sup> An important driver of the IOC's initiative was the intention to reduce the burden of litigation at ordinary courts. With a spike in

<sup>4</sup> Lorenzo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, GERMAN LAW JOURNAL, 1317–1340 (2011).

<sup>5</sup> M. Mudgal, LAW AND SPORTS IN INDIA (2011).

the number of international sports-related disputes, organizations were often forced to defend themselves at various courts.

Court of Arbitration for Sports performs the role of facilitating dispute resolution in sports-related matters. It works under two types of jurisdictions, wherein the first is appeal jurisdiction, and the other is ordinary jurisdiction. In the first instance, the matters are referred to the ordinary jurisdiction. Thus, if a dispute between two parties occurs, CAS hears the same based on a pre-existing arbitration agreement or a later agreement. The ordinary arbitration procedure functions in a similar manner to that of any other arbitration system, wherein the parties agree to refer the dispute to CAS as the first instance tribunal. The matters can range from disputes relating to sponsorship deals to a sports person's contract of employment. CAS arbitrations are required to be seated in Switzerland and are particularly of paramount importance because it is well known that the choice of the Arbitration establishes an association between the Arbitration and the legal and jurisdictional system of the said chosen territory. The place of Arbitration chosen may be of relevance in terms of legality to determine issues such as the national law applicable to certain procedural issues or the national law governing interim or conservatory measures.

In the initial years, very few cases were litigated before the CAS as sports organizations did not include the CAS arbitration clause in their contracts. In 1986, the very first case was

registered in the CAS docket, following which the dynamic development of a sports law has led to the twin concepts of '*Lex-Sportiva*' (meaning technical rules associated with Sporting Law, which regulates the public aspect and includes the "specificity of sports" within itself) and '*Lex-Ludica*' (meaning the "spirit of sports," of ethical sporting conduct, sportsmanship, fair play and other areas that are privately regulated in terms of athletes' sporting conduct in tournaments). The term 'twin concept' was coined by Matthieu Reeb, the acting Secretary-General of the CAS, in 1986 and developed through precedents by international institutions. Article 33 of the CAS Code holds that every arbitrator shall appear on the list drawn up by the ICAS, i.e., the 'CAS List of Arbitrators'. Originally comprising 60 members, the CAS list of arbitrators now consists of approximately 280, wherein each is appointed for a renewable period of four years. The list of arbitrators is a closed one and requires members to be appointed from the same.<sup>6</sup>

Only an arbitration agreement between the parties that includes resort to the CAS qualifies a case for submission to the Court of Arbitration for Sports. In essence, there are two categories of disputes which are submitted.

#### **i. Commercial**

The first category of disputes essentially involves those relating to the execution of contracts, such as those relating to sponsorship, the sale of television rights, the staging of sports events, player transfers, and relations between players or coaches, clubs, and agents. CAS acts as a court

procedural-rules.html (last visited January 9, 2022).

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<sup>6</sup> COURT OF ARBITRATION FOR SPORT CODE, <https://www.tas-cas.org/en/arbitration/code->

of sole instance for commercial disputes, as well as any civil liability issues which may arise during the course of a sports competition, such as an accident to an athlete.

## ii. Disciplinary

The second group of disputes submitted to the CAS involves a large number of doping-related issues. Aside from that, CAS is also called upon to judge on numerous disciplinary situations such as on-field violence, referee abuse, etc. As a measure of the resort, disciplinary issues are dealt with by the competent sports authority at first and subsequently referred to the CAS as a subject of an appeal at last instance.<sup>7</sup>

### *How is the Court of Arbitration for Sports (CAS) advantageous in the realm of sports disputes?*

- There are currently more than 300 arbitrators from 87 countries qualified to hear CAS disputes, who are experts in sports-related disciplines and better qualified than a civil judge who may not possess any specific knowledge with regard to a sport. The arbitrators at CAS are formed by high-level jurists and people generally held in high regard in the international sports community.
- The procedure adopted by the CAS in their functioning and settlement of disputes is flexible and informal, and it also provides for mediation services where required.

- The economic factor in resorting to the settlement of disputes through the CAS over traditional litigation allows a lower legal cost to be imposed on the participants.
- The expeditious proceeding is an unparalleled element of CAS, and cases are heard and determined within a few months from the date of reference. Adding to the same, awards are required to be made within 24 hours during the Olympics.
- The procedure adopted by CAS is a private method and is thus conducted without the public or any media interference. The arbitrators and CAS staff are obligated not to disclose any information connected with the dispute.

### *The Gundel Case*

In 1992, Mr. Elmar Gundel challenged an arbitral award issued in a disciplinary case before the Swiss Federal Tribunal, also known as the Swiss Supreme Court. Mr. Gundel primarily contended that the award issued was invalid because the Court of Arbitration for Sports did not meet the requirements of independence and impartiality as needed to be deemed a proper arbitral institution. This led to a landmark judgment being issued on March 15, 1993, by the Federal Tribunal with regard to the same, revolutionizing CAS.<sup>8</sup>

The Federal Tribunal recognized the CAS as a true and independent arbitral institution whose

<sup>7</sup> HISTORY OF THE CAS, <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> (last visited January 9, 2022).

<sup>8</sup> Gundel v. Fédération Equestre Internationale, 15 March 1993, Swiss Federal Court.

panels were proper arbitral tribunals issuing regular arbitral awards, and therefore in the eyes of the Federal Tribunal's view, there was no question that the CAS was sufficiently independent of adjudicating disputes having as a party to international federations. The Federal Tribunal also recommended greater independence of the CAS be ensured vis-à-vis the International Olympic Committee.<sup>9</sup>

In 2005, American sprinter Tim Montgomery was banned from international competition for two years by the CAS arbitration tribunal as a result of doping instances, despite the fact that Montgomery had never failed a doping test. The CAS ruled that a doping violation was found on the basis of the third-party evidence called against Montgomery, most of which connected Montgomery to a steroid scandal in 2003.

### ***The Caster Semenya Ruling***

On May 1, 2019, the CAS ruled on the Caster Semenya controversy, which had stirred quite an issue within the human rights and sporting community. Caster Semenya, a South African middle-distance runner, was barred from competing at the World Championships in Doha to defend her 800-meter title after the Swiss court stood firm on the rule that required her to take testosterone-reducing medication.<sup>10</sup>

The CAS Award in this scenario highlighted that women athletes could be banned from certain international women's track events if they have

naturally produced testosterone above five nanomoles and are sensitive to testosterone. The result of this conclusion legitimized the exclusion of women with certain intersex variations from specific women's competitions if they failed to lower their natural hormone production medically.

The decision did not see a positive reaction from the community, and various mainstream media outlets supported Semenya. The testosterone rules were also criticized by the World Medical Association as being 'contrary to international medical ethics and human rights standards.

The dispute further became a matter ultimately concerning human rights, where the tests carried out were called to be discriminatory in nature. However, the CAS panel went on to hold that in the Caster Semenya case, the regulations so concerned are based on scientific evidence and can be used as a criteria to define the category 'women' for the restricted sport events.

### **III. SPORTS ARBITRATION IN INDIA**

Arbitration in India is primarily governed by the Arbitration and Conciliation Act, which is based on the UNCITRAL Model Law. Part I of the same applies to arbitrations held in India, including both domestic and international, whereas Part II applies to arbitrations held outside of India. With regard to international arbitrations, it incorporates rules governed by the New York or Geneva Convention as required.

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<sup>9</sup> Mathew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 Pepp. Disp. Resol. L. J. 51 (2009).

<sup>10</sup> Mokgadi Caster Semenya v. International Association of Athletics Federation, <https://www.tas->

[cas.org/fileadmin/user\\_upload/CAS\\_Award\\_-\\_redacted\\_-\\_Semenya\\_ASA\\_IAAF.pdf](https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_-_redacted_-_Semenya_ASA_IAAF.pdf) (last visited January 9, 2022).

In sports, any dispute is first referred to the federations that govern a particular sport and subsequently to the international authorities that govern the sport. The existing component in the Indian legal executive prompted a large number of cases being accumulated and postponed. In India, a few associations make up the administering specialists of issues in sports, namely<sup>11</sup> -

- The National Sports Policy of India
- Sports Authority of India (SAI)
- The Sports Broadcasting Laws and Sports Law and Welfare Associations of India.

These associations oversee and control the issues that emerge in the circle of sports law in the nation apart from the courts. However, there is no national or state legislation for the regulation of sports in India. Arbitration quickly gained momentum as the opted choice among the several methods of disputes resolution, as it led to the steady disposal of disputes over litigation. With major issues being recognized in sports, the first arbitration center in India was inaugurated in 2009 in Delhi. The Indian Olympic Association (IOA) established the Indian Court of Arbitration for Sports in 2011 under the chairmanship of Dr. AR. Lakshmanan, a former Supreme Court Judge and former Law Commission Chairman, resolve all sports-related issues in India, known as the Indian Court of Arbitration for Sports (ICAS).

In the case of Indian wrestler Narsingh Yadav, who was caught up in a doping scandal before the 2016 Rio Olympics, his career was stopped indefinitely. The verdict was decided when the Court of Arbitration for Sports (CAS) upheld the World Anti-Doping Agency's appeal against the clean sheet given to him. Narsingh Yadav was caught in a doping controversy shortly before Rio Olympics 2016, where he was set to represent India in the men's freestyle 74kg category.<sup>12</sup> After returning positive for a banned steroid following a doping test, he was later cleared. However, an urgent application before the CAS ad hoc division challenging the decision was upheld, and the ad hoc division of the CAS slapped a four-year ban on the Mumbai wrestler.

India is in an appalling state with reference to the need for national legislation to move further in terms of development, promotion and uniform regulation of sports in India. There is a distinct legal system emerging from the field of sports, which requires attention and the legislature need to intervene for the same to flourish as no athlete should be made to spend their career in disputes.

#### IV. CONCLUSION

The Article attempts to examine the role of Arbitration in sports law, in light of impact of the Court of Arbitration for Sports (CAS) in the realm of sports law and trace the changes that have been brought about in India too along the

<sup>11</sup> *Viability of Sports Arbitration in India*, iPleaders, (January 9, 2022, 9:40 PM), <https://blog.ipleaders.in/viability-sports-arbitration-india/>.

<sup>12</sup> Shivang Yadav and Harshit Gupta, *Arbitration in*

*the Realm of Sports Law – Need of the Hour or Not?*, Jurist (January 9, 2022, 9:38 PM), <https://www.jurist.org/commentary/2020/04/yadav-gupta-sports-arbitration/#>.

lines of Arbitration and governance in matters of sports law.

Prior to the development of a dedicated "sports law" and setting up of institutions such as the Court of Arbitration for Sports (CAS), the interpretation of sporting disputes was being handled by Civil Courts who interpreted it as per their interpretation of ordinary civil law without any specific knowledge of the domain. Sports Law consists of its own technicalities and nuances, and the deciding institution or body for such disputes needs to have a thorough understanding of the concept and the field.

With the dynamic development of a dedicated sports law, the CAS has become a central body for the settlement of sports-related disputes. It possesses a distinct body of precedents that need to be adhered to, and knowledge needs to be discipline-specific. CAS also provides legal opinions and advice on sports-centered issues.

The framing of a concise and distinguishable dispute resolution practice, placing emphasis and reliance on Alternate Dispute Resolution, adds advantages to athletes. They benefit from access to high-quality dispute resolution services in their own countries, which would eliminate language barriers and reduce the costs that are currently associated with international tribunals, thereby increasing access to justice. To add further, each sport would maintain its independent arbitration services for matters of international dispute and ensure an enhanced understanding of disputes by arbitral tribunals.

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