

The Development of International Sports Arbitration Bodies and Challenges of Legislative Policy for Reestablishment of Sports Arbitration Agency in Korea

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As the Korea Sports Council and The Korean Olympic Committee (KOC) were integrated in June 2009, the Amended Articles expunged the applicable provisions of the Korea Sports Arbitration Committee (KSAC), which was established in March 2006. To successfully host international sports events, such as 2014 Incheon Asian Games and PyeongChang 2018 Winter Olympics, the Korea Sports Arbitration Committee (KSAC) must be restored immediately. In this sense, this thesis places emphasis on the necessity of precise legal basis with the purpose of the revitalization of sports dispute settlement as well as the enhancement of the Korea Sports Arbitration Committee.

Key Words : Court of Arbitration for Sport(CAS), Korea Sports Arbitration Committee (KSAC), Sports Arbitration, Sports Mediation, Med-Arbitration

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I. Introduction

At the turn of the 21st century, the establishment of the Sports Arbitration Agency is being actively promoted based on research results of the sports law circle.¹⁾ With the purpose of fulfilling sports autonomy, the International Olympic Committee (IOC) has already accepted public opinion that the Sports Arbitration Agency is necessary and founded the Court of Arbitration for Sport (CAS) in 1984. In 1994, the IOC guaranteed the independence and neutrality of the organization; it institutionalized activation plans and made it public to all nations that the Sports Arbitration Agency is needed. Furthermore, Korea started paying attention to the Sport Dispute Institution as Korean athletes were directly disadvantaged at the 2002 Winter Olympics in Salt Lake City and the 2004 Olympics in Athens. Taking these events of misjudgments of sports refereeing as an opportunity, the damage to “fairness” – the ground rule of the Olympic Charter – was considered pitiable and we all realized the significance of the Court of Arbitration for Sport, including the settlement body of sports entanglement.²⁾ In 2003, Japan established the Japan Sports Arbitration Agency (JSAA) and operated it as a general corporate body starting in April 2009. The JSAA started operating as a public corporate body after receiving recognition as one in April 2013.³⁾

By fairly and rapidly solving conflict between the contestants and sports groups through adjustment or arbitration, the Korea Sports Council (KSC)

1) Detailed contents can be found in: YEUN Kee-Young, "Establishment and Activities of Korea Sports Arbitration Committee", *The Korean Journal of Sports and Law*, Vol. 5, The Korean Association of Sports and Entertainment Law(KASEL), 2004, pp. 65-82; YEUN Kee-Young, "Proposal for Establishment of Sports Arbitration Organization" *The Korean Journal of Sports and Law*, Vol. 10 No.4, The Korean Association of Sports and Entertainment Law(KASEL), 2007, pp. 415-433.

2) On these two incidents, see YEUN Kee-Young, Id, pp417-418; on Dong-Sung Kim incident, see especially Arbitration CAS ad hoc Division (OWG Salt Lake City 2002) 007 Korean Olympic Committee(KOC) v. International Skating Union(ISU), award of 23 Feb. 2002, Matthieu Reeb(eds), Digest of CAS Awards III 2001-2003(2004),6.1.1; on Yang Tae Young incident, see CAS 2004/A/704 Yang Tae Young v. FIG, para 1.1.1.-1.1.5.

3) On JSAA, see <http://www.jsaa.jp/doc/gaiyou.html> (visited 2013. 8. 5); Dogauchi, Masato , "The Activities of Japan Sports Arbitration Agency" *The Korean Journal of Sports and Law*, Vol. 5, 2004.

specified a foundation in March 2006 in Art. 54 in Articles of KSC, and established and operated the Korea Sports Arbitration Committee (KSAC), with the means of contributing advancement of Korean sports. After the consultation, between the Ministry of Culture, Sports and Tourism and the KSC, which, to persuade the IOC members, have shared the understanding that the KSAC is necessary to attract attention to the PyeongChang Olympic Winter Games and other international competitions, the KSAC was founded. Nonetheless, in June 2009, as the KOC and the Ministry of Culture, Sports and Tourism have combined, Amended Articles have expurgated the regulation that is the basis of the KSAC and led to the discontinuation of budget support since 2010. These decisions are ignoring the foundation's purpose. In particular, it will likely act as an obstacle to hosting Asian Games Incheon 2014 and the 23rd Olympic Winter Games in PyeongChang, as well as many other upcoming international competitions. This will retrogress international trend and sports advancement, so either the KSAC should be reestablished or a new sports arbitration agency should be established.

In this paper, legal strategies to properly conduct the functions of the Korea Sports Arbitration Agency, which will be newly founded in the future, are proposed. The paper will discuss the measures to settle the arbitration agency as an activated organization. These kinds of theoretical and institutional bases are to be found in the foundation background and system reform process of the CAS.

II. The Distinctive Characteristics of the Sports Arbitration Agency and the Present Condition of International Sports Arbitration Bodies

1. Conception and the Process of Arbitration in the Arbitration Act

The Korean Arbitration Act (KAA) was revised in 1966 and was partly

modified in 1973; however, it has been criticized for its inadequacy to adapt to the international legislation environment. Thus, the current Arbitration Act (Law No. 6083), revised entirely in 1999, drastically embraced the content of UNCITRAL's Unicitral Model Law with the purpose to correspond to international tendencies. Such effort can be acknowledged to have restored trust from the international community and is still attempting to secure universality of dispute settlements. In other words, the KAA has procured international clarity, fairness, and legal stability.⁴⁾ In 2010, conforming to the 'easy-to-understand law making project' of the Legislative Office, the Arbitration Act was revised into a simpler and easier wording and has been operating since.⁵⁾

The Arbitration system is an autonomous dispute settlement system which solves conflicts by selecting a third party arbitrator following the terms of the Arbitration Agreement.⁶⁾ It acknowledges the adjudication of the arbitrator, not the verdict of the court.⁷⁾ It is one type of ADR system which can rationally and rapidly settle conflicts in professional and technical areas. Although this is an independent legal system, the national governmental authority's right to execute with force is guaranteed by Arbitrary Act (Art. 1, 8, 9, 13, 35, 37 KAA).

4) To see international trend of arbitration act, centering around UN, the reality of arbitration and issues of arbitration act and harmony of each country was rendered; in 1958, New York Convention for approval and execution of foreign arbitral award was held (Korea ratified in 1973. 5. 9). UNCITRAL adopted Model Law in 1985. 6.21 And advised each nation to apply the amendment to the arbitration act and accelerated international unification of arbitration act. Accordingly, since 1986 numbers of nations around the world established and reorganizing arbitration agencies with the purpose to attract international arbitration while reforming and enacting arbitration act. Korea was also influenced by this international tendency; the necessity for reforming arbitration act was raised from academia and business circles; there was also a need to quickly amend the arbitration act in a circumstance where international arbitral environment were radically changing. Eventually in 1999 arbitration act was entirely revised with the purpose to arrange international-level arbitration act, accommodating advanced foreign countries' examples of legislation and international standards to invite international arbitration.

5) <http://www.law.go.kr/lsInfoP.do?lsiSeq=103956&lsId=&viewCls=lsRvsDocInfoR&chrClsCd=010102#0000> (visited Aug. 3, 2013).

6) Kim Yong-Kil, "A Study on the Scope of Effect in Arbitration Agreements" *The Journal of Arbitration*, Vol. 23 No 2, The Korean Association of Arbitration Studies, 2013, pp.11-12; Sohn Kyung-Han /Shim Hyun-Joo "A New Approach on the Arbitration Agreement" *The Journal of Arbitration*, Vol. 23 No1, The Korean Association of Arbitration Studies, 2013, p. 57.

7) Takeshi Kojima, *Civil Procedure and ADR in Japan*, Series of the Institute of Comparative Law in Japan 65, Tokyo: Chuo University Press, 2004, pp. 265-344, especially see pp. 321-344.

The “Arbitration Agreement,” disregarding whether it is a contractual dispute or not, is a consent between the concerned parties to solve all the conflicts, or partial consent that has already occurred or will occur in the future by arbitration (Art. 3, No. 2 KAA).

The Arbitration Agreement can either be an isolated agreement or a form that includes an arbitration clause in the contract. It is the principle to complete the Arbitration Agreement in document. However, if the signed documents from the concerned parties contain the Arbitration Agreement, or if the Arbitration Agreement is included in the documents exchanged by letter, telegram, telegraph, fax or any other means of communication, or if one party claims that the party has the Arbitration Agreement and the other party does not argue about the claim, it ought to be considered as a settled arbitration (Art. 4 KAA). Arbitration is the concerned parties' expression of will to obey the decision made by the arbitrator. Arbitral Award is recognized to hold the same effect as the final ruling of the court.

The Arbitration procedure includes progress from the incident being charged to the incident being resolved by settled decision. When no negotiation appears during the process, the Arbitration agency applies the KAA's Arbitration Act and proceeds with proper procedure and methods of arbitration. In this case, the tribunal holds the right to judge the admissibility, relevance, and credibility of evidence (KAA Art. 20). When there is no separate negotiation or firm declaration of will from the concerned party, the procedure is decided upon the Arbitration Rules which the arbitration body had enacted.

2. Right of Sports Autonomy and the Distinct Characteristics of a Sports Arbitration Body

Sports hold distinct characteristics and professionalism of autonomy law in accordance to the game rules and regulations of the game group. To sports, autonomy law is the product of exercising self-determination. The rights to decide a sport group, to legislate self-regulating rules, and to operate them are guaranteed. Sports work independently, holding internationally agreed upon

game rules. The legitimacy and binding power of sports rules are acknowledged in that they are followed in regional tournaments, international games, and even in the Olympics; as such, sports can be shown to be organized.

Each sports organization works for the benefit of the sports people which belong to it, as well as for the development of the sport. However, in verified competitions occur collisions of interest among different sports people and organizations; speedy and amicable resolutions are required.⁸⁾

In order for a sensible resolution of sports disputes, it is ideal for the disputes to be resolved within the self-autonomy of sports and avoid the intervention of nations. Therefore, the best option for resolving sports disputes is to establish an independent arbitration organization and not to file a lawsuit to a court that is a governmental institution.⁹⁾

3. International Sports Arbitration Organization

(1) The Disciplinary Committee and Appeal Panel of FIFA

The disciplinary committee and appeal panel of FIFA is comprised of a chairperson, a vice-chairman, and a set number of members; the chairperson must have a qualification in law. The disciplinary committee applies the rules that the executive committee has set and decides on detailed bylaws. The disciplinary committee withholds the right to take disciplinary action when each nation's soccer associations and organization, executives and staff, coaches, and athletes violate FIFA's regulation and game rules, orders and decisions. However, it does not hold the right to take part in the athlete's qualifications transfer or halt memberships for soccer associations.

Conflicts among FIFA, national soccer associations, soccer clubs, and the members of the clubs are bound to the obligation not to file a lawsuit to a court that is a governmental institution but to let the autonomic arbitration body (internal organizations such as disciplinary committees) handle arbitrations. If

8) Kim Yong-Kil, "A Study of Alternative Dispute Resolution for Sports Dispute – Focus on Arbitration System –" *The Journal of Arbitration*, Vol. 21 No 1, The Korean Association of Arbitration Studies, 2011, pp.111–112.

9) Kim Yong-Kil, Id., *The Journal of Arbitration*, Vol. 21 No 1, 2011, pp.113–114.

conflict arises between two or more associations and thus agreement on organizing a tribunal, the FIFA executive committee is to decide on the matter.¹⁰⁾ It is regulated in FIFA rules not to request arbitration to the CAS.

(2) International Olympic Committee

The IOC is an NGO by international law; however, it is also acknowledged as a corporation in accordance with convention with the Swiss government November 1, 2000.¹¹⁾ The headquarters are located in Lausanne, Switzerland.¹²⁾

The IOC Executive Board assumes general overall responsibility for the administration of the IOC and the management of its affairs. In particular, it performs the following duties: it monitors observance of the Olympic Charter; it submits to the Session the names of the persons whom it recommends for election to the IOC; it establishes and supervises the procedure for accepting and selecting candidatures to organize the Olympic Games; it takes all decisions, and issues regulations of the IOC, which are legally binding, in the form it deems most appropriate; for instance, codes, rulings, norms, guidelines, guides, manuals, instructions, requirements and other decisions, including, in particular, but not limited to, all regulations necessary to ensure the proper implementation of the Olympic Charter and the organization of the Olympic Games.¹³⁾ The IOC Executive Board may delegate powers to one or more of its members, to IOC commissions, to members of the IOC administration, to other entities or to third persons.¹⁴⁾

10) FIFA Rule Art. 40 defines the list of disciplinary actions; in occasion of insubordination, the club cannot participate in title match nor goodwill match and every international match sponsored by national associations and/or clubs.

11) Olympic Charter Rule 15.1. "The IOC is an international non-governmental not-for-profit organization, of unlimited duration, in the form of an association with the status of a legal person, recognised by the Swiss Federal Council in accordance with an agreement entered into on 1 November 2000".

12) Olympic Charter Rule 15.2.

13) Olympic Charter Rule 19.3.

14) Olympic Charter Rule 19.4.

4. The Development Process of the Court of Arbitration for Sport (CAS)

(1) Foundation Background

The Court of Arbitration for Sport (CAS) was founded as an ADR Organization by the IOC in 1984.¹⁵⁾ In 1981, Antonio Samaranch was elected as IOC chairman; he drew up an arbitration body, insisting on the necessity of a specialized body for Sports Arbitration.¹⁶⁾

The history of the CAS dates back to the 1982 Session of the IOC in Rome. At this session, at the instigation of President Antonio Samaranch, the IOC accepted the idea of creating a court of arbitration, the jurisdiction of which would encompass activities linked more or less directly with sports. Thereafter, a draft of a statute was elaborated by three jurist members of the IOC, among them Keba Mbaye (Senegal), at that time a judge of the International Court of Justice (ICJ) at the Hague. This draft statute was subsequently adopted by the IOC on the recommendation of its Executive Board at its New Delhi Session in March 1983. The Statute entered into force on June 30, 1984.¹⁷⁾

(2) The Independence and Reform

Since its establishment in 1984, the independency and fairness of the CAS as an arbitration body has been questioned. The chairman of the CAS doubled as an IOC member; the IOC elects 30 out of the 60 committee members of the CAS while 15 people among those 30 members doubled as IOC member. Also, they artificially made two-thirds of the CAS committee members approve of the reformation of CAS regulations through the instruction of the IOC executive committee during an IOC session.¹⁸⁾ Although the CAS was under the direct

15) <http://www.tas-cas.org/en/histoire/frmhist.htm>(visited Aug. 3, 2013).

16) <http://www.tas-cas.org/en/histoire/frmhist.htm>(visited Aug. 3, 2013).

17) Bruno Simma, "The Court of Arbitration for Sport", in: *The Court of Arbitration for Sport 1984-2004* (ed. by Blackshaw/ Robert C.H. Siekmann/ Janwillem Soek), T.M.C. Asser Press, 2006, p. 21.

18) Matthew Reeb, "The Role and Functions of the CAS", *The Court of Arbitration for Sport 1984-2004* (ed. by Blackshaw/ Robert C.H. Siekmann/ Janwillem Soek), T.M.C. Asser Press,

control of the IOC at the time of its establishment, the necessity for the body to turn into a more neutral organization was addressed since there was a possibility of a situation in which the IOC would file a case. However, it reached the point where a consensus that the CAS should be reformed as an independent organization from the IOC.¹⁹⁾

On the other hand, in February 1992, a German horse rider named Elmar Gundel lodged an appeal for arbitration with the CAS on the basis of the arbitration clause in the International Federation for Equestrian Sports (FEI) statutes, challenging a decision pronounced by the federation. This decision, which followed a horse doping case, disqualified the rider, and imposed a suspension and fine upon him. The award rendered by the CAS on October 15, 1992 founded partly in favor of the rider (the suspension was reduced from three months to one month).²⁰⁾ Then, Elmar Gundel filed a public law appeal with the Swiss Federal Court. He disputed the validity of this award; the fact that his claim was rendered by a court did not meet the condition of impartiality and independence needed to be considered a proper arbitration court. In its judgment of March 15, 1993, the Swiss Federal Tribunal (Court) recognized the CAS as a true court of arbitration. However, the Swiss Federal Tribunal (Court) drew attention to the numerous links which existed between the IOC and the CAS: the CAS was financed almost by the IOC; the IOC was able to modify the CAS Statute; and the real power given to the IOC and its president to appoint members of the CAS. In the opinion of the Swiss Court, the CAS had to be made more independent of the IOC both organizationally and financially²¹⁾.

This Gundel judgment led to the reform of the CAS.²²⁾ Accordingly, CAS rules were drastically reformed in 1993. First of all, the CAS Statute and Rules were completely revised to make it independent of the IOC.²³⁾ After the International

2006, p. 33.

19) James Nafziger, *International Sports Law* 2nd ed., Transnational Publishers Inc., 2004, p.43.

20) Matthiew Reeb, Id.,p.33.

21) Matthiew Reeb, Id.,pp.33~34; Jan Paulsson, "Arbitration of international Sport Disputes", *The Court of Arbitration for Sport 1984-2004* (ed. by Blackshaw/ Robert C.H. Siekmann/ Janwillem Soek), T.M.C. Asser Press, 2006, p. 47.

22) Matthiew Reeb, Id.,p. 34; Jan Paulsson, Id., 47.

23) Matthiew Reeb, Id.,p. 34.

Conference 'Law and Sport' in Lausanne, the International Council of Arbitration for Sport (ICAS) was created by the Paris Agreement.²⁴⁾ Practically speaking, the operating fund of the ICAS is provided by three organizations: the IOC; the Ifs, including the Association of Summer Olympic International Federations (ASOIF) and the AIWF; and finally the Association of National Olympic Committees (ANOC). There are 20 committee members in the ICAS.

The purpose of the ICAS is to facilitate the resolution of sports-related disputes through arbitration or mediation and to safeguard the independence of the CAS and the rights of the parties involved. It is also responsible for the administration and financing of the CAS.²⁵⁾

The disputes to which a federation, association or other sports-related body is a party are a matter for arbitration pursuant to this Code, only insofar as the statutes or regulations of the bodies or a specific agreement so provide.²⁶⁾

The seat of both the ICAS and the CAS is Lausanne, Switzerland.²⁷⁾

The term of ICAS members is four years and reappointment is allowed. Upon their appointment, the members of the ICAS sign a declaration undertaking to exercise their function personally, with total objectivity and independence, in conformity with this Code. They are, in particular, bound by the confidentiality obligation provided in Article R43 of the CAS. Members of the ICAS may not appear on the list of CAS arbitrators or mediators nor act as counsel to any party in proceedings before the CAS.²⁸⁾

The ICAS exercises the following functions²⁹⁾: It adopts and amends this Code; it elects from among its members for one or several renewable period(s) of four years the president, two vice-presidents who shall replace the president if necessary, by order of seniority in age; if the office of president becomes vacant, the senior vice-president shall exercise the functions and responsibilities of the president until the election of a new president, the president of the Ordinary

24) <http://www.tas-cas.org/en/histoire/frmhst.htm>(visited Aug. 3, 2013).

25) Art. S2 Code of Sports-related Arbitration. "S" is Statues of the Bodies Working for the Settlement of Sports-related Disputes.

26) Art. S1 Code of CAS.

27) Art. S1 Code of CAS.

28) Art. S5 Code of CAS.

29) Art. S6 Code of CAS.

Arbitration Division and the president of the Appeals Arbitration Division of the CAS, the deputies of the two division presidents who can replace them in the event they are prevented from carrying out their functions. The election of the president and of the vice-presidents shall take place after consultation with the IOC, the ASOIF, the AIOWF and the ANOC.

The ICAS exercises its functions itself, or through its board, consisting of the president, the two vice-presidents of the ICAS, the president of the Ordinary Arbitration Division and the president of the CAS Appeals Arbitration Division.³⁰⁾

(3) The Basis of Arbitration

1) The Olympic Charter Article 59 (Dispute-Arbitration):

All disputes related to Olympic Games are obligated to only be filed to the CAS in accordance with the sports related arbitration rules. The CAS's so-called exclusive jurisdiction is acknowledged.³¹⁾

Also, all Olympic athletes can only ask the CAS for judgment if they have written a pledge acknowledging the jurisdiction of a temporary arbitration court.

2) Olympic anti-doping code Art 3.1: The recipient of the decision made by competent authorities such as the IOC, the IF, the NOC, and other organizations applying the rules can appeal to the CAS.³²⁾

(4) Main Cases under Jurisdiction

The CAS constitutes panels which have the responsibility of resolving disputes arising in the context of sport by arbitration and/or mediation pursuant to the Procedural Rules.³³⁾ For such purposes, the CAS provides the necessary infrastructure, effects the constitution of Panels and oversees the efficient conduct of the proceedings.³⁴⁾

30) Art. S7 Code of CAS.

31) Olympic Charter Article 59.

32) Olympic anti-doping code Art 3.1

33) Art. R27 Code of CAS.

34) Art. S12 Code of CAS.

1) Doping

The most frequently brought up issue in sports arbitration is doping. In the case of the Nakano Olympics, the IOC decided on depriving an athlete who inhaled marijuana of a gold medal. The athlete appealed to the CAS; the CAS returned the gold medal to the athlete, acknowledging that marijuana is not a doping substance. The measure of doping substances varies game by game; Marijuana is not considered to be a doping substance restricted from all games. On the other hand, not all the doping substances are on the doping list. In the Atlanta Olympics, there was an arbitration in which the athlete was deprived of a bronze medal for using a substance that has a stimulating effect. This substance was invented in the former Soviet Union for military purposes; although it has a stimulating effect, it is not included on the doping list. The CAS returned the medal to the athlete, adjudicating so because the chemical effect of the substance is quite different and the data for the effect of the substance was insufficient.

2) Qualification as Representative

The qualification as representative is not a typically expected dispute for the CAS. It is because the qualification as representative is not a problem between international sports leagues and athletes; it is rather a dispute between each nation's Olympic Committee or domestic sports leagues and the athlete. In other words, it is categorized to be a domestic sports dispute. The CAS holds the right to judge for the qualification as representative for Olympic Games only in Australia. In the United States, the American Arbitration Association categorizes it as general arbitration.

3) Qualification as Representative Athlete.

In the case of South Korea, nationality does not cause much issue. However, in other nations, changing nationality to become a representative athlete is often discussed. In such cases, the legitimacy of qualification as athlete can cause a dispute.

(5) Current Processing Situation of the CAS's Dispute Settlement

Numbers of deutes brought up to CAS is increasing annually. There were 76 cases in 2000, 42 in 2001, 86 in 2002, 109 in 2003, 271 in 2004, 198 in 2005, 204 in 2006, 252 in 2007, 313 in 2008, 275 in 2009, 298 in 2010, 365 in 2011, 374 in 212. In the case of Ad hoc Division that executes during Olympic season, there were 6 in 1996, 5 in 1998, 15 in 2000, 8 in 2002, 10 in 2004, 12 in 200, 9 in 2008, 5 in 2010, 11 in 2012. Detailed statistics are contained in the following chart:³⁵⁾

[STATISTICS]

TABLE 1

This table lists the cases submitted to the CAS since its creation. The year refers only to the date when the requests were filed, not when the awards or advisory opinions were published.

Année / Year	Demandes d'arbitrage enregistrées / Requests for arbitration filed	Demandes d'avis consultatif enregistrées / Requests for advisory opinions filed	Total	Demandes d'arbitrage ayant abouti à une sentence / Requests for arbitration leading to an award	Demandes d'avis consultatif ayant abouti à un avis / Requests for advisory opinions leading to an opinion	Total
1986	1	1	2	1	1	2
1987	5	3	8	2	1	3
1988	3	9	12	0	1	1
1989	5	4	9	1	0	1
1990	7	6	13	1	0	1
1991	13	5	18	4	1	5
1992	19	6	25	12	0	12
1993	13	14	27	6	1	7
1994	10	7	17	5	1	6
1995	10	3	13	6	2	8
1996	20	1	21	16	0	16
1997	18	2	20	10	0	10

35) <http://www.tas-cas.org/en/stat/frmstat.htm>(visited Aug. 3, 2013).

1998	42	3	45	33	2	35
1999	32	1	33	21	1	22
2000	75	1	76	60	1	61
2001	42	0	42	28	0	28
2002	83	3	86	70	3	73
2003	107	2	109	82	1	83
2004	271	0	271	178	0	178
2005	194	4	198	133	3	136
2006	204	0	204	128	0	128
2007	252	0	252	183	0	183
2008	311	2	313	220	2	222
2009	270	5	275	188	5	193
2010	298	0	298	209	0	209
2011	365	0	365	246	0	246
2012	374	0	374	90	0	90
Total	3,044	82	3,126	1,933	26	1,959

Comments:

- 1) the consultation procedure was deleted on January 1, 2011
- 2) the table includes the cases submitted to the CAS ad hoc divisions.

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TABLE 2

Affaires soumises au Tribunal Arbitral du Sport depuis l'entrée en vigueur du Code de l'arbitrage en matière de sport (22 novembre 1994) jusqu'au 31 décembre 2012

Cases submitted to the Court of Arbitration for Sport from the entry into force of the Code of Sports-related Arbitration (November 22, 1994) until December 31, 2012

	O	A	C	AcHoc	TOTAL	F	D	W	P
1995	2	8	3	0	13	8	4	1	0
1996	4	10	1	6	21	16	2	3	0
1997	7	11	2	0	20	10	4	6	0
1998	4	33	3	5	45	35	4	6	0
1999	8	24	1	0	33	22	3	8	0
2000	5	55	1	15	76	61	4	11	0

2001	10	32	0	0	42	28	3	11	0
2002	9	66	3	8	86	73	6	7	0
2003	61	46	2	0	109	83	18	8	0
2004	9	252	0	10	271	178	58	35	0
2005	9	185	4	0	198	136	25	37	0
2006	17	175	0	12	204	128	44	32	0
2007	22	230	0	0	252	183	33	36	0
2008	26	276	2	9	313	222	20	69	2
2009	25	245	5	0	275	193	4	72	6
2010	49	244	0	5	298	209	13	70	6
2011	71	294	0	0	365	246	23	74	22
2012	62	301	0	11	374	90	17	73	194
TOTAL	400	2,487	27	81	2,995	1,921	285	559	230

Abréviations/Abbreviations:

O : Procédures ordinaires / Ordinary procedures

A : Procédures d'appel / Appeals procedures

C : Procédures consultatives / Consultation procedures

AdHoc : Procédures ad hoc / Ad hoc procedures

F : Procédures ayant abouti à une sentence ou un avis / Procedures leading to an award or an opinion

D : Procédures terminées par une décision du TAS autre qu'une sentence / Procedures terminated by a CAS decision other than an award

W : Affaires retirées / Cases withdrawn

P : Affaires en cours au 31.12.12 / Pending cases on 31.12.12

III. The Necessity and the Role of the Korea Sports Arbitration Agency

1. Guarantee of Basic Sports Rights and Sports Autonomous Rights.

Issues about sports-related rights are hardly ever found in the history of the development of basic rights since sports began to play a role in human life in modern society. In that sense, foreign legislation cases show changes in the basic rights of many nations, as the constitution was legislated or reformed after World War II. Among those changes appeared sports rights as a constitutional right; in the 1970s, sports became a major part of a nation's policies, and was starting to be addressed constitutionally.

Sports rights, although not part of constitutional regulation, hold a position

equivalent to the basic law since they are rights that are essential to the development of human culture and happiness. As a constitutional right, sports rights hold a variety of legal characteristics. The basic rights were expanded as they have been developed from the right of freedom to social rights.

One of the nations that has a constitution containing rules on sports is Greece. Greece introduced rules on sports in the constitution during the 1970s. Greek Constitution Art.16.1 codes the freedom of art and scholarship; in second provision states “Education is a nation’s fundamental task with the purpose of educating people of Greece morally, mentally, professionally, and physically,” defining sports in an educational perspective. Also, provision 9 of the same article states that “Sports is under the nation’s protection and regulation; the country financially supports and regulates all sports leagues that belong to each and every sports organization in accordance to the legislation. The constitution regulates the application of guarantee of each financial support in accordance to the aimed provision of the supported organization.”

Similar to Greece’s case, constitutions of numerous nations regulate basic sports rights as express provisions in the constitution; such nations include Portugal, Spain, Switzerland, Netherlands, and many states of Germany and South Africa.

The Korean constitution surely allows the relief of rights in sports disputes through trial, guaranteeing the right of access to courts.³⁶⁾

Such regulation of our constitution is coded in the same way in every democratic country. It is proper for the ideology of a constitutional state which guards the dignity and value of people and guarantees a living worthy of human dignity that sports people conform to a sports group, legislate rules, and join and participate in that group. Also, disputes occurring in such autonomic and self-regulating sports activity ought to be resolved by its own resources; it coincides with sportsmanship. It is rather natural considering the special characteristics of sports disputes. Therefore, establishing the Korea Sports Arbitration Association and operating an autonomic ally, within the boundaries of positive law, is advisable and adequate.

36) Art. 10, 37(1) Korean Constitution.

2. Distinct Characteristics of the Rights of Sports Autonomy and Sports Arbitration Bodies

The field of sports has strong professionalism and specialty in legislation of self-government by the rights of sports autonomy in game rules as well as the rules of the game group. In sports, the right of autonomy is the product of practicing autonomous determination. It is guaranteed to form a sports group, set up rules for the organization, set game rules, and operate via an autonomically. Each sport operates independently with internationally unified game rules. The legitimacy and binding power of the rules are acknowledged in local tournaments, international tournaments and even in the Olympics.

Each sports group works for the benefit of the concerned sportspeople and for the development of the sport. However, collision of interest occurs among different sportspeople and organizations as competitions gradually increase; speedy and amicable resolution is required.

In order to have reasonable resolutions of sports disputes, it is ideal for the disputes to be resolved within the self-autonomy of sports and avoid the intervention of nations. Therefore, it is the ideal option for resolving sports disputes to establish an independent arbitration organization and not to file a lawsuit to a court that is a governmental institution. To satisfy this, an international organization, the Court of Arbitration for Sport was established in 1984; sports arbitration organizations are installed and are operated in numerous countries including Japan, United Kingdom, United States, Germany, Netherlands, Canada, Hungary, and New Zealand.

The systems that allow arbitration without judicial dispute are: negotiation, intercession, adjustments, arbitration, and reconciliation. When a dispute arises, first the directly involved parties endeavor to resolve it on their own. When such an endeavor collapses, each person requests and counsels with professionals and hopes for the dispute to be resolved through deputies. If the settlement still fails at this point, then the case is filed in an official organization such as a court for a fair settlement.

When the settlement is handed to the hands of the national organization,

court, the winner and the loser are clearly divided; however, usually the conflict and confrontation of the directly involved parties deepens. That is the reason why various ADR systems are applied in each field to reconcile conflicts and confrontation with the purpose of social unification. Moreover, the importance of scholarly research on the method of arbitration and establishment of the organization which can maximize the proper function of such an institution is increasing.³⁷⁾

3. Special characteristics of sports dispute

Sports disputes have to be resolved fairly in a prompt, friendly, and inexpensive manner. Procedures for general trials are processed in accordance to the strict procedure of legal procedure law; if the trial proceeds to the third trial, it takes too much time. Sports disputes must be resolved quickly and in amity. Adjustment and arbitration systems can contribute to making social unity, relaxing and resolving the conflicts and oppositions because the procedure is closed to the public and comprised of sufficient conversation and consultation with amity. It also results in economic advantage for the sports arbitration utilizing a single-trial system, a concentrated trial, and preliminary discussions; the time and expenses consumed during the procedure are inexpensive.

While general civil suit procedures are achieved by strict legal procedure law, thus comparatively guaranteeing propriety and fairness, the arbitration of the arbitration agency can be found to be less fair because of its special characteristics of being speedy and of being founded on the autonomy of the parties directly involved.

The system of arbitration or adjustment must be able to minimize the aftereffects of the dispute arbitration compared to the trials, especially because such a system allows conflict to be resolved or relaxed through offering opportunities to sufficiently stating the point of the issue and depends on mutual negotiation to draw a conclusion.

The system of arbitration and adjustment holds, as unofficial procedure,

37) Hirota Manabu, *Handbook of Dispute Resolution*, Shinsan Publish Co., 2002, Tokyo, Japan, pp. 3~17.

rapidness and elasticity, excluding the strict regulation application of evidence rule.

Generally, in the procedure of resolving disputes, the system of arbitration and adjustment has great significance in the sense that it actively utilizes a single-trial system, a concentrated trial, and preliminary discussions to minimize the time period until a conclusion is deduced; expenses consumed by the parties directly involved in the dispute can be reduced drastically using this system.

For example, if the dispute is about an athlete's qualification, even if the arbitration agency adjudges to admit the qualification of the athlete, the decision may hold no meaning to the athlete if he misses the game in question. Therefore, sports disputes lean to the tendency of requiring the arbitration agency to speedily draw conclusions.

4. Necessity according to International Tendency.

It is almost impossible not to follow the international tendency of sports. The Korea Sports Arbitration Committee was established upon the emphasis of the need for a sports arbitration agency along with successful hosting of the Seoul Olympic Games in 1988 and World Cup 2002. Also, the direct disadvantages the Korean athletes had to endure during the 2002 Salt Lake City Winter Olympics and the 2004 Athens Olympics, the interest in the CAS and international sports dispute systems increased sharply. The KOC requested the CAS for an arbitration, however, the case was dismissed; this unfortunate incident became an opportunity for renewing the realization of the necessity and the significance of a sports arbitration agency.

When the CAS was established in 1984, the organization was unable to resolve any dispute for the first two years; the number of cases resolved increased to one in 1986, and five in 1987; however, until 1993, for about ten years the organization only settled 76 cases (seven cases per year). After the reformation that acknowledged the priority rights and exclusive jurisdiction in sports arbitration area for the organization, the CAS succeeded to stimulate itself and escaped the danger of revocation. As a result, the CAS is now settling an

average of 200 cases every year since the increase of cases in 1994.

Japan established the Japan Sports Arbitration Agency in 2003 and has been operating the organization since then. Although the number of cases settled in this agency seems inadequate (three in 2003, two in 2004, one in 2005, one in 2006, none in 2007, and three in 2008), in April 2009 the agency rather constituted itself as a general incorporated foundation. In April 2013, the agency was approved as a public utility foundation and constructed a firmer legal foundation for itself.

The United Kingdom, the United States, Canada, New Zealand, Hungary, Netherlands, Germany, and South Africa have also established and reformed basic sports law or similar applicable Acts, supporting the sports arbitration agencies' operations.

5. The Necessity of Sports Advancement

The Korea Sports Arbitration Agency is essential for the sports advancement of Korea as a sports powerhouse. It has become more obvious that Korea is now a sports powerhouse, ranking 7th at the 2008 Beijing Olympics and 5th at the 2012 London Olympics. It is a commonly held opinion among all parts of society that Korea should be a developed sports country. It is necessary to achieve a true sports advancement that can act as a foundation for creating economical profit and national integration. It should be noted that the majority of sports advanced countries have established an active sports arbitration agency.

IV. Challenges of Legislative Policy

1. Fundamental Principles for Reestablishment: Granting Priority Rights and Exclusive Rights to Sports Dispute Arbitration.

Regarding the issue of granting priority rights and exclusive rights of sports dispute arbitration to a newly established Korea Sports Arbitration Agency in

accordance with the special characteristics of sports disputes, a question arises as to whether this might violate the right of access to courts, as guaranteed in Art. 27 of the Korean Constitution.³⁸⁾

Considering the need for speedy and fair resolutions of sports disputes, sportsmanship, and sports autonomy, an arbitration system that does not oppose good social customs and public order exhibits justification and legitimacy.

Therefore, to invest preferred and exclusive arbitral rights to the Korea Sports Arbitration Agency cannot be seen as violating the rights of access to courts of people since the agency is an arbitration body founded on sports autonomy that is constitutionally guaranteed through the approval and agreement of relevant parties, including the Korea Sports Council and affiliated bodies, as well as district subdivisions.

2. Legislative Measures for Reestablishment

(1) A Measure Coding Basic Sports Law

The necessity of clearly defining a legal basis to enhance the position of a sports arbitration body and to stimulate sports arbitration through enacting a Basic Sports Law or a National Sports Law is emphasized once again.

The following summarizes the necessity of the enactment of a Basic Sports Law, as mentioned numerous times above: First, there are 50 laws related to sports; however, there is no basic law that embraces and organizes these laws. The National Sports Promotion Act, which serves such a function, is insufficient to fill the role of a basic law.³⁹⁾

Second, it is natural to include sports in the major policies of a country. It is a commonly approved fact that sports plays a significant role in enhancing national prestige, national harmony and each individual's life through a number of events, such as the Olympics. However, not to mention the current poor legal

38) Jung Seungjae, "Sports Autonomy and Sports Dispute", *The Korean Journal of Sports and Law* Vol. 5, The Korean Association of Sports and Entertainment Law(KASEL), 2004, p. 47.

39) Detailed contents can be found in: Yeun Kee-Young, "Structure for the Enactment of Fundamental Law of Sport in Korea", *The Korean Journal of Sports and Law* Vol. 11 No. 4, The Korean Association of Sports and Entertainment Law(KASEL), 2008, pp. 113-143.

support for sports, it is not even included in 50 major government administrative tasks. The sports administration realm is dispersed among many departments; it is difficult to plan and execute policies.

Third, a fundamental law that systematically and synthetically regulates and manages the business in the field of sports is needed because it is urgently required to define general principles of other sports-related laws.

A fundamental law generally directs itself through systemizing and integrating many other principles of laws. It is common that a fundamental law leads to greater effectiveness of other relevant laws.

Such fundamental laws began to be enacted in 1966, starting with the Minor Enterprises Act; as of December 10th, 2009, there are 51 fundamental laws enacted and enforced. After 1987's democratic contention, the national consciousness of rights increased and the numbers of fundamental laws increased correspondingly. After 2000, numerous fundamental laws were enacted following the trend of changing social structure and national consciousness. A Basic Sports Law ought to regulate, ideally, fundamental aspects related to a Basic Law of Sports, the responsibility of the government, basic guidelines for sports industry promotion and sports promotion, and sports and international cooperation.

(2) Policy Regulating the National Sports Promotion Act

Until the Basic Sports Law is enacted, it is worth considering reforming the National Sports Promotion Act to regulate necessary respects. As long as the National Sports Promotion Act is enforced, it would be desirable to define it as a corporation having a special status, such as the Korea Anti-Doping Agency. I would like to suggest the draft proposal for the reformation of this act as follows:

Draft Proposal for Amendment to the National Sports Promotion Act
Article 35. 2 (Establishment of a Korea Sports Arbitration Committee)

① In order to bring a peaceful, satisfactory and reasonable settlement to sports disputes through professional mediation and arbitration, with consideration of its distinct characteristics, and to allow each of the following businesses and

activities to be enacted, hereby the Korea Sports Arbitration Committee (KSAC) is founded with the approval of the Minister of Culture–Sports.

1. Establishment and execution of planning consultation, mediation, and arbitration of sports dispute.
2. Installation and operation of a tribunal of sports arbitration.
3. Education, public relations, collecting information, and study for sports arbitration.
4. International and domestic cooperation for sports arbitration.
5. Other businesses and activities for the sake of sports arbitration.
- ② The KSAC must be established as a corporate body.
- ③ The KSAC is composed of 11 committee members, including one chairman and one vice chairman. The method for the election and terms of the members are defined in articles of the association.
- ④ The KSAC is allowed to operate as a for–profit business as defined by a presidential decree, with the purpose of arranging necessary expenses for businesses and activities in accordance to Provision 1.
- ⑤ Any matter other than defined in this act about the KSAC should apply with codes about a juridical foundation defined in Civil Law.
- ⑥ The KSAC may demand public officials of the relevant administration and executives and staffs of the relevant organization and/or group to be dispatched upon necessity.
- ⑦ Prior to a lawsuit claim, parties involved in sports disputes must preferentially apply mediation or arbitration to the KSAC as defined by presidential decree.

(3) Enactment for Special Law

It is possible to consider a method of enacting a “Sports Med–arbitration Act” with consideration of the distinct characteristics of sports arbitration. This Law may define the KSAC's establishment, activities, its procedure for mediation and arbitration, and its effectiveness. Sports–related arbitration requires immediacy and professionalism more than anything. Because of its short history, the KSAC operates under a limited budget and less stimulated activities.

V. Conclusion

Sports disputes require immediacy and professionalism more than anything else. The Korea Sports Arbitration Committee has a short history; the lack of organization, budget, and stimulated activities seems inevitable. Enacting a more definite legal basis for the new, soon-to-be-established Korea Sports Arbitration Agency is strongly recommended in order to stimulate sports arbitration and to enhance the Korea Sports Arbitration Agency's position. Establishment of a National Sports Law and a Fundamental Law of Sports are urgently called for. Defining aspects related to a Basic Law of Sports, the responsibility of the government, basic guidelines for sports industry promotion and sports promotion, and sports and international cooperation, as well as coding a basis for establishment of sports arbitration organizations, are demanded. Legislating a Sports Arbitration Act as a special law of the Arbitration Act currently in force is also proposed. It is also desirable to first define such aspects through reforming the current National Sports Promotion Act until a Basic Sports Law or a special law is enacted.

When a Korea Sports Arbitration Agency is established with the arranged legal basis, it will be required to enact "Sports Arbitration Rules" or "Sports Mediation Rules." Methods to apply for dispute settlement without arbitral agreement as well as a "Med-Arbitration" system that allows simultaneous processing of mediation and arbitration should be considered through applying supplements and amendments to the articles of association of the KOC and the affiliated organizations when establishing the rules mentioned above.

Such reformation of the institution can emulate the CAS's reformation of related laws to allow the organization have exclusive jurisdiction in 1990. Olympic Charters Article 59 states, "The Olympic Games or any dispute arising related to it should apply only to the CAS for settlement in accordance to the Sports Arbitration Rules," approving the exclusive jurisdiction of the CAS. The fact that the majority of international sports federations approve of the CAS's exclusive jurisdiction must be recognized.

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