

CHALLENGES AND PROSPECTS REGARDING ARBITRATION FOR SPORTS IN KOREA

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I . OVERVIEW: ARBITRATION IN THE FIELD OF SPORTS RELATED DISPUTES

1. THE DEFINITION OF ARBITRATION

When a legal dispute occurs, it is best to come down to a peaceful negotiation within the stakeholders. However, if those two parties can never reach reconciliation, they might as well resort to a resolution method involving a third party. If they decide to do so, they can choose between judicial and non-judicial resolution. Non-judicial resolution, in other words, negotiation, does not have any binding force for the individuals concerned, whereas judicial method binds the concerned parties to implement verdicts.

Judicial resolution includes two parts: arbitration and adjudication. Arbitration is a system where international dispute is resolved based on respect for law, by an arbitrator ('judge' when it comes to adjudication) designated by the parties directly involved. The biggest difference between arbitration and adjudication is that for the former, conflicting parties decide by themselves who should be designated as the arbitrator what should be set as the rules of trial whereas for

the latter, judges and rules of trial are already set. To sum up, these two methods have 'binding force' in common for the parties concerned, but the procedures are up to their will when it comes to arbitration.

2. THE NECESSITY OF ARBITRATION IN SPORTS RELATED DISPUTES

1) Necessity of Arbitration in General Terms

Before looking at needs for arbitration in sports related disputes, the general necessity of alternative dispute resolutions must be first pointed out. ADR (alternative dispute resolution) seeks simple and speedy resolution with flexible procedures and related expertise, adding some elements of formal judicial dispute resolution. In other words, it retains its own system and procedure to maximize its leverage with scientific expertise and at the same time tries to complement its legal status with judicial legitimacy.

2) Need for Time-Sensitive Procedures and Cost-Benefits

In fact, sports related dispute is a realm where the utility for ADR is the most prominent. It would be even needless to say that it is desirable to widely make use of these ADRs in the future where more variety of disputes might occur as sport industry and culture develops. It is time and cost-efficient to resolve disputes before the individuals concerned get to international adjudication which entails enormous expense. For example, because most sports players have limited working period, going through formal judicial procedures may cause critical loss to him/her as well as to the team he/she works for.

3) Technical and Specialized Nature of International Transactions

Furthermore, sports related disputes require technical and professional analysis. Therefore, it is absurd to expect for the judges to be well-informed about all the characteristics and contents that different areas of sports disputes include. In this case, as trial goes on, the judges must resort to experts in each field related to each step of the procedure, which is likely to cause serious time and cost burden on the individual.

4) Amicability

For arbitration, the interested parties can designate by themselves the arbitrators. In that way, complaints about verdicts can be minimized and resolution by the arbitrators can take place before the actual trial. Also, disputes can come to an end in a relatively comfortable ambience. In particular, while lawsuit takes place only in rigid courts, individuals in arbitration can proceed with trial in a softer atmosphere, which can make the parties relaxed with no time pressure. Also, it is not desirable to tell good from bad in sports domain, and we should rather solve disputes in an assimilatory way, for the sake of peace and harmony of entire sports community.

5) Confidentiality

In order to keep fairness of judicial process, court's trial is as a rule open to the public. However, the parties concerned might be hesitant to this kind of disclosing under specific domain or circumstances. Sports players, for instance, avoid going public about conflicts with their clubs caused by the players' transfer. From this point of view, confidentiality of information is one of the suitable characteristics for individuals or groups that work in sports field. In order to solve these problems and resolve the disputes in sports domain quickly and

efficiently, specialized ADR is necessary.

3. THE SUBJECT AND COVERAGE OF ARBITRATION IN SPORTS RELATED DISPUTES

The target of arbitration includes any cases asked by those related to sporting event - sports players, sports volunteer agencies, or sports coaches. Even so, judgments made by referees during the play are left out. Based on this regulation, the targets for Arbitration Committee of Korea is limited to disputes that take place in sports play.

However, sports disputes can encompass not only those conflicts directly related to during the games, but also the external disputes that are related to the game but does not take place during the actual play. Also, there can be some disputes between the interested persons and ordinary citizens as well as among the sports related persons. If we are to assume various types of sports disputes like this, current coverage of sports arbitration by Arbitration Committee of Korea is too narrow. Therefore, the range of possible targets and coverage should include overall potential conflicts that can take place in sports realm. Even so, referee's verdict during the game should still be left out from the arbitration process as it can violate referee's authority and hinder rapid dispute resolution.

II. THE CURRENT STATE OF ARBITRATION FOR SPORTS

1. INTERNATIONAL ASPECTS: COURT OF ARBITRATION FOR SPORTS (CAS)

1) Foundation and Roles

The Court of Arbitration for Sport was established in the 1980s when international sports disputes became more frequent and the need for international sports arbitration arose in the absence of independent decision-making bodies. In 1981, the IOC chairman, Juan Antonio Samarance, initiated the establishment and the initial outline of this concept was to provide the IOC with all the operational costs and the jurisdiction of the CAS with the players, and to operate independently. In 1983, the IOC formally ratified the CAS statute and began operating under the direction of Mbaye and General Secretary Gilbert Schwaar. Thus, CAS played a role in a variety of cases including athletes' nationality, employment, sponsorship and licensing agreements, and with the advent of the Appeal Arbitration Act, a number of doping cases were continuously submitted to CAS. In 1992, however, the issue of independence and equity of CAS was raised from Elmar Gundel's method appeal, which led to a major reorganization of CAS. This is because the federal courts of Switzerland have raised the view that the financial and organizational linkages between the existing IOC and the CAS will cause a violation of a sufficiently serious degree of independence. Thereafter, CAS will undergo structural reforms with a clear independence from the IOC. In this coordination, the International Council of Arbitration for Sport (ICAS) was established, replacing the role of the IOC in the operation and financing of CAS. In addition, two arbitration divisions (the Ordinary Arbitration Division and the Appeals Arbitration Division) were established to distinguish disputes based on independent disputes and decisions by sports organizations. The creation of the ICAS and the CAS were approved in Paris, 1994, by the International Sports Arbitration Commission, known as the Paris Agreement. After the Paris Agreement was

signed, all Olympic international organizations and many Olympic committees recognized the jurisdiction of the CAS and included the CAS arbitration clause in their statutes. And in March 2003, numerous governments published the Code of Conduct and stated that CAS is the appeal body for all international doping disputes. The headquarters of the Tribunal is located in Lausanne, Switzerland, and consists of legal professionals with sports knowledge of about 250 in 85 countries. In this way, the CAS is recognized and plays a role as the mediator of the most prestigious sports dispute to date in judging the doping decision, judging the outcome of the match

III. DOMESTIC CHALLENGES REGARDING ARBITRATION FOR SPORTS

Based on the above discussion, it can be seen that the arbitration procedure is more appropriate than the dispute settlement through the judicial process. Particularly, it was also suitable in that dispute settlement can be achieved with overcoming the actual hierarchical order existing among the parties to the dispute, and the damage of the athletes is minimized in that the arbitration proceedings are carried out promptly and secretly. In the international aspect, there is the 'Court of Arbitration for Sports'(CAS), an independent sports arbitration institution, which intervenes the conflicts regarding the doping decision, the outcome of the match in the sport field. However, the establishment of an arbitration system at the domestic level is still insufficient. Therefore, in this chapter, we will examine why domestic arbitration system could not be activated smoothly.

1. THE ABSENCE OF PROPER ARBITRATION SYSTEM

1) Dissolution of Korean Court of Arbitration for Sports(KCAS)

Korea successfully hosted the Seoul Olympic Games in 1988 and the

2002 World Cup, provoking national enthusiasm and achieving steady growth in the sports industry. However, at the last Olympic Games, we suffered a disadvantage due to the misjudgment of Kim Dong-sung's disqualification and Yang Tae-young's arrival, thus greatly reducing the institutional and structural basis for disputes related to sports. Therefore, Korea established a mechanism for fair and rapid resolution of sports disputes, which is the 'Korea Sports Arbitration Committee'(KSAC), which was established on May 17, 2006. The KSAC consisted of nine members, one auditor, and 59 arbitrators who were recommended by the Korea Sports Council, the Korea Olympic Committee (KOC) and the Korean Bar Association.

In addition to the disputes among the members, competition qualification of the athletes, selection of international athletes, doping and so on, as well as the rules of sports arbitration, sports intervention training and legislation. Since its establishment in 2006, it has conducted 37 arbitration consultations only in 2007 and has actually conducted one arbitration decision. However, two years after inauguration, it was evaluated as insufficient, and there was a move to make an internal renovation. As a result of such efforts, KSAC, which was subordinated to the Korea Sports Council's Articles of Incorporation, changed its foundation to "the National Sports Act" and changed its status to an autonomous organization and tried to guarantee the jurisdiction. However, the Korea Olympic Committee were integrated, resulting in the suspension and abolition of the budget for the Korea Sports Arbitration Commission. Even so far, the Korean Sports Arbitration Commission is suspending its operation and expects it to be practically disrupted.

There are two reasons why KCAS actually broke down despite

national consensus on the need for arbitration instruments and systems. First, the environment in which the athletes can practically use the mediation process through KCAS has not been established. The arbitration committee's rules require that the parties to the dispute agree to comply with the KSAC decision in order for the dispute to be arbitrated. However, disagreement with the decision of the sport-related institution and applying for arbitration is accepted as negative in sports emotion. In other words, domestic sports organizations are reluctant to accept arbitration in terms of disagreement and challenge to authority, and individual parties wishing to arbitrate are reluctant to apply for mediation because of fear of adversely affecting their athletic life.

Second, there was a lack of institutional support to settle the KCAS arbitration system. In order for the new system to be established and to be practically effective, institutional support is needed to ensure that the system is adopted and actively utilized by the Korea Sports Council and sports related organizations. However, KCAS's arbitration system is weakly guaranteed by the provisions of the Korea Sports Council that it can be resolved through an arbitration committee in the event of a sports dispute. In other words, in the situation where problem solving through judicial procedures is routinized, passive guarantee of KCAS's arbitration system did not lead to actual result of active use of the parties to the dispute.

As the core institution of the arbitration system, KCAS, has disappeared, the possibility of resolving sports disputes through arbitration has become scarce. In the midst of a small number of professional arbitration organizations and lawyers in the sports field, KCAS broke down and the domestic arbitration system became

virtually inexplicable.

2) Irrational Arbitration Procedure in Sports Related Disputes

Because sports disputes require prompt resolution, procedural rapid progress and final decisions should be made after the arbitration case is filed. In special cases, an interim relief may be required at the same time a dispute arises or an arbitration case is received. However, although Article 18 of the Arbitration Act and Article 41 of the Korean Arbitration Rules allow interim relieves, they are rarely used in the sense that there is a time gap until the Arbitral Tribunal is organized. The parties to the dispute can apply to the court for an interim relief even before the Arbitral Tribunal has been constituted, but It is against the intention of an arbitration agreement and likely to reduce the effectiveness of the arbitration proceedings.

There is also a time gap in the arbitrator selection process. The arbitrator selection method is divided into the parties selecting method and the secretariat selecting method. In the former case, there will be a delay in the composition of the judge until the parties have reached an agreement. In the latter case, there is also a delay in sending the list of arbitrator candidates to the parties to the dispute, collecting their opinions, and forming an arbitral tribunal.

The procedural gaps in sports disputes that require swiftness can be fatal to the parties to the dispute. It should be noted that the irrationality that exists in the arbitration process can be an obstacle to the activation of the arbitration system. Therefore, institutional restructuring of the domestic arbitration system is required to ensure the basic principles of arbitration through prompt dispute resolution to minimize the opportunity costs of the parties to the dispute

3) Lack of Understanding and Demand of Arbitration for Sports

The lack of awareness of the arbitration system is one of the obstacles to the activation of domestic sports arbitration system. Athletes, associations and other relevant organizations are not aware of any effective methods to resolve disputes. It is due to the fact that there was an attempt to use the arbitration system through the establishment of the KSAC in 2006, but the frequency of the use of the arbitration system was remarkably low because of lack of awareness of the arbitration system of the sports parties. In other words, the lack of understanding of the arbitration system of the parties to the dispute and doubts about its effectiveness negatively affect the activation of the arbitration system.

It is due to the absence of a strategic approach to promoting arbitration. It is not easy for sports dispute parties to have the opportunity to be educated or acquire relevant knowledge in advance of mediation. The absence of publicity and education also manifests itself in the absence of an arbitration provision in the dispute resolution clause in the general contracts used in the sports industry. Arbitration agreements must be settled to resolve disputes through arbitration. Therefore, in most cases where arbitration is used, it is necessary to include an arbitration clause in the dispute resolution clause in the contract. However, the general contract does not include an arbitration clause, which means that there is a lack of publicity for the arbitration and there is no strategic approach to support it.

In addition to lack of awareness of the arbitration system, the reason for the low demand for it is that there are few arbitrators who have expertise in arbitration of sports disputes. The arbitration system is a

system in which arbitrators composed of the best experts in each field participate to judge matters. In one paper, KSAC is abolished, and now it is expected to settle the dispute through Korean Commercial Arbitration Board (KCAB). There are 1091 experts from various fields in the arbitrator list held by the Korean Commercial Arbitration Board. However, according to the Korean Commercial Arbitration Association classification standard, the sports arbitrators are not divided into a separate field but are included in the field of entertainment. Only a very few of the 35 arbitrators in the field of entertainment are only sports arbitrators. Therefore, in a situation where there is not enough arbitrators who understand the specificity of the sports field and make legal judgments, the parties to the dispute become doubtful about the effectiveness of the arbitration system and depend on the judicial process rather than the arbitration system.

2. THE NECESSITY OF PROPER ARBITRATION SYSTEM IN KOREA

1) The Host Country of Olympic in 2018

The 2018 PyeongChang Winter Olympic Games are a national initiative and have attracted national attention. In addition, under the name sports, there is also an approach from a political point of view and an economic point of view. However, people still do not realize the importance of sports arbitration. The Korean Sports Arbitration Commission mentioned above is a placenta that does not even know that it existed. Every time an international sporting event is held, Korean players are disadvantaged and injured. However, there is no discussion about problem solving at all, just a moment of anger.

It is nothing more than to leave everything to the “luck” to make a voice of our country in international organizations with only the size of the country, economic situation and geographical position, and to attract sports competitions. It is not competitive. In this regard, the PyeongChang Olympics is a once-in-a-lifetime opportunity for us. Now that national interest has increased, there is a need to raise interest in sports mediation as well. Every time Korean people have to be angry and disadvantaged because of ignorance of international sports arbitration system or sports laws? Korea's own sports arbitration committee is not only to develop sports culture in Korea but also to protect the national interest and love for the sports given to us now and also for the task of our “mental health”

IV. PROSPECTS AND IMPROVABLE MEASURES REGARDING DOMESTIC ARBITRATION FOR SPORTS

1. COMPARATIVE STUDIES

1) Japan

Japan is currently arranging sports dispute by JSAA (Japan sports Arbitration Agency) which was set up in 2003. In 1992, ‘Japanese Academy of Sports Law’ was established and the discussion for setting up JSAA began at that time. This academy officially suggested in January of 1998 that there needs to be a system to resolve conflicts in sports domain, JOC (Japanese Olympic Committee) started to examine specific measures, and finally JSAA was founded in April of 2003.

JSAA has processed 21 cases of arbitrations and 8 cases of conciliations since its establishment in 2003. This means that Japan has gone through 10 years of research and discussion to set up JSAA,

and has operated this institution for over 10 years with significant outcome. We can find out several implications from this prudently set up system.

First of all, numerous researches and discussions about establishment and management of sports arbitration institution have been accumulated. Secondly, there has been constant change and development concerning its operation like diversifying formerly one and only arbitration rule into five rules. Third, JSAA is implementing specific promotion plans in order to activate arbitration system. Lastly, 29 cases of resolutions are not too many, but enough to prevent conflicts or disputes beforehand. For instance, fairness and transparency of team management and recruiting players are boosted by JSAA, because some sports units have improved those procedures after they went through arbitration cases.

2) American Arbitration Association (AAA)

Another important arbitration institution around the world is the ‘American Arbitration Association’(AAA), which effectively reflects the characteristics of arbitration in the sports dispute field. By looking at three separate areas of arbitration in American sports – selection process of players for the Olympics, doping disputes, and annual income disputes with professional sports players – we can figure out how AAA is operating in detail.

(1) U.S. Olympic Arbitration

Selection match is naturally severely competitive from the process to the results, because for sports players being able to represent his/her own country is a sensitive matter. If a dispute takes place during the competing match, concerned parties need to convey to the executive office the list and information of participating players, and

the office designates arbitrator by itself if the case is FastTrack Procedure. If not, the executive office reselects arbitrator from the second candidate list to which the concerned parties have added new names. Under FastTrack Procedure, the case has to end in 48 hours regardless of their attendance in court hearing.

(2) U.S. Anti-doping Agency Arbitration

Doping is a special medical treatment or medication for the sake of enhancing performance in sports game. World Anti-Doping Agency announces every September drugs that are judged to enhance performance or threat health of sports players. Disputes regarding doping are resolved through AAA's supplementary procedures. First, initiation of arbitration process is done by U.S. Anti-Doping Agency, not the athlete who violated doping. Second, lodging an appeal is possible in this arbitration.

(3) Baseball Arbitration

Baseball arbitration mainly focuses on annual income disputes between professional baseball player and his club. Each party proposes to the arbitrator the final amount they think is 'appropriate' and the arbitrator chooses one of those two that he/she thinks is 'reasonable'. This system is devised to induce the interested persons to suggest realistic amount so that it is selected in the end. Therefore, arbitrator can receive most reasonable offer from the parties, and sometimes resolutions are achieved without any process since there is not much difference between those two figures.

2. SUGGESTIONS FOR IMPROVABLE MEASURES

1) Recruitment of Arbitrators with Sports Expertise and Background

Currently, 300,000 people are estimated to work in sports related businesses in Korea. More than 130,000 are registered athletes for the Korean Sport & Olympic Committee and up to 100,000 are unregistered. Taking into account lawyers and professors related to sports businesses, this number would presumably increase. In order to help out with sports related disputes, constructive measures that make use of these experts' opinions and experience should be sought.

The sole arbitration institution in Korea, Korean Commercial Arbitration Board, currently does not possess a significant workforce of sports-related special arbitrators. Field experts, with the recommendation of relevant associations, should be recruited as arbitrators and special education and training programs for these experts must be provided.

In the case of the AAA, disputes regarding doping are only dealt by AAA arbitrators who are both part of the NA-CAS and have received special training on the subject matter. This way, parties in dispute would less likely question the credibility of the whole process. New recruitments of arbitrators with sports related backgrounds and expertise supported by regular care and training of the new workforce would play a big part in invigorating the arbitration industry of Korea in general.

2) Establishment of a Standard Prevention Policy

Practical training of contracting parties is also crucial in order to invigorate the arbitration system in Korea. However, first-hand explanations and promotions have its drawbacks and limits of cost and time. Therefore, it is necessary to establish various strategies to solve this problem. One of them would be the promotion strategy of

creating and distributing standard contracts according to contract types. In other words, it is a way to encourage the use of standard contracts that reflect industry specificity through mutual cooperation with relevant committees and institutions.

Typically, an establishment and use of standard contracts between a professional sports player and a club or an agent is possible. The AAA recommends the use of standard arbitration provisions that reflect the characteristics of the industry in cases of disputes on annual salary agreements between the MLB and professional baseball players. In Korea, there is no standard contract model reflecting the characteristics of the industry. Therefore, standardized contracts created through continuous research on characteristics of the domestic sports industry by arbitration institutions should be distributed. In addition, it is expected that if these standardized contract are announced, the arbitration system would be naturally invigorated and related industries would be continuously exposed.

3) Consolidation of Exchange through Foreign Partnership

As the impact that sports has on the world increases, it is clear that contracts transcending borders are on the rise. This means that chances of international arbitration cases are also increasing, and an ever-growing need for an enhancement of mutual cooperation through strategic alliances of arbitration institutions comes to the fore.

For instance, the mere imposition of the procedures and systems for baseball arbitration used by the AAA would neither be sufficient nor adequate. Problems will inevitably arise without proper understanding through active exchanges. It is absolutely necessary

to seek advice on various issues such as the management know-how and methods of operation of this system. Ultimately, strategic alliances aimed at strengthening inter-agency exchanges will be needed to solve these problems.

V. CONCLUSION

The sports industry is very popular and its market is growing day by day. As time goes on, the sports industry will develop more and the sports disputes that arise from it will increase. Therefore, if the arbitration system is properly promoted and recognized as a dispute settlement method in the sports field, the substantial effects and potential opportunities that follow will greatly increase.

The arbitration system is on the whole, comprised of a much speedier process compared to the litigation system. The arbitrators are selected among specialists and the expertise of the arbitrator is widely recognized. It is more flexible than the litigation system and provides comfort to the parties in the proceeding process, especially in that the details of the dispute between the parties are kept confidential by principal. Furthermore, it is advantageous in terms of cost as compared with the average lawsuit.

However, it is regrettable that intervention in the domestic sports dispute settlement has not been utilized properly due to some problems inherent in the system itself. A typical problem is the absence of a professional arbitrators in the sports field. As a result, there is not much awareness of the necessity of arbitration system because there are not many cases regarding sports disputes, and consequently, it is difficult for mutual cooperation system between related associations and commercial arbitrators to be established.

These lead to the current state, in which experts in the field of sports are not properly registered in the arbitration list of the Korean Commercial Arbitration Board. In addition, there are some problems that may cause delays in the procedure, and necessary institutional improvements are not provided. In particular, there is a lack of procedural flexibility when a temporary disposition problem occurs prior to the composition of the arbitration tribunal.

Therefore, it is necessary to check the possible improvements of the arbitration system in advance. In particular, the acquisition of professional arbitrators through close ties with sport-related associations facilitates the search for excellent new arbitrators and their expertise. Through the provision of continuous training programs that help these experts in the field of arbitration, Korea can expect to have an adequate work force that specializes in these disputes.

Finally, improvement of the customized system, while taking into consideration the promotion strategy and the specificity of the field, should be carried out. Standardization of contract work and distribution thereof should be followed in order to activate the arbitration system.

Such efforts will not only have a positive impact on the promotion of arbitration system in sports disputes, but will also present a new direction for future dispute resolution mechanisms. In short, it is necessary to complement the institutional problems discussed in this study, and to encourage practitioners in the field to promote the arbitration system by raising the frequency of actual use through institutional publicity. Furthermore, it is necessary to continuously

publicize the necessity of the arbitration system and the positive factors that can be gained through it.

