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ROAD TO RIO

6: Arbitration in Sport

Nicholas Randall QC is recognised as a leading sports lawyer. He is a member of the FA Premier League Panel and regularly sits as an FA appointed Arbitrator as well as being a member of the Sports Resolutions Panel. He specialises in all aspects of sports law including regulation, discipline, contract, commercial, employment and competition law.

A key feature of the sporting landscape is the role of arbitration. It is increasingly rare for sports disputes to be resolved in the ordinary Courts, particularly where the sport in question is well developed and subject to appropriate regulation. This article sets out the way in which sports arbitration works in England and the typical features of the system.

The starting point is that there are some disputes which are not capable of being resolved through arbitration. Two obvious examples in the sporting context are criminal proceedings and certain statutory employment disputes, such as those concerning unlawful discrimination. Save for these excluded categories a very wide range of sporting disputes are capable of being sent to arbitration and will normally be resolved in this way.

Although the general approach of the English Courts is to support arbitration as a method of resolving disputes, this approach is not without its critics. These criticisms are based on two primary grounds. The first is that the common law is being deprived of important opportunities for its development in the commercial context. This is obviously a criticism that is wider than just sports disputes. The second primary ground of criticism is that, in the sporting context in particular, the individual participant has no practical choice but to agree to arbitration because it is a requirement of taking part in the sporting competition itself that rules relating to arbitration will apply. This second criticism undoubtedly has some force particularly in a jurisdiction such as England where a high quality and independent judiciary is available to hear disputes. Such criticisms also have force where the governing body is seen to develop unhealthy systems of patronage where places on panels are in the gift of the governing body or where the sport has become a part of the national fabric and transparency may be considered to be a healthy influence.

However these criticisms have less force when the global nature of sport is recognised. In particular global governing bodies have obligations to ensure that their sport is pure and free from political interference. Once this context is

understood it can be seen that arbitration is a key part of the armoury of sporting competition.

As set out above the general approach of the English Courts through the Arbitration Act 1996 is to support arbitration. It is seen as a vital element of a modern system of commercial rights, and the Courts are obliged to take a very strict approach to any attempt by a party to circumvent or evade the operation of an arbitration agreement.

The arguments in favour of arbitration are numerous. Some of the advantages include: (a) efficiency through developing particular forms of arbitration which are tailored to specific types of dispute – a classic example of this is domestic football which has a multitude of arbitral dispute processes operated not only by the FA as the governing body but also through the different leagues which will have distinct structures for player disputes, club disputes and governing body disputes; (b) the parties can select who will adjudicate their disputes. In particular they can select not only lawyers who have particular insight into the dispute but also other former players and officials who will have in depth experience and understanding of the subject matter of the dispute; (c) the confidentiality of the proceedings; and (d) client autonomy, which can be of considerable assistance in the sporting context. The concept of party autonomy means that the parties are generally entitled to dictate the speed and structure of the arbitral process provided they are in agreement on the approach to be adopted.

Notwithstanding the obvious benefits of arbitration it is still necessary to establish that there is an arbitration agreement that covers the dispute in question. It is in this area that legal issues can often arise. The relevant context is important since, if no arbitration agreement exists which covers the dispute, recourse to the domestic Courts is an absolute right of the participant concerned. In particular issues can arise as to when disputes crystallise and when the individual is said to possess the relevant quality of a ‘participant’ so as to be covered by the terms. This can cause considerable difficulties in sports with an international element where individuals may have moved to other national leagues before the dispute in question crystallises and the claim is commenced.

Furthermore there may be cases in which the rules of the governing body require that disputes are resolved by arbitration but that provision is overlooked when the individual parties contract. This can lead to disputes as to how the arbitration agreement is said to be implied or imposed into the agreement between the parties. It is also not unknown for some individuals to deliberately put themselves beyond the jurisdiction of the governing body and its rules (or attempt to do so). This has certainly been the approach taken by some unscrupulous agents within the football community. If an arbitration agreement can be established it will be open to a party

to block any attempt to bring Court proceedings by the other party to that agreement. In particular, section 9 (1) of the Arbitration Act 1996 provides that any party to an arbitration agreement against whom legal proceedings are brought, in respect of a matter which under the agreement is to be referred to arbitration, may apply for a stay of the proceedings. If such an application is made, section 9 (4) provides that:

> *"On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed."*

As with all contractual rights and obligations there are numerous different versions of arbitration agreements within the sporting context. A striking example of this is to distinguish between the rules of the IFA (Northern Ireland) and the English FA. The IFA rules simply provide for arbitration but they are silent on all other matters including appointment of the arbitrators and the procedure to be adopted. This contrasts with the Rule K procedure which applies to the English FA and which sets out a detailed procedure for all matters leading to the conclusion of the arbitration. There may also be occasions when the sporting body alters the normal rules of contract and requires the arbitrators to act in the interests of the sport rather than apply the strict rules of law that are otherwise applicable.

It is typical for sporting arbitration agreements to restrict the extent to which the Court can interfere with the arbitral process. It is common for appeals on points of law, for example, to be excluded (a step which is permissible under section 69 of the Arbitration Act 1996) although the Court will always retain powers in relation to the arbitral process itself to ensure that it has not gone seriously astray – for example if the tribunal lacked substantive jurisdiction to determine the dispute, or if there was some other serious irregularity affecting the arbitral tribunal, the proceedings or the award.

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Further information

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