

[Vol. 10: 1, 2009]

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The Future of Sports Dispute Resolution

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I. INTRODUCTION

I was Vice President of the U.S. Olympic Committee and when—like some of my former colleagues here—I was on the Athlete’s Counsel for the U.S. Olympic Committee, part of my duties were to review every athlete complaint filed for the U.S. Olympic Committee. Although I was a partner at Latham & Watkins for the last fifteen years, I have run a large international private equity firm, and I am constantly in, unfortunately, cases and arbitrations where courts either try to interfere in arbitrations throughout Asia, South America, and Turkey. Today I will speak about arbitrations from the International Council of Arbitration for Sport’s (ICAS) perspective.

I think that it is important to talk about “what.” What should be done? What is happening? What could be done? What might happen in the future? I also think it is important to talk about “how.” I do not usually talk at sports law associations and to other practitioners. I like to talk to law schools. I like to do that because what concerns me most is that I do not think we have good thinking about this. I think we confuse a lot of issues. In law school, commentary, and scholarly works, I think that is critical in helping people understand what they are doing.

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II. CHANGE

It is not rocket surgery, but it is complex. You do need to be clear-headed and you do need to think about things in the right way. Having said that, let us talk about change. We are discussing potential changes that can occur in ICAS, and by extension the World Anti-Doping Agency (WADA). Organizations are never static, they are always changing. ICAS was formed in 1994 as the body to oversee the Court. For ten years prior to that there was no body overseeing the Court. The Court really is the arbitrators. The Court comes up with the rules and the arbitrators answer to it. But each of these organizations, particularly ICAS, fit within a tradition, a culture, and a society. Sometimes the societies move them along, and sometimes they move along within their own realm in terms of improving or evolving. The issue is to understand a way of thinking about change, because there are some really interesting ideas here. I would love to hear an explanation of how an International Criminal Justice system will be created when an effective system does not exist right now for war criminals. I am certain that doping will be an important issue, once an effective system is instituted instead.

I am going to tell you a “box” story. When I was in law school, one of my classmates was defending an issue dealing with military law. I am old enough to say that 1968 was the formative year in my life, which says a lot about my view of the military and other things. In regards to this topic, he said what you have to do is understand the box. Military justice makes sense if you are in the military justice box. It has an internal logic and rigor to it. If you are outside the box, you will never get it. This is an important concept. We need to understand the box of ICAS when we discuss what needs to be changed, and by the same token, the bigger box of the Olympic Movement and other related areas.

There are three concepts. ICAS is an international arbitral body for sports. First, if you do not understand comparative international law, you will fail in understanding this box. The world is filled with different legal systems. Although, not as many as you may think. There is civil law, common law, Sharia—which we will need to understand better—and Chinese law, which is an amalgamation based on Confucianism. The rest of the world, including common law countries, thinks that the United States’ pre-trial discovery processes are crazy. Most of the world does not depose people *ad nauseum* as is more common in the United States. Most of the world does not have discovery. Even though the English use common law, they do not share the same system that Americans use. Most lawyers do not understand international comparative law.

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

In an international sports structure there are often documents in a foreign language. If you want to compete in Europe and you are not comfortable with international sports, you must become comfortable by understanding the structures and how things are done. There are virtually no straight lines in an international sports organization chart. If it could be boiled down to one example, it would be the Olympic Games. There are world championships and there are dotted lines everywhere; however, the structure needs to be understood. Again, it is not rocket surgery, but it is complicated.

The last concept is that it is an arbitration system. Commercial disputes, particularly commercial international disputes, are the cradle of arbitration. A number of hallmarks flow from commercial disputes. Although the list is unlimited, time does not permit the discussion of each. It is debatable whether the system should still exist, but the following is an explanation of its origins.

In an arbitration system, the parties pay. Arbitration is supposed to be faster and cheaper than litigation because each party has limited appeals to court. Arbitration also allows flexible rules for evidence because good arbitrators are tasked with establishing limited rules and ad hoc procedures. Arbitrators should also bring specialized expertise to the table. Arbitration is supposed to be confidential. The expression "trapping ourselves in the commercial arbitration box" originates from the concept that arbitration is confidential. Later, I will explore the concepts of *lex sportiva*, recognizing that all arbitrations were initially confidential. Lastly, arbitrators are practitioners. There is a lot of law about the repeat player issues. I will discuss why this is a problem and why it needs to be fixed. However, numerous courts throughout the world have ruled on this issue. It is not acceptable for a person to litigate or arbitrate in front of a panel when that individual was on the panel three years ago. This concept is universal law, from Switzerland to the United States.

Dollars are used as proxy in arbitration. The problem is, generally speaking, no amount of money can compensate an individual for the Olympic team ring he or she deserves. Stories like this are frequently promulgated, and more individuals are suing for this; however, one is either on the team or they are not. Eligibility disputes frequently arise, whether it is because of doping or because of disagreements with the selection process, things like "I should be able to represent Aruba in the Olympic Games because I want to!". These experiences are unique, and money is an ill substitute. You cannot cut a baby in half for this. Having said that, I have

an open view towards mediation of these disputes, but it's a little jaundiced because of some of the resulting deals that are morally wrong. I firmly believe you are either on the team or you are off the team.

III. HISTORY OF ICAS

The Paris agreement in 1994 was a response to a Swiss federal tribunal—the highest court in Switzerland—which did not vacate an arbitral award but raised problems. Because of that, ICAS was formed. It is important to know the composition of those who serve on ICAS: cabinet level officials of France, Syria, and Egypt; the president as well as former current judges of the International Court of Justice at the Hague; the presidents of the Supreme Courts of India and Switzerland; two United States court judges; two presidents of the ICC Court of Arbitration, which is the premier international arbitration body); the president of the Constitutional Court for Bosnia Herzegovina; the president of the U.S. run claims tribunal at the Hague; and me, Michael Lenard. Other people know the sports like me, and we can discuss the politics of the body. But I want to emphasize that these are real people. Not all have a background in athlete's rights. The members tend to be diplomats; after all, the Hague is the Hague, and that needs to be kept in mind. However, each member starts with an arbitration background—that is the box.

The other thing that I think was critically important in the history of ICAS was, and other commentators or people involved in ICAS do not think this, but it was the ad hoc panel in Atlanta. The reason why is everything you are going to read is going to talk about "All IFs agreed to be bound." They said that. They raised their hands and said "I am bound," and not a single one of them changed their rules. The first time we were able to actually get proof that these people would listen to the court was when we put it in the Olympic Games because the IOC controlled that and there was nothing they could do. They wrote it into their organic documents so now it covers the World Championships, now it covers other events, but it was not until then we knew it.

There were two reasons we did it. The first reason was because of the Butch Reynolds case in 1992. Anyone who is interested in athletes' rights knows that Butch Reynolds won a court case here and the IAAF, which is track and field, said, "So what? I do not live in the United States. Come and sue me in Barcelona two days before the Games start and see if I will let you in." Because of the way the system works with the IOC, the IOC could not overrule the IAAF. That is a problem, and the hallmark of the ad hoc panel is "never leave an athlete knocking at the gate of the Olympic Village. Never." So we always have to provide something. The other reason was

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

people were worried that there were going to be a lot of these court cases, they are going to run into federal court, and it is going to disrupt the Games. That is an important concept.

IV. THREE IMPORTANT PRINCIPLES

First, although there is a lot of criticism from lawyers who represent athletes, arbitration was the cornerstone of the athletes' rights movement when it started here in this country. This was because most athletes, who are not people who made trillions of dollars, had no effective way to be heard by the independent party. Perhaps the ad hoc group does not have full time to review everything. What is the alternative? Should we allow some guys in blue blazers figure it out in the back room of the IOC? Or should we at least provide some chance to go talk to someone whose job it is to be neutral and to think about these sorts of problems? We do the best we can under the constraints. But do not forget, this was an athletes' rights initiative and the rest of the world adopted it.

Second, all right to compete issues are athlete versus athlete. It was the case with Floyd Landis where Greg LeMond is right there saying to him, "You are dirty." When Marion Jones finally admitted she was dirty, many athletes were saying, "I have been telling you that for years." It is always athlete versus athlete. This is a divisive issue, and the fact that you do not hear from some of those other people but rather through proxy, perhaps of WADA, we need to remember the team selection cases and what was done there.

Finally, doping cases are sui generis. If you look at all the CAS, AAA, or Article 9 cases for right to compete, they are different from the doping cases. It is very difficult to come up with some meta-rules that govern all cases because doping raises different issues. There is a quasi-criminal context to it. There is a variety of different issues. There is the science aspect so you have to analyze those by their own set of rules.

I find it interesting that we were very concerned that WADA lost some cases, and then they changed the rules. The Siraki, Lindland, Perez, and Bassani cases were fundamental failures of the procedural system, and we then changed the rules. The idea that you are going to change the rules to make sure the problems do not happen again in terms of making sure all the athletes are there at once, that you take jurisdiction—of course we do that. It is really the value judgment of what did you do and what are you affecting.

Three additional points. First, the changes that we have to make include increasing the quality of the arbitrators. We are working on that. In

particular, that means the qualifications, it means the training and it means the independence. Second, we have to improve and refine the access to the *lex sportiva*, meaning black letter law, what it is, and we all have to agree on that. Third, is that if CAS is a supreme court of sport, does it not have to function as more of a check and balance to the other institutional structures of sport? Because right now it cannot.

V. RECOMMENDATIONS FOR QUALITY OF ARBITRATORS

First, there should be closed lists. People should not pick just arbitrators that they want to pick. How are we supposed to train them? How are they supposed to know that a warning chart is good for certain scenarios, yet not others. How are they going to know the signs? This is not an unknown in arbitration; this is consistent with that theme.

Second, there needs to be mandatory, real training. We had seminars; they were not real training. I mean continuing education. We are amping that up, including using the ad hoc panels to train new arbitrators.

Third, we need to create specific development paths to become presidents of panels. This is an important position for us, assuming that we still allow the parties to pick their arbitrators, and then we pick the president. There have been cases where they had terrible presidents, and hopefully we will do a better job because our goal is to get people who are experienced in doing that.

Fourth, we need an expanded code of ethics, and it needs to be real. This is a giant issue in arbitration. When I tell this to my colleagues on ICAS from Europe, they think we are crazy. California has a very strict one, and ICAS is moving towards that. They understand that arbitration is becoming more judicial. Those hallmarks are leaving, but it was not without great debate in California that they did not push through that new ethics issue.

Finally, why do we have parties appoint arbitrators? If we want to move to professional arbitrators, why do we not find professional neutrals? Why do we not just pick all the arbitrators?

VI. LEX SPORTIVA

We need *lex sportiva*. We need the law schools, we need people writing, we even need newspapers, but more importantly, we need the professors. We can write op-ed pieces, or we can write pieces from lawyers who represented a party and think that they were wronged. I would rather see scholarly work to enhance everything we are doing. There is black letter law—Field of play and assertion of jurisdiction. Even before WADA, there

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

was established as black letter law that there is a difference between disqualification from an event and the sanction received afterwards. If you want to understand WADA, you need to understand those differences because that is one of the quintessential athlete versus athlete issues.

VII. THE CHECK AND BALANCE

The check and balance is a tougher issue. We are not WADA. In general, arbitrations are governed by the arbitration agreement. The people at WADA are smart; they put a lot of things in their arbitration agreement. In our arbitration agreements in Latin America, we carve out things that are appropriate for the arbitrators to do. But WADA is a little different. I do not understand why everyone is shocked and amazed at WADA. Some people were shocked at the prosecutorial function. Nobody trusted the international federations because they were letting athletes go free. We bring in an independent agency, and we tell them that doping is bad and it destroys sport. Then we let them loose to do God's work. And they bend the rules. I am shocked and amazed. You know, shocked. That is what we set up. Pendulum fault goes too far. We need to fix that. There are real problems in WADA that are fatally unfair. The "two bites at the apple" does not work. It is a giant problem.

VIII. CONCLUSION

There are two things that are much more interesting than doping. The first is citizenship. This is the big new issue. The world is globalizing. Countries mean less. There are trade unions. There are political organizations. Olympic committees cannot fill their pipeline for their own Olympic teams because they cannot get enough training for their athletes with clubs in their country. It is a giant issue. We are entering into a stage of city-states and stateless people. Barcelona is more important than Spain, for example. Sport is not immune to that. You have club teams with international rosters. The work rules in the European Union are depleting the national teams. There are emirate countries buying African runners for their citizenship. There was an American basketball player who sold herself to Russia where she plays club basketball for two months a year so she can be in the Olympic Games. These are issues that are going to come up. We have heard a lot of about these and it is only going to increase.

However, the biggest danger in sport is not doping. It is the basic concept of integrity of outcome. If we think it is rigged, none of us are

going to be interested in sport anymore. The doping, now that East Germany is gone, is more of an individual issue. Some examples include when you have an NBA referee in jail for shaving points, when you have match outcomes for a Russian tennis player and others being looked at because of the betting line, when you have a recent CAS case that invalidated an Olympic qualifier in handball because by videotape analysis they can clearly tell the referees were bribed. There are more and more of these issues. The rigging of the results will kill sports faster; we will become Vince McMahon.

But what about the other ethical issues? Tanking in tennis, resting my best players when the game does not matter to me but it matters to somebody else? What about losing a game purposefully in order to get a better seed? This is clearly a gray area. It is easy to figure out when you pay someone, but it is harder to figure out what is ethical and fair. There is some great work being done by the Positive Coaching Alliance and others on these issues. To me, this is all very interesting to ruminate about. I wish I had time to write on all of these. And so with that, I will conclude my rumination. Thank you.