SPORTS ARBITRATION IN TRINIDAD AND TOBAGO[1]

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Introduction

"*There is however a more credible line of reasoning in support of exclusive extrajudicial authority to settle sports disputes. This is the concept that the exclusive disciplinary jurisdiction of sports officials has been granted by the parties to the dispute on a consensual basis; the ordinary courts are thus ousted by virtue of the familiar contractual mechanisms of prorogation.*"[3]

1. Arbitration is a creature of contract. Defined by Moses as a "private system of adjudication[4]" it has also been called a "growth industry[5]". Paulsson's allusion above to the consensual basis upon which sports arbitral tribunals have been given exclusive dispute resolution jurisdiction reflects both the fact and the fiction of the process. Fact: because judicial intervention is generally discouraged and sporting federations' autonomy encouraged. Fiction: because the threat of exclusion from sport's mega events militates against true and genuine consent to arbitration by athletes.
2. The issue of consent apart, current trends in international arbitration suggest that the question of setting aside an arbitrator's award is gaining prominence and giving rise to new jurisprudential developments both inside and outside of the sports arena. The March 2014 judgment of High Court Judge Andre Des Vignes in Trinidad and Tobago is a case in point and will receive due consideration below.

Fast, Frugal, Fair and Final

"*The new regime for domestic commercial arbitration reflects how far Australia has come in creating a substantively distinct jurisdiction for commercial dispute resolution as an alternative to the courts. An avowed desire to avoid the replication of processes through the courts motivated the authors of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). Their aim was*

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[3] "Arbitration of International Sports Disputes" by Jan Paulsson in the Book 'The Court of Arbitration for Sport 1984-2004' Edited by I S Blackshaw, R C R Siekmann and J W Soek, 2006, TMC Asser Press, The Hague, The Netherlands, at page 41

[4] "The Principles and Practice of International Commercial Arbitration"-Margaret L. Moses, Chapter 1

[5] "Arbitration of Rights and Obligations in the International Sports Arena"-James A.R. Nafziger

to restrict drastically the scope for curial intervention in order to achieve speedy, cost-effective, fair and final resolution of disputes."[6]

3. The four goals articulated above mirror the objectives of most, if not all, organisations involved in alternative dispute resolution (ADR). Predictably, each target is experiencing its own level of success, with speed and cost varying from country to country and industry to industry.
4. As far as fairness is concerned, sport arbitrations underwent some scrutiny with the 1992 *Elmar Gundel*[7] challenge. Arising from that case the International Council of Arbitration for Sport was born, with a view to producing clearer separation 'organizationally and financially'[8] between the International Olympic Committee (IOC) and the Court of Arbitration for Sport (CAS), a body conceived by the IOC about thirty-five years ago. The Swiss Federal Tribunal in *Gundel* endorsed "not without hesitation,"[9] the impartiality of CAS, cautioning that an "arbitral tribunal which is an organ of an association appearing as a party to the dispute does not ensure a sufficient degree of independence."[10]
5. The fourth objective, the finality of arbitration, is the focus of this article.

Setting aside the Arbitration Award

6. In the latest round of battles between the governing body of West Indies cricket, the West Indies Cricket Board ("the WICB[11]"), and the players' union, the West Indies Players' Association ("the WIPA"), the full cycle of dispute resolution was unveiled. By July of 2010, negotiations and mediation led to no breakthrough, thus leading to the arbitral process pursuant to the Arbitration Act Ch 5:01 of Trinidad and Tobago ("the TT Arbitration Act") under the jurisdiction of a sole panelist, Seenath Jairam, S.C.
7. The arbitration clause usually inserted into the Collective Bargaining Agreement (CBA) between these two parties reads as follows: "*If there is no resolution of the grievance by mediation, the aggrieved party may refer the matter to an arbitration tribunal for the expressed purpose of hearing the grievance and determining the matter…"*

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[6] "When Even Fraud is Not Nearly Enough. Recourse Against Arbitral Awards and Public Policy Considerations: An Anglo-Australian Perspective"-Julian Sher, The International Journal of Arbitration, Mediation and Dispute Management, Vol 80 No.2, April 2014.
[7] Gundel v International Equestrian Federation (FEI)
[8] Matthieu Reeb, CAS Secretary General, as quoted in 'Sport, Mediation and Arbitration by Prof Dr Ian Blackshaw at page 152
[9] Paulsson, supra, at page 47
[10] *Ibid* at page 45
[11] The WICB has been rebranded to Cricket West Indies (CWI)

Arbitrator Jairam made his award on December 7, 2011("the Jairam Award") ordering that the WICB pay over US$1 million representing loss of earnings, loss of sponsorship opportunity, gate receipts, mediation and arbitration costs, legal fees, interest, and nominal damages.

8. The WICB applied to the High Court citing eight grounds upon which the award should be set aside or remitted to the arbitrator pursuant to Sections 18 and 19 of the TT Arbitration Act. Des Vignes J. set aside the arbitrator's award. An appeal was subsequently filed by the WIPA.

The rationale for setting aside the Jairam Award

9. At the heart of the order to set aside the Jairam Award were the errors of law identified by Justice Des Vignes. The possibility of setting aside was contemplated by the parties in the drafting of the CBA. Yet, this preliminary point still had to be ventilated as the WIPA questioned whether the court had the jurisdiction to determine the matter. The resolution would come by construing Article XI 4(b) of the CBA, which stated that: "*Except on a point of law, the decision of the arbitration tribunal shall be final and binding on both parties.*"
10. The judge expeditiously disposed of the issue noting that the language of the Article was "clear and unambiguous[12]" and that "provided that the issues raised by the WICB concern the Arbitrator's interpretation of points of law, this court is sufficient[ly] vested with authority to review the decision of the Arbitrator.[13]"
11. It is in this regard that relatively recent developments in Australia and England, in particular, are worthy of mention. Lord Steyn in ***Lesotho Highlands v Impregilo***[14] alluded to the "right of appeal 'on a question of law'"[15] as articulated in section 69 of the UK 1996 Arbitration Act, the question of law referring specifically to "a question of the law of England" as defined in Section 82(1) of the 1996 Act.
12. Sher notes, though, that traditionally it has been a feature of English arbitration to restrict judicial intervention.[16] He adds that by "enacting the Arbitration Act 1996 (the English Arbitration Act), the UK Parliament adopted the Model Law, but went much further, by severely restricting the possibility of setting aside in particular."[17] This approach, he observes,

[12] CV 2012-00046-WICB v WIPA, Des Vignes J at paragraph 39
[13] *Ibid*.
[14] [2005] 3 All E.R. 789
[15] *Ibid* at paragraph 3
[16] Sher, *supra*, at footnote #4
[17] *Ibid*.

confirms the practice of the English courts to confine "setting aside to only the most egregious and reprehensible of cases."[18] The position in England, then, is that arbitral awards will be respected as final and binding, with setting aside occurring only in the most extreme circumstances.

13. Further, Sher contrasts the Australian statutory ethos, stating that, if the making of an arbitral award was contrary to public policy, it could trigger recourse against the award, including setting aside[19]. Within the last 4 to 5 years, Commercial Arbitration Acts have been enacted in Australia at the State level, complementing the adoption of the International Arbitration Act into federal law.

14. A useful question has consequently been asked in the Australian context: "What is the test for remittal rather than setting aside?"[20] This query is apposite in the Trinidad and Tobago setting as well, in the light of the court's response to the Jairam Award. Justice Des Vignes was satisfied that errors of law warranted a setting aside and not an 'order for remission.'[21] An Australian judge would probably concur, with his English counterpart likely to dissent.

15. Notably, both England and Australia currently have access to the expertise of sports-specific dispute resolution bodies, respectively, Sport Resolutions UK and the Oceania Registry of the Court of Arbitration for Sport. In a recent case emanating from the CAS Sydney Registry, the sole arbitrator made the significant point that he "would arbitrate on the dispute and render an Award in conformity with the agreement between the parties to submit their dispute for arbitration before the CAS"[22] It appears, then, that his safeguard from having a challenge lodged against his award would be to comply with the terms of the arbitration agreement. In any event, appeals against CAS awards are rare and typically restricted to very limited grounds.

16. It is conceivable that the Des Vignes ruling could be a catalyst in shaping sports-related arbitration law in Trinidad and Tobago and, perhaps, even the wider Caribbean. Yet, the decision may also have indirectly endorsed the wisdom of the well-established practice of using subject matter experts in ADR generally.

17. This analysis is offered in view of the fact that, although arbitrator Jairam identified the relevant principles of contract interpretation, the judge's appraisal was that Jairam "failed to apply these principles".[23] Des Vignes J. added that the

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[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*
[21] Des Vignes J, supra, at paragraph 108
[22] Australia Sports Anti-Doping Agency v Bannister Ref. A 1/2013 at paragraph 18
[23] Des Vignes J, supra, at paragraphs 72 and 76

Arbitrator's construction of the CBA "flouted business common sense"[24]

18. The latter observation is reminiscent of Lord Mustill's message in the *The Chrysalis*[25], a message which Tweeddale succinctly summarized as follows: "…Mustill J. recognised that a court might be less willing to substitute its own judgment for that of the arbitrator if the issue concerned an area of industry in which the arbitrator had extensive practical experience."[26]

19. Where the CAS excels, the Trinidad and Tobago and, by extension, the Caribbean sports ADR mechanism, underachieves. The reality is that there is a dearth of arbitrators in the region with a strong history of practical experience in sports-related disputes, thus putting the Jairam Award into some context. The judge's comment that the arbitrator's decision flouted business common sense was not an indictment on his competence but rather may have reflected a possible lack of familiarity with the overlap between the commercialisation and juridification of international cricket in the 21st century.

20. Conversely, arbitrator Ian Mill, Q.C., although not from the Caribbean, had a different narrative.

The Ian Mill Arbitral Award: FIFA World Cup 2006

21. Although previous academic consideration has been given to this case,[27] the current discussion explores a few additional areas, including the governing arbitration law and procedure as well as the binding nature of an arbitration award.

22. The litigants were both from Trinidad and Tobago, the Claimants being sixteen football players who represented their country at the FIFA 2006 World Cup in Germany, while the Defendants were the national governing body for football, the Trinidad and Tobago Football Association(TTFA) (then known as "the Trinidad and Tobago Football Federation"(TTFF)) and its former president, Oliver Camps.

23. The relevant arbitration provision, Clause 14, was found in the Player Agreements which were executed before the World Cup. It stated as follows:

"14. *Disputes/Arbitration*

The parties shall submit all disputes arising out of or relating to this Agreement before an arbitration panel or a mediator appointed by the TTFF in Trinidad and Tobago…The award shall be rendered in such form that a judgment may be entered thereon. An appeal arising out of a decision of the arbitration or

[24] *Ibid*

[25] [1983] 2 All E.R 658

[26] "Section 69 of the English Arbitration Act 1996-When Fact and Law Collide"-Andrew Tweeddale et al, The International Journal of Arbitration, Mediation and Dispute Management, Vol 80 No.2, April 2014 at page 139.

[27] "ADR in Caribbean Sport"-Global Sports Law and Taxation Reports, June 2011, J. Tyrone Marcus.

mediation shall be to an appeal committee appointed by CONCACAF and any appeal therefrom shall be to the Court of Arbitration for Sport, LAUSANNE, Switzerland."[28]

24. The procedural direction of this dispute was somewhat unorthodox and potentially confusing. The case started as a High Court breach of contract claim by the players, alleging non-payment of money due and owing to them arising from their participation in the 2006 World Cup. An initial question that arises is whether, according to Clause 14 of the Player Agreement, the first course of action was to the High Court. The wording of the clause suggests that the dispute should have gone either to arbitration or mediation in Trinidad and Tobago.

25. On the facts of the case, arbitration did take place but only after the High Court claim was filed. The way that the arbitral process was engaged is noteworthy, since it was the Defendants who applied for a stay of proceedings pursuant to Section 7 of the Arbitration Act Chapter 5:01.

26. The matter is further complicated given the signing of a new Arbitration Agreement in September 2007 ("the September Agreement") which provided for arbitration under the English Arbitration Act 1996 and not the TT Arbitration Act. With the inherent confidentiality of arbitration proceedings, understandably, crucial documents have not come into the public domain. One can only speculate that the new Arbitration Agreement superseded Clause 14, which, in arbitration law and practice, is sufficient in and of itself to constitute an arbitration agreement.

27. The arbitral award was made by Ian Mill Q.C ("the Mill Award"), on behalf of the Sports Dispute Resolution Panel (SRDP) under whose auspices the English arbitration took place. The Defendants expressed concerns after parts of the award were leaked to the media and decided to re-engage the High Court. If Clause 14 still applied, it is reasonable to assume that their next step could have been to a CONCACAF[29] Appeal Committee.

28. Clause 10 of the September Agreement now becomes instructive. It said: "*The Arbitration award shall be final and binding on the parties and shall be registered as a judgment of the High Court of Trinidad and Tobago in these proceedings and enforceable accordingly, provided however that either party shall have a right of appeal to the Court of Arbitration for Sport but only with leave of the Arbitrator"*[30] This clause left available a right of appeal to CAS, an option which evidently was not explored.

29. The entire process suggests, at least, two possibilities: a failure to adhere to procedural guidelines or an in-built flexibility which is a hallmark of ADR processes. The question

[28] CV 2007-02238-Andrews et at v TTFF and Camps-Rampersad J at page 3.
[29] Confederation of North, Central American and Caribbean Association Football.
[30] Rampersad J, supra, at page 13

still begs, though, whether the CAS would have been a more appropriate forum for this matter to be heard with regard to the Defendants' challenge to the SDRP arbitration. In fact, it is also important to consider whether the stay of proceedings did contemplate the exhaustion of the entire arbitral process including an appeal to CAS. It may be that, since the Defendants sought to challenge the validity of the agreement itself and not actual arbitral award, they returned to the High Court as against approaching CAS.

30. To the chagrin of Trinidad and Tobago nationals, this case endured an eight-year legal roller coaster and, although the approach to the SDRP with a right of appeal to CAS was a commendable measure, since it placed the imbroglio before two specialist sports disputes tribunals, it is hard not to conclude that an opportunity for earlier resolution was missed.

Setting aside the Arbitration Agreement

31. Very early in his judgment, Rampersad J summarised the key areas for determination, stating that the case "specifically examines the question of breach of confidence in arbitration. Incidental to this principle of confidentiality is the issue of the binding nature of the arbitration award and its enforcement in the High Court of Trinidad and Tobago."[31] However, the twist in this case, as mentioned earlier, was the Defendants' attempt to invalidate the September Agreement and not the Mill Award.

32. Justice Rampersad further distilled the issues down to one, namely, "**whether the disclosure of the award was a fundamental breach of the terms of the arbitration agreement such that the agreement ought reasonably to have been set aside."** *[Emphasis original].* He did not have much difficulty in finding, in light of the prevailing law, that the confidentiality obligation, so fundamental to the arbitral process, was breached by the Claimants. The SDRP Rules also expressly provided for the confidentiality of the proceedings. The salient question that followed was whether that breach went to the root of the contract leading to a repudiation of the entire agreement[32]. Justice Rampersad answered in the negative.

33. Citing Redfern and Hunter in *the Law and Practice of Commercial Arbitration*, the judge noted that there "are limits to the confidentiality of the arbitral process…for example…the existence (and perhaps the contents) of an award may become public knowledge if the winning party is obliged to take action in the courts to enforce it."[33] He concluded that the arbitration agreement remained irrevocable in accordance with Section 3 of the TT Arbitration Act. Additionally, pursuant to the 1958 New

[31] *ibid* at pages 3-4.
[32] *Ibid* at page 10
[33] *Ibid* at page 12

York Convention[34] and Section 6 of the Arbitration (Foreign Arbitral Awards) Act Ch 5:30 of Trinidad and Tobago, the court granted leave for the Mill Award to be registered and enforced as a judgment of the High Court of Trinidad and Tobago.

The Way Forward for Sports Arbitration in Trinidad and Tobago

"*Qatar is also in the process of modernising its law on arbitration. It is expected the new rules, again based on the UNCITRAL Model Law, will be passed shortly…Aside from the World Cup…there has been a clear shift in favour of arbitration in domestic disputes because it is recognised as a more expedient process.*" [35]

34. It is indisputable that arbitration has evolved into a favoured mechanism for the extra-judicial settlement of disputes. In the lead up to the 2022 World Cup, Qatar, as host nation, continues to refine its ADR framework as are many of its Middle Eastern neighbours, whose increasing prowess in trade and economy has necessitated such initiatives.
35. In the Caribbean, the journey is still very much at the early stages given the *ad hoc* nature of sports dispute resolution processes. At present, arbitration has been centred primarily on conflicts in cricket, with no new or established ADR entity having developed a lucid, well-structured framework for managing sports-related disputes, as the CAS and others like Just Sport Ireland, the Sports Dispute Resolution Centre of Canada, Sport Resolutions UK or the Sports Tribunal of New Zealand have so successfully done.
36. In Trinidad and Tobago, sporadic sports-based arbitrations have been the norm and while the above-mentioned High Court decisions have offered a useful starting point in discerning how arbitration law and principles can be applied to the sports sector, this country still awaits a coherent legal, academic and practical foundation that would give sports arbitration, the credibility and sustainability that the industry really needs.
37. One closing observation is worth mentioning. Current research suggests that no case from Trinidad and Tobago has been heard and determined before the CAS. At best, the ***Mohammed Bin Hammam v FIFA*** case[36], merely involved events in and personalities from Trinidad and Tobago, while the anti-doping disciplinary appeals of Olympians Kelly-Ann Baptiste and Semoy Hackett both reached a settlement before the scheduled CAS hearing.
38. Perhaps the CAS needs to be brought to Trinidad and Tobago before Trinidad and Tobago is brought to the CAS!

[34] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)
[35] "The Resolver," August 2013 at page 7
[36] CAS 2011/A/2625.