

JUDICIAL TREND OF INTERVENTION IN SPORTS ARBITRATION AND ITS FUTURE IN INDIA

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I. INTRODUCTION

Sports arbitration is a developing branch of alternate dispute resolution which provides for new ideas and mechanisms to cater to the unique requirements of sports disputes. It aims to provide satisfactory resolution of disputes in light of various superseding factors in sports law. This includes issues such as the need of speedy trials to maintain the dignity of sporting events,¹ the confidentiality required in such awards as well as reduced cost of dispute resolution.

Following this, various sports arbitral bodies under different federations have been set up to settle sports disputes through Alternate Dispute Resolution.² For the purpose of this paper, the researcher will focus on the Court of Arbitration for Sports (“CAS”) which is being increasingly identified as the apex body in the field of sports arbitration.

II. COURT OF ARBITRATION FOR SPORTS AS A DISPUTE RESOLUTION BODY

The CAS (1983) based in Lausanne, Switzerland, established by the International Olympic Committee (“IOC”), has been gradually dominating the international sports resolution scene.³ It is often referred to as the ‘sport’s supreme court’.⁴ Almost all International Sports Federations to the Olympic Movement require

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¹ Sports arbitral awards have been issued by arbitral bodies within 24 hours under institutional arbitration. For instance, Article 18 of the Arbitration Rules for the Olympic Games of the XXVII Olympiad in Sydney, 29 November 1999, stated that decisions were to be rendered within 24 hours of the application for arbitration is filed. This is a unique feature of Ad Hoc Division (ADH) of the CAS which is set up specifically for particular sporting events to deal with disputes arising during the event.

² The IABA, the World Governing Body of Amateur Boxing, for instance, established its own Arbitral Tribunal

³ S. Gearhart, *Sporting Arbitration and the International Olympic Committee Court of Arbitration of Sport*, 6 JOURNAL OF INTERNATIONAL ARBITRATION 39 (1989).

⁴ Available at <http://www.wada-ama.org/en/Anti-Doping-Community/Court-of-Arbitration-for-Sport-CAS/> (Last visited on February, 2012).

sports disputes arising between themselves and sportspersons who come under their auspices to be settled by the CAS.⁵

Functioning of the CAS: The functions of the CAS, in relation to any dispute arising directly or indirectly from sports, include commercial disputes.⁶ Hence, any natural or a legal person may refer a dispute to the CAS.⁷ It is governed by its own set of rules and procedure. Under the CAS, the operative law is the Swiss law unless otherwise agreed upon by the parties.

Jurisdiction of the CAS: The CAS has a wide jurisdiction within the field of sports law to settle disputes between parties who have agreed to submit to its jurisdiction. Section 1 of the Code,⁸ while establishing the jurisdiction of CAS, provides for arbitration “only in so far as the statutes or regulations of the said sports bodies or a specific agreement”. It consists of two ‘divisions’, the Ordinary Arbitration Division, which handles matters of first instance and the Appeals Arbitration Division, which deals with appeals from the decisions of federations, associations and other sports bodies.⁹

An important jurisprudential principle as to the jurisdiction of the CAS arose from the Sydney Olympics (1999) through the decision of the Australian Courts in the case of *Raguż v. Sullivan*.¹⁰ In this case, one of the two Australian ‘Judokas’ involved in arbitration, challenged an award by the CAS in the New South Wales Court of Appeal. The court refused to exercise its powers for the lack of jurisdiction. It stated that CAS Agreement for Arbitration form signed by the parties was not a ‘domestic arbitration agreement’ within the Commercial Arbitration Act 1984¹¹, but a foreign one. Hence, it was declared to be outside the jurisdiction of the Australian Courts. The court also made a distinction between the physical (Sydney, Australia) and the legal (as expressly stipulated by the agreement Lausanne, Switzerland- the seat of CAS) place of arbitration.

CAS and its Interaction with National Courts: Under the ambit of Sports Arbitration it is observed that national courts orders’ have no binding authority upon non-

⁵ Simon Gardiner, *SPORTS LAW* (Cavendish Publishing Limited, Sydney, London, 3rd ed., 2006).

⁶ CAS can also hear and settle disputes over sponsorship contracts, for instance.

⁷ *supra* note 7.

⁸ Code of Sports Related Arbitration. Most of the world’s sports bodies have included such a statute or regulation into their rules except for the IAAF and FIFA.

⁹ Paul H. Haagen, *Have the Wheels Already been Invented? The Court of Arbitration for Sport As A Model of Dispute Resolution*, (last visited on February 19, 2012), <http://www.law.duke.edu/sportS.C.enter/haagen.pdf>.

¹⁰ *Raguż v Sullivan*, 2000 NSWCA 290.

¹¹ *Commercial Arbitration Act*, 1984 No. 160, as amended by the Act 1990 No. 100, available at http://www.austlii.edu.au/legis/nsw/consol_act/ca1984219.txt (last visited on February 29, 2012).

national parties but are binding upon parties who fall under the jurisdiction of the courts.¹² Such forays of the national courts in awards rendered by International Bodies may have the effect of invalidating them. This is reflected in the case of *Samoa NOC v. IWF*,¹³ where an interim award granted by the Samoan Courts precluding the enforcement of a decision by the National Level Weightlifting Federation resulted in the CAS ultimately setting aside the International Weightlifting Federations' decision. This occurred because the National Federation's decision was the keystone to the IWF's. Thus, this indicates that finality of awards in case of International Tribunals, such as the CAS, is subject to the exercise of jurisdiction by national courts.

CAS in the Indian Context: In India, the international forum provided by the CAS has been scarcely utilized. However, recently the relevance of CAS as a global forum of dispute resolution in sports was realized in the case of four athletes, Ashwini A.C., Sini Jose, Priyanka Panwar and Tiana Mary Thomas. These athletes who represented India at the CWG and the Asian Games were suspended for a period of one year by the National Anti-Doping Disciplinary Panel ("NAADP") for steroid violations in December, 2011.¹⁴ During the appeal before NAADP, World Anti-doping agency ("WADA") cited several rulings of the CAS while arguing for a more stringent punishment.¹⁵ Further, in case of an unsatisfactory ruling either party can approach the CAS is appeal.¹⁶ Therefore, it appears that the CAS is typically approached at an appeal stage when the dissatisfied party has exhausted remedies at the national level.

Hence, it is observed that the decision of the Australian Court in *Raguz v. Sullivan*¹⁷ and other similar cases, preserving and affirming the jurisdiction of the CAS, have established its position as a global dispute resolution body. However, in the Indian context, the finality of the decisions of international arbitration

¹² Richard H. McLaren, *Sports Law Arbitration by CAS: Is It the Same as International Arbitration*, Pepperdine Law Review, 29 PEPP. L. REV., (2001-2002).

¹³ *Samoa NOC v IWF*, Arbitration CAS ad hoc Division (O.G. Sydney 2000) 002, awards of Sept 12, 2000 *Also See* Sierocki v IOC, Arbitration CAS Ad Hoc Division (O.G. Sydney 2000) 007, award of Sept. 21, 2000.

¹⁴ K.P. Mohan, *Athletes' lawyer rebuts WADA's contentions*, available at <http://www.thehindu.com/todays-paper/tp-sports/article2921779.ece> (last visited on March 1, 2012).

¹⁵ *WADA appeal another setback for four quarter milers*, available at <http://indiatoday.intoday.in/story/wada-appeal-another-setback-for-four-quarter-milers/1/172803.html> (last visited on March 1, 2012).

¹⁶ *WADA seeks two-year ban on Ashwini's Co.*, available at <http://timesofindia.indiatimes.com/sports/more-sports/others/WADA-seeks-two-year-ban-on-Ashwini-Co-/articleshow/11815497.cms> (last visited on March 1, 2012).

¹⁷ *Raguz v Sullivan*, 2000 NSWCA 290, *Also See* *Raducan*, Arbitration CAS Ad Hoc Division (O.G. Sydney 2000) 011.

institutions, such as the CAS, is doubtful after the Indian Supreme Court's decision in the *Venture Global* case. Here, the court held that Indian courts could exercise their jurisdiction to set aside foreign arbitral awards in pursuance of the ratio of *Bhatia International* case.

III. THE JURISDICTION OF INDIAN COURTS WITH RESPECT TO FOREIGN ARBITRAL AWARDS

The Arbitration and Conciliation Act, 1996¹⁸ (the "Act") was enacted with the purpose of reconciling the law of dispute resolution with the international economic scenario.¹⁹ Part I of the Act is largely based on the structure of the UNCITRAL Model Law and is applicable to arbitrations for which "the place of arbitration is India".²⁰ Whereas Part II contains provisions to give effect to the Geneva Convention²¹ and the New York Convention,²² on enforcement of foreign arbitral awards. Part II of the Act was enacted as a sign of reassurance to foreign investors that the enforcement of foreign awards will be quicker, clearer and more in line with the New York Convention.²³ Therefore, as per the initial format of the Act, there existed a clear division between 'domestic' and 'foreign' awards. Further, due to non-application of Part I to Part II and in absence of any provision in Part II empowering the Indian Courts to claim jurisdiction to accept an application to challenge foreign awards, there existed no provision to set them aside in India. Though foreign awards could be set aside or suspended in the country in which or under the laws of which the award was made.²⁴

However, this distinction between 'domestic' and 'foreign' awards has been eroded subsequent to the Indian Supreme Court's decision in the *Bhatia International* case. In this case, the court ruled that Section 9 could be invoked to support foreign arbitral proceedings. Therefore, the application of Part I of the Act was no longer limited to domestic arbitral awards but also extended to foreign awards. The court reasoned that in the absence of the word 'only' in

¹⁸ *Arbitration and Conciliation Act, No. 26 of 1996, India Code (1996)*.

¹⁹ B Srinivasan, *Public Policy and Setting Aside Patently Illegal Arbitral Awards in India*, (March 27, 2008). available at SSRN: <http://dx.doi.org/10.2139/ssrn.1958201> (last visited on February 19, 2012).

²⁰ Section 2(2) of the *Arbitration and Conciliation Act, No. 26 of 1996, India Code (1996)*.

²¹ The Convention on the Execution of Foreign Arbitral Awards (Geneva, 26 September 1927) ('the Geneva Convention'). India became a signatory to this Convention on 23 October 1937 (one amongst six Asian nations to become a signatory).

²² The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) ('the New York Convention'). India became a signatory to this Convention on 13 July 1960.

²³ T.T. Arvind and Zia Mody, *Bombay Gas Company Ltd v Mark Victor Mascarenhas—Challenge to a Foreign Award*, 1 INT. A.L.R. 180 (1980).

²⁴ The 1996 Act, s 48(1)(e), corresponding to Art V(e) of the New York Convention.

Section 2(2) of the Act²⁵ an inclusive interpretation applies which confirms Part I application to domestic awards but does not rule out its application to foreign awards. However, such application is not permissible where Part I has been expressly or impliedly excluded by the parties in the arbitration agreement.

At this juncture it is relevant to note the decision of the Supreme Court of India in *Oil and Natural Gas Corp v. Saw Pipes Ltd.*²⁶ In this case, the court broadly interpreted the ground of 'public policy' under Section 34 and expanded its scope so as to allow scrutiny of an arbitral award on merits. It held that an award can be challenged on the ground that it contravenes the provision stated under the Act, any other substantive law governing the parties or is against the terms of the contract. Further, the court stated that an award will conflict with the public policy of India if it is 'patently illegal' and contrary to the 'interest of India' and its 'justice or morality'. However, the court restricted its opinion to domestic awards mindful of the decision of a larger bench in the earlier case of *RenuSagar Power Co v. General Electrical Corp.*²⁷ The Supreme Court, in this case, had narrowly construed the ground of public policy in relation to foreign awards as being limited to 'fundamental policy of Indian law'.

Subsequently, in 2008, the Supreme Court applied the principle of the *Bhatia International* case in the *Venture Global* case for a Section 34²⁸ application to set aside a foreign award. Hence, the court deviated from the scheme of the Model Law under which the domestic court has no jurisdiction to set aside a foreign award. The Supreme Court held that in case of an award made by an international commercial arbitration tribunal which required performance in India but was contrary to the Indian law, the Indian courts could allow a challenge under Section 34 of the Act. The court further held that such a challenge under Section 34 will have to meet the grounds specified therein as well as the ground under the expanded scope of 'public policy', as laid down in *ONGC v. Saw Pipes*.

This line of thought adopted by the Supreme Court faces fierce censure for weakening the 'certainty of the finality' of an arbitral award by an arbitral tribunal to whose jurisdiction both the parties had agreed to submit to.²⁹ Further, this verdict is considered to subvert the well established policy of minimum judicial

²⁵ This section lays down the extent of application of the act.

²⁶ 2003 (5) S.C.C. 705.

²⁷ 1994 Supp. (1) S.C.C. 644.

²⁸ This section sets out limited grounds on which an arbitral award can be set aside. These include : the invalidity of the arbitration agreement, a failure to comply with the arbitration agreement, a failure of due process during the arbitration, a conflict with public policy etc.

²⁹ SaroshZaiwalla, *Commentary on the Indian Supreme Court Judgment in Venture Global Engineering v. Satyam Computers Services Ltd.*, 25 (4) J INT. ARB 507 (2008).

intervention in the arbitral process.³⁰ It is also argued that the decisions of *Bhatia and Venture Global* have incorporated a new procedure for recognition and enforcement of a foreign award which were not envisioned earlier under the Act. Now, for enforcement in India a foreign award has to face two tiers of judicial scrutiny. This includes one under the application of enforcement of Section 48 of the Act³¹ and the other under Section 34 of Part I of the Act. Moreover, pursuant to *Venture Global* and the court's interpretation of the *ONGC v. Saw Pipes* therein, enforcement of foreign award involves fulfilling the requirements of a broad 'public policy' ground created under Section 34 of the Act.³² Hence, it is said to have replaced the statutorily envisaged mechanism with 'judge-made law'.³³

Consequently, the principle of *Bhatia International* and *Venture Global* has been applied and affirmed in the case of *Citation Infowares Ltd v. Equinox Corporation*³⁴ and more recently, in *Yograj Infrastructure Ltd v. Ssang Yong Engineering and Construction Co Ltd*.³⁵

Though the decision of the court in *Venture Global* case has been vehemently criticized for being contrary to the spirit of the Act and the jurisprudence behind it, it should be noted that the decision might have made room for certain positive implications.

The practice of national courts to claim jurisdiction over challenge to a foreign award may allow courts to make finding under its own legal system as to illegality of the underlying contract, the extent of such illegality and whether it can be

³⁰ *supra* note 21.

³¹ Section 48 of the Act states the conditions for enforcement of foreign awards. These include 7 grounds on which enforcement may be refused by the court, incapacity of the party, inadequate notice, award beyond the scope of the arbitration, composition of arbitral authority or procedures not in accordance with the agreement, award not binding or is set aside or suspended by the foreign court having jurisdiction, subject matter not arbitrable and against public policy of India.

³² The S.C. while explaining the ambit of Public Policy held that an "award which is, on the face of it, patently in violation of statutory provisions" is against public policy. It further clarified that an illegality to be patent "must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against public policy".

³³ Summet Kachwaha, *Enforcement of Arbitration Awards in India*, 4 (1) ASIAN INTL. ARB 64 (2008).

³⁴ (2009)7 S.C.C. 220. The court held that it has the jurisdiction to appoint arbitrators in all international commercial arbitrations irrespective of the substantive law governing the arbitration agreement and the seat of arbitration as cited in Raghav Sharma, *Citation Infowares Ltd. v. Equinox Corporation: A Retrograde Ruling for International Commercial Arbitration*, available at <http://ssrn.com/abstract=1422446>.

³⁵ *Yograj Infrastructure Ltd v Ssang Yong Engineering and Construction Co Ltd*, ('Yograj Infrastructure'), A.I.R. 2011 S.C. 3517.

enforced under the legal regime of the country.³⁶ Such inquiry is especially relevant if the underlying contract is closely connected with the country and the recognition and enforcement of award is likely to be sought in that country.³⁷

The crux of the reasoning in *Venture Global* was based on the court's conviction that in no circumstance the public policy of India should be bypassed. Through the application of Part I to foreign awards the courts have ensured that a party to arbitration does not circumvent the "legal and regulatory scrutiny" it would have been otherwise subject to in India by seeking enforcement in another country. Further, the court in *Venture Global* adopted a supervisory role in view of the fact that there existed a close nexus between the award rendered and India.³⁸ This would further facilitate the promotion of the legal policy of the countries closely related with the underlying contract which otherwise would have been evaded.³⁹ Moreover, it is in consonance with the one of the fundamental objectives of the act, that is, to make certain that the arbitral tribunal remains within its jurisdiction⁴⁰ and does not flout considerations that every tribunal has to undertake solely because the award is a foreign one. Thus, the judgment sends out a strong message that arbitrators or the parties cannot overreach themselves to ignore any obvious illegality involved in the performance of the award in India.⁴¹

This is also supported by the fact that degree of interference of the courts in private law matters is dependent on the freedom of contract in a particular country.⁴² In India, such legal freedom of parties is not impeded unless the parties disregard the legal policy of India. Therefore it is only logical for the courts to ensure that arbitral awards arising out of an agreement parties and requiring enforcement in India do not breach the legal and public policy of India. Further, if an award disregards the substantive law of a country and the courts subsequently fail to intervene then they indirectly allow subversion of societal aims and endanger public good.⁴³

³⁶ Koji Takahashi, *Arbitral & Judicial Decisions: Jurisdiction to Set Aside A Foreign Arbitral Award, In Particular An Award Based On An Illegal Contract: A Reflection On The Indian Supreme Court's Decision In Venture Global Engineering*, 19 AM. REV. INT'L ARB. 173.

³⁷ *Id.*

³⁸ In *Venture Global*, the shares to be transferred were those of an Indian company and that the transfer would have required steps to be taken in India under the law of India such as FEMA, 1999 and the Companies Act.

³⁹ *supra* note 38.

⁴⁰ *Statement of Objects and Reasons, Arbitration and Conciliation Bill, 1995.*

⁴¹ *supra* note 31.

⁴² *supra* note 21.

⁴³ OP Malhotra & Indu Malhotra, *The Law And Practice Of Arbitration And Conciliation*, (Lexisnexis, Butterworths, 2nd ed.,) (2006).

The judgment in *Venture Global* has also been disapproved of because it is argued that the court misinterpreted the reasoning in *Bhatia International*. It is claimed that in *Bhatia International* the Supreme Court expressly held that the Part I general provision will apply to Part II to the extent that there existed no corresponding provisions in Part II. Hence, the correct interpretation of *Bhatia International* is considered to be that Part I will not apply where special provisions exist in Part II, more specifically regarding definition of a foreign award and its enforcement.⁴⁴ As per this approach it is asserted that solely Section 48 of Part II applies to foreign awards instead of Section 34 of Part I and Section 48 as was held by the Supreme Court in *Venture Global*.

However, this apparent conflict between the two can be reconciled through a literal reading of the two sections. While Section 34 refers to the grounds of setting aside of an award, Section 48 enumerates conditions of enforcement of foreign awards. Further, it can be seen that the scope and effect of both the sections is distinct. On one hand Section 34 allows for the remission of the award to the arbitral tribunal to cure the defects⁴⁵ while on the other, Section 48 does not envisage any such modification on application. Therefore, the researcher believes that it cannot be said that Section 48 being a special provision of Part II prevails over prevails of Part II over Section 34 because the purpose fulfilled by Section 34 is not similar to that of Section 48 and hence, there appears to be no misconstruction of the principle in *Bhatia International*. Moreover, the application of Section 34 actually encourages the enforcement of awards after remission and modification by the arbitral tribunal.⁴⁶ On the other hand, under Section 48 a party which approaches the court for enforcement might be rejected outright with no recourse to remission as provided under Section 34.

Further, an analysis of the enforcement statistics (including grounds of challenge) of foreign awards reveals that the courts favor enforcement of awards in spite of its interventionist nature and expanded judicial scrutiny. An evaluation of the High Court and Supreme Court judgments between the years (1996-2007) reveals that in spite of the grounds enumerated under Section 34, Section 48 as well as the expanded scope of 'public policy' the courts have maintained the

⁴⁴ Raghav Sharma, *Sanctity of Foreign Awards; Recent Developments In India* , 75 ARBITRATION 148 2009.

⁴⁵ Section 34(4) of the Act.

⁴⁶ Further, the practice of remitting awards under Section 34 as a rule is being increasing followed by many High courts. Only in cases where it is unfeasible to remit the award to the tribunal the courts set aside such awards. This practice is reflected in the case *Union of India v. Prem Kumar Lihala*, 2005(Suppl.) Arb. LR 506 (Del.). *Also See*, *Gayathri Projects Ltd. V. Airport Authority of India*, 2007(3) Arb. LR 416 (Del.) Such an approach is in consonance with the principles of party autonomy and judicial supervision as cited in *supra* note 21.

integrity of a foreign award save for setting aside a lone case.⁴⁷ Therefore, this indicates that concerns about India being an unviable enforcement jurisdiction might be overstated as the courts have chosen to exercise their powers of regulation of enforcement of foreign awards discretely.⁴⁸

Lastly, the courts in these judgments have given due consideration to the requirement of party autonomy in arbitration proceeding. This is done by allowing parties to exclude the application of Part I provisions (both derogable and non-derogable) in case of a foreign arbitration by an agreement stating the same.⁴⁹ Recently, in *Yograj Infrastructure* the Supreme Court clearly demonstrated their intention to uphold this principle and restrict unwarranted judicial intervention in foreign awards. Herein, the court held that once the parties have specifically agreed that the arbitration proceedings were to be conducted according to the SIAC rules, including Rule 32, the decision in *Bhatia International* and subsequent similar decisions will no longer apply.⁵⁰

IV. CONCLUSION

Traditionally, the judicial trend has been against judicial review and in favor of finality of arbitral awards by tribunals. However, it is not simple to strike a balance between the requirement of privacy, speed and finality of the arbitral process as well as wider public interest through judicial control.⁵¹ In India, where a sport is equated to religion and successful sportspersons achieve the status of demigods, it is imperative that sports disputes are provided all the legal protection available against enforcement of agreements which are violative of the legal policy of the country. While the ideas of party autonomy in arbitration should be upheld to the extent feasible, the approach adopted by the courts to supervise enforcement of foreign awards is in consonance with the higher aim of maintaining equality, fairness and justice in legal relationships.

In sports arbitration it is observed that there exists a disparity of bargaining power between the parties to the dispute. It is usually characterized by a sports federation on one side and a penalized athlete or an official on the other (other cases might include two legal persons at loggerheads). In such a case, judicial scrutiny by national courts becomes relevant to prevent victimization of the

⁴⁷ *supra* note 35, the decision being one of the Korean Commercial Arbitration Board.

⁴⁸ Nicholas Peacock, *Arbitrating in "Developing" Arbitral Jurisdictions: A Discussion of Common Themes and Challenges Based on Experiences in India and Indonesia*, Reprinted from INTERNATIONAL ARBITRATION LAW REVIEW, Sweet & Maxwell, (Issue 6, 2010).

⁴⁹ *Bhatia International v Bulk Trading*, 2002 (4) S.C.C. 105; *Venture Global v Satyam Computer Services*, (2008) 4 S.C.C. 190.

⁵⁰ *Yograj Infrastructure Ltd v Ssang Yong Engineering and Construction Co Ltd*, A.I.R. 2011 S.C. 3517, ¶38.

⁵¹ *supra* note 45.

weaker party and ensuring justice. Therefore, as per the decisions of the judgments discussed above, the position stands that any award by an international arbitral tribunal can be set aside by the Indian courts under Section 34 of the Act. In light of this, an award (including a sports arbitral award) has to undergo the scrutiny by Indian courts for enforcement in India. However, as seen earlier, Indian courts implement their supervisory powers with great circumspection. In light of this, the future of sports arbitration appears fairly bright and therefore, efforts should be made to foster such mechanism of alternate dispute resolution.